Communication under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)

To: Petitions Section, Office of the High Commissioner for Human Rights, United Nations Office at Geneva, 1211 Geneva 10, Switzerland

Filed on the 28th July 2016

PART I

Complainant

Name: Luiz Inácio Lula da Silva, invariably known as 'Lula'
Nationality: Brazilian
Date and Place of Birth: 27th October 1945, Garanhuns, Pernambuco, Brazil

Address for Correspondence

c/- Valeska Teixeira Zanin Martins & Cristiano Zanin Martins
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Name of state against which complaint is directed

Brazil (ratified ICCPR in 1992; ratified Optional Protocol in 2009)

Language

The correspondent speaks Portuguese, the native language of Brazil. As this is not an HRC language, all documents in the case will be translated into English.

PART II

Articles of Covenant alleged to have been violated

(i) *Article 9 (1) & (4)* – protection from arbitrary arrest or detention

(ii) *Article 14(1)* – entitlement to an independent and impartial tribunal

(iii) *Article 14(2)* – right to be presumed innocent until proven guilty by law

(iv) *Article 17* – protection from arbitrary or unlawful interference with privacy, family, home or correspondence, and from unlawful attacks on honour or reputation.

APPLICATION TO OTHER INTERNATIONAL PROCEDURES

This matter has not been submitted for examination under any other international procedure of investigation or settlement

EXHAUSTION OF DOMESTIC REMEDIES

In each abuse of power of which complaint is made herein, there is no remedy afforded by Brazilian law or procedure which is available within reasonable time and/or which is effective. See Part IV.

PART III
FACTS OF THE COMPLAINT

BACKGROUND

1. Lula was the elected President of Brazil, an office he held from 2003 to 2010. He is a metal-worker who became a trade union leader and went on to found the Workers Party, which is one of the main parties represented in the country's Federal Congress, i.e., in the House of Representatives and the Senate. His successor as President, Ms Dilma Rousseff, is also a member of the Worker's Party. Since leaving office Lula has made a living as a lecturer and remains politically active. He is internationally renowned as a fighter for worker's rights and for the country's economic and social development, especially for the relief of poverty; in Brazil his honour and reputation stands high, particularly among the poor, but he has many detractors all-too ready to believe ill of him when he is defamed by judges and prosecutors who have included him as a suspect in corruption enquiries. Such authorities try to create public expectations of Lula's guilt through their collaborations with media companies which are almost all opposed to the former president and his Workers Party.
2. Lula does not bring these proceedings out of any claim to be above the law: as an ex-President he holds no office or subsisting privilege, and he has always assisted police and prosecutors when they requested him to provide clarification in their enquiries or other investigative procedures. He brings these proceedings because he has been made the victim of abuses of power by one judge, aided and abetted by the prosecutors who attend him, and acting hand in glove with the media. These abuses cannot be satisfactorily remedied in Brazilian law. Having been advised that certain violations of human rights he has suffered or is likely to suffer (notably invasion of privacy, arbitrary arrest, indefinite detention before trial, media presumption of guilt and inability to remove a biased judge) are contrary to international human rights law, Lula seeks a determination to this effect by your Committee in the hope and expectation that its views on these complaints will not only provide some redress for the violation of his rights but will assist future governments in making laws and procedures which strengthen the fight against corruption whilst protecting the basic rights of suspects.
3. Corruption has long been a problem in Brazil, although a recent study concludes that it is less serious than in most countries and it tends to be exaggerated by the local

media.[1] Nonetheless, and notwithstanding the other claims on his presidential time, Lula took a number of legislative initiatives to combat it, as did his successor.[2] There was one case, the *Mensalão* proceedings, that concerned alleged 'backhanders' taken by a number of Congressmen and officials from various parties (including the Worker's Party) who have been convicted. However, an official enquiry found as a fact that Lula had no involvement.[3]

4. The case in which he has become a suspect is called "*Operation Car Wash"* (*Operacão Lava Jato*). That operation happened to be within the federal jurisdiction of the state of Parana, and it fell into the jurisdiction of the judge of the 13th Federal Criminal Court of Curitiba, Judge Sérgio Moro. He is a crusader who believes that corruption convictions should be obtained by procedures that breach human rights. As he explains in lectures, public hostility should be whipped up against particular powerful political suspects, whose prosecution will become easier if it is supported by a mob. They should be held in prison until they confess (i.e. make a plea bargain) and they should suffer public obloquy, whether or not they are convicted. Evidence obtained by telephone tapping which may show them or their family in a bad light should be disclosed to the public (see later, paragraph 28). Moro has become a man consumed by a desire for favourable self-publicity, in order to aggrandise his crusade against politicians he alleges are corrupt, allowing books and magazines to describe him as the "hero of Brazil" for his crusade against corruption. This is not a disqualification for a journalist or a politician but it is wholly inappropriate for a

[1] L Pagotto & A Teixeira, 'The Brazilian Anti-Corruption Policy in Motion' (2016) 17(2) Business Law International 103

[2] Among the measures against corruption taken during Lula's government we note: (a) the actual creation of the Office of the Inpector General (*Controladoria Geral da União* – CGU), a body created to fight corruption; (b) the creation of the Transparency Portal (*Portal da Transparência*) and the Registry of Unqualified Entities (*Cadastro de Pessoas Inidôneas*), which lists the entities which have been penalized and are prohibited from executing contracts with the Government; (c) the expansion and broad qualification of members of the Federal Attorney's Office, the Federal Police and the Financial Activities Audit Council (COAF - *Conselho de Controle de Atividades Financeiras*); (d) the election of the chief prosecutor of the Federal Attorney's Office (the Attorney General) through direct votes from the members of the Federal Attorney's Office; (e) the ratification of the United Nations Convention Against Transnational Organized Crime (Decree No. 5.015/2004); (f) the ratification of the United Nations Convention Against Corruption (Decree No. 5.687/2006); (g) the enactment of Law No. 10,763 of 2003, which increased the punishment for corruption.

[3] The final report of the *Comissão Parlamentar de Inquérito* (Parliamentary Commission of Inquiry) considered Lula's knowledge of the wrongdoing and concluded that "*there are no facts or evidence"* to implicate him. "*The country's highest authority cannot be imputed with strict liability merely because he leads the executive – that would mean he would be liable when he had no knowledge of the facts... However, there is no evidence that he omitted to act when he should have."*

supposedly impartial judge. Moro even publicly participated in the launch of a book entitled "*Lava Jato*" (Car Wash), which has his picture on the cover and which treats him hagiographically, whilst it demonises Lula by placing him "in the centre of Car Wash". The rights for this book were sold and will serve as basis for a Netflix series to be launched in 2017, which following the book will presumably depict Moro as hero and Lula as villain. It is unprecedented, in terms of security and ethical judicial behaviour, for a judge to endorse, publicly, with a book that condemns a man whom he will try.

5. It is an anomaly of Brazilian law that the judge who takes jurisdiction over an investigation, and to whom it therefore falls to approve the actions, warrants and investigative developments by police and prosecutors in the case, is also the judge who seamlessly goes on to determine guilt or innocence after he decides that the case should proceed to a trial before him alone. There is no jury (except in crimes against life) and the judge sits with no assessors. Hence there can be a clear danger of bias, in the case of a judge who has opened investigative procedures against a suspect/defendant and ordered search and interception procedures in the hope of incriminating him and on the assumption that he is probably guilty. Most jurisdictions separate the investigation stage from the trial stage, but Brazil does not. All other jurisdictions at least permit judicial recusal where the investigating judge has displayed hostility to the defendant: this judge cannot be perceived as impartial.
6. It is a further anomaly of Brazilian law that a judge in the investigative phase can order a suspect's arrest for an indefinite time until he makes a 'plea bargain' acceptable to prosecutors. This will involve a confession, likely to have been induced by a wish to get out of prison. The same judge who approves the plea bargain will then turn around to become the trial judge, convicting the plea-bargainer and deciding sentence.
7. "Operation Car Wash" has undoubtedly uncovered some serious corruption in the national oil and petrol company, *Petrobrás*, as the result of the apparent unlawful operation of Brazil's five major construction companies, which allegedly formed a cartel, and the desire of various parties, across the political spectrum, for secret campaign funds. The allegation is that the construction cartel agreed to a system of fake tendering, whereby the "winner" would be contracted in a sum much higher than the work was worth: illicit payments could thereupon be made to *Petrobrás* directors and officials who facilitated the scheme, and to politicians who politically supported

these officials. This amounts to corruption at an institutional level. Many suspects have been arrested and some convicted – although on plea bargain confessions of questionable reliability because they were made to obtain release from detention.

8. The complainant has always asserted that he supports proper investigation of any crimes by the building industry cartel and any complicity in these crimes by officials and politicians of whatever party. He has repeatedly and emphatically denied that he has known, let alone approved, of such crimes or that he has knowingly received any money or favours as "kickbacks" for actions or decisions he took when Brazil's President, or at any other time. He has refuted, in detail, allegations that construction companies helped him buy a holiday apartment (he did not buy it) or to furnish a country property (which was owned by friends) in return for any favour, or moreover paid for his lectures as a *quid pro quo* for services rendered to them while he was President (the lectures were given years after he left office and no evidence has emerged for any such agreement: the lectures were all given for a fixed sum and had no reference to any precedent or a corrupt act on the part of the President). He has always voluntarily submitted to requests for questioning by police or prosecutors. Nonetheless, he has had to suffer, at the hands of Judge Moro, outrageous breaches of his privacy and a short but wrongful detention without any legal provision achieved by Moro's authorization of a bench warrant, and because Moro has opened investigations into him he is likely to suffer arbitrary and indefinite detention and unfair trial by a biased judge. Because of systematic leaks from the Judge and the Prosecutors, the media have created a climate in which his guilt is presumed.

9. Judge Moro (who has been relieved of all other duties so he can concentrate full-time on 'Car Wash') and the prosecutors (who belong to the designated "Operation Car Wash Task Force") led by chief prosecutor Rodrigo Janot (who is also Brazil's Attorney General), have made no secret of the theory upon which they are trying to arrest and convict Lula. It is a discredited doctrine which emerged during the 'Clean Hands' (*Mani Pulite*) prosecution in the early 1990's of Italian political figures (including Prime Ministers) alleged to have been in cahoots with the Italian Mafia. It is literally translated as "*domain of the fact*" although it appears to be a distorted version of the international criminal law principle of "command responsibility". In the view of Moro and the prosecutors, it means that when serious criminality can be imputed to a gang, the presumption of innocence is reversed in relation to the gang leader, who is assumed to be guilty unless he proves his innocence. Of course, there

can be no equivalence between the government of Brazil and the Italian Mafia, and the gang involved in "Car Wash" was the construction company cartel, of which it cannot be alleged that Lula was the boss. But in any event, "command responsibility" (derived from the U.S. Supreme Court ruling in *In re Yamashita*) requires both knowledge of the crime and approval of it by a commander, and no evidence of either mental state has emerged against Lula.[4] However, in order to arouse public anger against him and public expectation that he will be found guilty, prosecutors and the judge have disclosed many of the seized documents and transcripts of telephone intercepts to the local media, to create an expectation that Lula will be arrested and found guilty. The Chief Prosecutor Janot has denounced Lula on the basis that "the criminal organisation could not exist without Lula's participation".[5]A prosecutor, who is spokesperson for the Car Wash task force, Mr. Carlos Fernando dos Santos Lima, has publicly declared that he is guilty. A complaint was made by Lula against this prejudicial and improper prosecutorial conduct to the audit body of the Federal Attorney's Office (the National Council of Prosecutors) however this body decided that no measure could be taken to stop him from acting that way

10. Your committee has been astute to uphold fundamental human rights in respect to the treatment of those suspected of terrorism, and for all the righteous public anger that can be whipped up against politicians accused of corruption, it must ensure that they are dealt with by the same basic standards. Since the 'Car Wash' case began in 2014, basic standards have been flouted and breaches of the Convention have gone unredressed. The investigative judge believes he is empowered to abuse those he targets by releasing for public delectation and acrimony the transcripts and audiotapes of telephone conversations he has ordered to be taped, subjecting suspects to indefinite detention until they confess; acting to oppress them in ways which he knows to be contrary to law and (with the assistance of police and prosecutors) leaking selective confidential information to media outlets known to be politically hostile to Lula so he may be stigmatised and demonised before his trial.[6]
11. The complainant asks the Human Rights Council to rule on six specific breaches of the Convention to which he has been thus far subjected:

[4] *In re Yamashita*, 327 U.S. 1 (1946)
[5] O Globo, 4th May 2016, p.3
[6] See Open Letter to the International Community from Professors and Researchers from Brazilian Universities, 26th March 2016.

COMPLAINTS

Complaint 1: Article 9 (1) - The Illegal Bench Warrant of 4th March

12. This was a blatant breach of Brazilian law by Judge Moro, who must be credited with basic legal knowledge and therefore was well aware of the unlawful and arbitrary nature of the action he took to restrict Lula's liberty by issuing this bench warrant. It is well known to Brazilian lawyers and judges practising in crime that Article 260 of the Brazilian Criminal Procedure Code lays down an essential pre-condition for issuing a bench warrant:

    "*260: If the defendant refuses to give testimony in the interrogation... the competent authority may order that the defendant be compelled to attend the investigating authority."*

13. It is clear as crystal from the legislation, and confirmed by case-law, that this is a compulsory procedure which deprives the suspect of his liberty (i.e. by forcing him to leave his home and to accompany the police/prosecution team to wherever they choose to have the interrogation and for as long as they wish to interrogate) and can only be ordered by a judge if the defendant has explicitly refused to give testimony previously. The judge must first subpoena the potential defendant, and only if he fails or refuses to answer to it can a bench warrant be issued.
14. In this case, however, Judge Moro issued the bench warrant on March 2nd, 2016 for execution on 4th March. Early that morning, the fact of the raid on Lula's house was leaked to the media, undoubtedly from the prosecution apparatus (i.e. the judge, the federal prosecutor and the federal police). The police obtained entry to the house with the bench warrant at 6am, and demanded that Lula accompany them – not to the nearest police station, but to the official compound at the Congonhas Airport, an hour from his home. Lula refused, although he stated that he would be content to answer all the questions at his home. The police insisted he obey the warrant as otherwise he would be put in prison. His lawyer, on establishing that the bench warrant had been signed by Judge Moro, advised him by telephone that he had no practical alternative but to obey it, despite its illegality. Lula therefore accompanied the police: the photograph below shows him (front right) being led away from his apartment in a elevator packed with police. They took him to the airport, where the questioning continued for some four hours. As Judge Moro would have known, the news that he

had issued a bench warrant for compulsory interrogation had been leaked to the media. There were in consequence photographs taken of Lula as if he were under arrest, and while he was being held in the airport that was the scene for demonstrations and counter-demonstrations. The whole event was staged by the prosecutors so as to give the impression that Lula was under arrest because he was avoiding questioning, and had a case to answer.

15. This spectacle was clearly foreseeable, which makes the judge's subsequent justification for issuing the bench warrant disingenuous. Moro claimed that a bench warrant was necessary to secure the safety of Lula, "*to avoid the disturbance of the public order"* because it was less likely that disturbances would be caused at the airport than at the house. This was not a justification at all, since the legal pre-condition for the issuance of the warrant was never fulfilled (i.e. there had been no refusal to testify) and so the question of public order could not arise. It was also hypocritical, because the breakdown of public order that did occur at the airport (rival factions gathered to insult each other) came about because the fact of Lula's detention on a bench warrant had been leaked to the media by the police/prosecution team.

Image: Lula in the elevator, image taken from CCTV footage of the 4th March 2016

16. In his decision on the 'Suspicion Motion' that sought his recusal from the case, Judge Moro offered a new justification for his action, namely an allegation that he had learned from telephone intercepts that Lula had heard of the warrant and was minded to "call some congressmen to surprise them", and that this may have interfered with the search. However, in context, this was merely a thought that some MP's might be

present as witnesses to any police action, which would have been his legitimate entitlement. It cannot begin to justify an order for compulsory interrogation where the suspect had not declined to be interviewed.

17. The illegal behaviour of Judge Moro was made the subject of expert comment (e.g. "*Lula's Bench Warrant was illegal and Spectacularized, say lawyers"* (Conjur, 4th March 2016, Exhibit A) and *"Was Lula's Bench Warrant Legal?"* (Epoca Magazine, 8th March 2016, Exhibit A). All made the point that a bench warrant could not be issued unless and until the suspect had refused to testify in the investigation. Not only had Lula never been asked to testify in such investigation, but when he was requested to provide testimony he always attended it and provided answers to all questions. The pretence used by Judge Moro to "justify" the bench warrant, namely a fear of public disorder, was hypocritical precisely because this was exactly the consequence which could be foreseen from using a bench warrant to force him to testify, rather than to allow him to testify voluntarily. The fact of the "arrest" – the compulsory detention of the former president – was (as the prosecutors well knew, because they had tipped off the media) calculated to give the impression that he was uncooperative and had something to hide since he had to be subjected to a compulsory process only fit for use against unwilling suspects.
18. This episode of the bench warrant stands out as a brazen illegality, used to damage his individual liberty and security and to damage his public honour and reputation. Although the period during which he was compulsorily detained was only 6 hours, the event (and the demonstration it provoked) had enormous symbolic effect: anti-Lula demonstrators at the airport carried effigies of the complainant in prison clothes, as if in expectation of his jailing (see the photographs in text of Exhibit B, which were widely published throughout Brazil in newspaper and on television). These consequences were deliberately brought about by a hostile judge abusing his judicial power to issue an illegal order, which he must have known would result in a spectacle degrading to the former President's honour, and against which he would have no effective remedy.
19. The issue of the bench warrant was plainly a breach of Article 9(1) of the ICCPR, viz:

> "*1. Everyone has the right to liberty and security. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."*

The bench warrant deprived Lula of his liberty – he was placed in compulsory detention for 6 hours, and taken by police to an inappropriate place for interrogation. He had volunteered to answer questions at his home, but this request was refused. The detention was unlawful (and thereby arbitrary) since the 'bench warrant' procedure is only available for those who have already refused to testify. The 'public order' justification for using it unlawfully was not and cannot serve as a defence or as an excuse. This is a notorious example of judicial over-reach by lawbreaking, in this case with the object of publicly shaming and demonising a suspect against whom there is no significant evidence of a criminal offence.

20. The position has been described precisely by Celso Antônio Bandeira de Mello, Professor of Administrative Law at the Catholic University of São Paolo, in a published interview:[7]

"*A gross illegal act was committed. A bench warrant cannot be imposed on anyone unless this person refuses to testify. If the person in question never refused to testify; has a fixed place, is a person that everyone knows where to find; if the person is a public figure, such as former president Lula, who has testified in every occasion he was called to do so, there is no sense in ordering a bench warrant.*

A bench warrant is a violent action, literally, in a case like this. If we were under the Rule of Law, the person who ordered such illegal act would obviously suffer a sanction for having acted beyond his jurisdiction.

Such sanction should be imposed against the judge who ordered the bench warrant. And also against the MPF (the Federal Attorney's Office), because it should not comply with an order that is clearly illegal. This is an illegal order, therefore the MPF should also be punished.

I think nothing relevant will happen. What should happen is to hold liable the judge for said illegal act, and the Federal Attorney's Office for having complied with the illegal court order. This should be the procedure according to the law. But the law

[7] http://brasildefato.com/br/node/34318

expects normality, and we are not living in an environment of normality, are we? At least I don't think so."[8]

21. Justice Marco Aurélio de Mello of the Federal Supreme Court has also commented on the day when the bench warrant was executed:

"*I didn't understand it. A bench warrant is only applicable when an individual shows resistance and does not show up to testify. And Lula did no receive a subpoena (...) Did he (Lula) want that kind of protection? I believe that, actually, this argument was given to justify an act of force. (...) This is a setback, and not a progress. (...) We are judges, not lawmakers, or avengers."*[9]

Lula testified on Friday, in page 24 of Operation Car Wash. Photo: Marcos Bizzotto / Raw Image

[8] http://brasildefato.com.br/node/34318

[9] http://www1.folha.uol.com.br/colunas/monicabergamo/2016/03/1746433-ministro-do-stf-diz-que-decisao-de-moro-foi-ato-de-forca-que-atropela-regras.shtml

Agência O Globo

Foto: AFP

Aeroporto de Congonhas ficou lotado de manifestantes prós e contra Lula

Photo: AFP- The Congonhas Airport was crowded with protesters for and against Lula.

22. There is no doubt, from the Committee's jurisprudence, that Article 9(1) is engaged. Although the detention was "only" for 6 hours, its consequences for Lula were calamitous, in view of the publicity and the insinuation from the bench warrant that he was hiding from justice. The Human Rights Committee includes 'house arrest' as a deprival of liberty: so too is compulsory transportation for questioning (see *Jaona v Madagascar* Com 132/1983, (1985) paras 13-14). The bench warrant was plainly unlawful, and it was arbitrary as well since it was inappropriate and unjust (*De Guerroro v Colombia* Com 45/1979, UN Doc CCPR/C/15/D/45/1979 (1982)). Eight hour detention, even when lawful, has been held to be disproportionate and therefore arbitrary: *Spakmo v Norway* Com 631/1995 (1999) Paragraph 6.3.

Complaint 2: Article 17 - Publication by Judge Moro of (a) authorised and (b) Illegal and unauthorised Intercepts

23. In February 2016, having secretly applied for and received the bank and tax records of the complainant and his family, Judge Moro approved a request to tap the telephones of the complainant, members of his family and his lawyer (the latter action being the subject of the next complaint). The Federal Constitution itself provides for the secrecy of telephone calls in Article 5, item X11:

"*The secrecy of correspondence and telegraphic data and telephone communications cannot be violated, except in the latter case upon court order, or in the cases and in the manner provided by law for the purposes of criminal investigation or at the evidentiary stage.*"

24. The Brazilian law on phone tapping provides, in Law 9, 296/96, Article 2, that it shall not be allowed when:

(i) *There are no reasonable indications that an individual committed or participated in a crime, or*

(ii) *The evidence may be produced by other means.*

25. It is the complainant's contention that neither condition was fulfilled. Although the law vouchsafed him no effective remedy, the fact that some interceptions were of his calls to the President enabled the latter to seek a remedy directly in the Federal Supreme Court. In President Rousseff's complaint No.23.457/PR, Justice Teori Zavascki ruled (on 22nd March) that the reasons given by Judge Moro were insufficient to justify such exceptional measures, which were taken for "merely abusive" reasons (Exhibit C). Notwithstanding this illegality, Judge Moro had made and received through it many transcripts of conversations between the complainant, his family and his lawyers and other persons, which were authorized without legal reason, but he also authorized, in sequence, the lift of secrecy of the wire-tapped conversations. This was a reprehensible and illegal measure (The Committee's Article 17 jurisprudence endorses this position, namely that the State must take measures to ensure that gathering and storage and use of personal data should not be subject to abuse or used for purposes contrary to Article 17 of the Covenant.[10])

26. Article 8 of Law No.9, 296/96 provides:

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

27. It follows that a judge has no right or power or discretion to release transcripts of the telephone taps to the media. Indeed, under Article 10 of the same law:

"*It is a crime to tap telephone data and telematics communications or to breach judicial secrecy without judicial authorization or for purposes which are unauthorised by law*."

[10] Concluding Observations on Sweden, 2009 UN DOC CCPR/C/SWE/CO/6

28. Notwithstanding his knowledge that what he was doing amounted to a criminal offence, Judge Sérgio Moro on 16th March 2016 released to the media various transcripts of telephone intercepts between Lula, his wife, his lawyers, his family (including the wives of his sons) and third parties. He released not only the transcripts but the audio versions of the intercepted conversations, so they could actually be played on radio and television and downloaded from websites by curious members of the public. This was an outrageous breach of the complainant's right to privacy, with no conceivable justification. It was designed to cause the maximum public humiliation and embarrassment to Lula and his family. The malice of Judge Moro is demonstrated by his decision to release transcripts of a robust discussion between his wife and his son about demonstrators, and a discussion between his daughter in law and her husband's business partner which gave rise to idle gossip. Disclosure of this material to the press had no conceivable public interest, and was done out of malice with the design of publically humiliating and intimidating a suspect against whom his invasive procedures had produced no evidence of crime.
29. Judge Moro's behaviour became even more lawless. He had finally ordered an end to the intercept, at 11.12am on March 16th 2016, when he sent an urgent notice to the Federal Prosecutor's Office to discontinue tapping Lula's telephone. At 11.44am, records confirm that this Office notified the Chief Office of the Federal Police. But contrary to, and in disobedience of, the judge's order, the tap was still in place at 1.32pm, when Lula called the personal office of President Rousseff and discussed with her matters related to his appointment as Chief Minister. This conversation, although intercepted contrary to his own order, Judge Moro decided to release to the media that very afternoon. It was not only unlawfully recorded, as he well knew, but irrelevant to any subject of "Operation Car Wash". But it contained sensational information (i.e. Lula's impending return to the Government), and Moro knew this would cause political upheaval. Lula's appointment would also have the effect of taking his case out of Judge Moro's jurisdiction and into the province of the Supreme Court (henceforth, the prosecution would have to proceed against Lula before a Supreme Court judge, because he would be a government Minister) and this was a consequence that Moro was desperate to avoid. So desperate was he that he deliberately breached the law that required him to send the intercept transcripts concerning the President immediately and in confidence to the Supreme Court.

30. Furthermore, the revelations on the transcript of the illegally recorded tape were, as Moro well knew, of a kind to cause political sensation and mayhem, which of course they did.
31. On March 29th, 2016, Judge Sérgio Moro provided information to the Federal Supreme Court, in which he recognized that the lift of secrecy caused "unnecessary embarrassments", and he also "respectfully apologized" to the Supreme Court – but not to Lula, who was jeopardized the most (Exhibit D). Also in this official letter sent to the Brazilian Supreme Court, the judge made various charges against the former president, including accusations that he intended to obstruct justice, which is a crime in Brazil. He even made prejudicial comments about matters which are the objects of investigations under the Federal Supreme Court, such as accusing the former President of being the real owner of a property in Atibaia, which ownership he has denied. This forms the subject of a charge which Moro may now bring to trial, and the comments reveal his bias. No less than twelve times, Moro makes allegations of crimes against Lula – a matter which will be considered under Complaint 4, the right to an impartial judge.
32. Moro justified the release of the transcripts of the illegal tapes to the media on the grounds of public interest, although this can be no defence. It was an excuse rejected by Justice Zavascki on June 13th 2016 when he considered the case brought by the President:

    "*The public disclosure of the conversations was unacceptable... Against such an express constitutional rule (see paragraph 22 above), it is unreasonable to say that the public interest justified the disclosure or that the affected parties are public figures (as if they have no right to privacy)... one must recognise the irreversibility of the practical effects arising from the undue disclosure of the tapped telephone conversations."* (Exhibit E)

33. Why did Judge Moro disobey the law and think (correctly) that he could get away with doing so? Because he realised that he had, (albeit illegitimately) taped the President (whose remedy lay under the jurisdiction of Supreme Court, and not of Judge Moro) and that Lula, having been appointed Chief of Staff, would also be outside his grasp, as he would henceforth would be answerable only to the Supreme Court. So the unlawful release of the tapes on the afternoon of Wednesday 16th March was designed to create a public political outcry and to create strong pressure to

reverse the appointment of Lula. Moro's release of the transcripts led to protests against the government throughout the country, and to demonstrations demanding that Lula be sacked and arrested: exhibited photographs show demonstrators with large balloon effigies of Lula dressed as a convict (Exhibit F). The protests adopted the 'spin' supplied by the prosecutors office, namely that Lula's appointment was not a decision made in the public interest but rather an attempt to protect him from Moro's investigative jurisdiction. Moro himself justified his breach of the law on the grounds of national interest. This is not, of course, a valid defence. Moreover, the national interest that he invoked was in fact his own self-seeking interest in retaining power through his capacity to indict an ex-President.

34. Moreover, the fact of Lula's appointment as Chief of Staff was in any event announced to the public by the President's Office on the morning of 16th March, and it was not necessary to inform them through disclosure of telephone taps that this would have a consequence of removing Lula from Moro's jurisdiction – this was obvious from the very fact of his appointment. Moro's decision to release the confidential transcripts gave the appointment a sinister (as well as sensational) overtone, and was used to give the impression that Lula was anxious to escape apprehension because he was guilty.

35. On June 13th, 2016, Justice Zavascki handed down his final decision on Moro's "breach of data and telephonic confidentiality" in the case brought by the President (Exhibit E, above). He affirmed that Moro displayed lawless behaviour on two grounds – (1) his refusal to obey the law that required him to forward the intercepts of the President's conversation to the Federal Supreme Court (committing "usurpation of jurisdiction"), and (2) his unlawful decision to disclose the President's private conversation to the media. (See judgment, Exhibit E, paragraphs. 7, 9 &11). In his second finding, he totally rejected Moro's 'national interest' defence, which was no defence to a deliberate breach of the law. The Supreme Court rejected Moro's reliance on *US v Nixon* as "an example to be followed" because "*this court's judicial precedents are categorical regarding the infeasibility of using evidence gathered without due compliance with fundamental constitutional rights."* Moro apologised, but in grudging and limited terms (*"I understand that (my) reasoning would be considered incorrect or if correct could have brought unnecessary polemics or embarrassment")*. Moro's decision, actually delivered on March 17th 2016, was

"cancelled forthwith" by the Supreme Court, but the damage had been done to Lula and Moro will suffer no consequences for his illegal actions.

36. When observing an act that may constitute a crime, the Federal Supreme Court should have submitted a copy of the case to the Federal Attorney's Office for legal measures, pursuant to Article 40 of the Code of Criminal Procedure:

    Art. 40. When judges or courts verify in records and documents which are known to them the existence of a public action crime, they shall send to the Federal Attorney's Office the copies and documents needed to file a charge

    But this has not occurred, and such act went unpunished. The Courts' audit body, the National Court Council (CNJ – *Conselho Nacional de Justiça*), shelved several complaints against judge Moro, filed by citizens who were outraged by his act.

37. Moreover, the case related only to the release of the wiretaps of Lula's conversations with the President, and not to Moro's release of the other intercepts. These remain valid, and Moro himself, after the proceedings returned to him from the Supreme Court, ordered that these intercepts be used in the investigations and potential legal actions.

38. Judge Moro should have known he was acting unlawfully, not only by disclosing the transcript of the unlawfully intercepted conversations with the President, but also by disclosing to the media the other intercepted conversations. Not only is the law clear, but Brazil has recently been condemned by the Inter-American Court of Human Rights for allowing the disclosure of secret recordings of a personal nature: see *Escher v Brazil*.[11] This case has direct parallels with the present, and the Court's decision emphasises the rule that a judge who authorises the secret interception of an individual's telephone cannot, for political or any other purposes, self-authorise disclosure of the transcripts to the media. It is extraordinary that no action has been taken against Judge Moro for these actions: the seems to enjoy impunity. It would be possible for the Government of Brazil itself to file an *Action of Recourse,* to remove Judge Moro from any case involving Lula, and his proven misconduct requires that it do so. However, Moro's publicity campaign and media support seems to have intimidated the responsible organs of state from doing their duty to protect those in position of the complainant, namely as a suspect of a formally opened investigation,

[11] Escher v Brazil, Inter-American Court of Human Rights 6th July 2009

from suffering his illegal attacks on their honour and reputation, as a prelude to his decision to have them arrested and convicted.

Complaint 3: Article 17 - Telephone Intercept of Complainant's Lawyer

39. Judge Moro has gone to extremes to harass and embarrass the complainant, and this includes tapping the telephone of his lawyer and releasing transcripts and even the audio version to the media. As a judge, Moro knows the confidentiality which in law attaches to communications between an individual client and his lawyer. As the judge investigating Lula, Moro would know that the distinguished attorney Roberto Teixeira (and the firm Teixeira, Martins & Advogados, of which he is a partner) has been Lula's personal lawyer for over 30 years. It must be assumed that as a first instance judge, Moro was well aware of the law relating to telephone intercepts, which may only be ordered "*in the case of evidence in a criminal investigation"* if "*there are reasonable indications that the relevant party committed a crime or participated in a criminal violation"* and it is not possible to "*produce evidence by other means"* in relation to a crime likely to carry a prison sentence (see Article 2, Law No.9, 296/96).
40. Despite this knowledge, Moro approved the tapping of several conversations between Lula and Roberto Teixeira. On 26th February 2016 he specifically authorised an intercept on the central extension of Teixeira's law firm (affecting 25 lawyers and 300 clients). When this order was lifted in March, Moro tried to excuse his authorisation:

    "*Despite him (Teixeira) being a lawyer, I did not identify with clarity the lawyer/client relationship to be preserved between the former President"* because Teixeira's name was not in one of the files objecting to a search warrant. This was disingenuous – (a) because his name was in all other files and (b) because the lawyer who was nominated in the particular file was Teixeira's partner.

41. The only other basis on which he justified his decision to approve tapping the telephone of the lawyer and his firm was that there was evidence of Teixeira's involvement in the purchase of a property at Atibaia, where Lula was suspected of being the real owner and having some favours done by property cartel members, "*so he is an investigated person and not properly his lawyer."* This is a false distinction. Teixeira at all times remained Lula's lawyer. The only situation in which he could lose his legal privilege to advise his client in confidence was if he was reasonably suspected of involvement in a serious crime. There could be no such suspicion

deriving from involvement as a lawyer in a property purchase, unless the transaction itself was fraudulent or illegal, and no such evidence existed and nor did it emerge from the transcripts of the intercepted calls. Nonetheless, Moro authorised a selective release to the media of the conversations between Lula and Teixeira, covering the lawyer's advice to his client about various aspects of the client's problems with Moro. In other words, this judge who opens an investigation of the complainant then authorises the interception of telephone calls with his lawyer concerning advice about the judge and the investigation: the clearest breach of attorney-client privilege.

42. Judge Moro's behaviour has been condemned by the Brazilian Bar Association. The Federal Council of the Brazilian Bar Association filed a petition with the Federal Supreme Court stating that Moro lied when he said he did not know the attorneys had been wire-tapped. They affirmed that Moro had with him the documents furnished by the telephone company which confirmed that the tapped phones corresponded to the personal cell phone of attorney Roberto Teixeira and the central extension line of the law firm Teixeira, Martins & Advogados. The Federal Council also stated: "*One cannot allow the tapping of the attorneys' telephones to find out if their clients are involved in a crime or not. The reason for this is there has not been any proof of concrete elements that allow for the order of the breach of secrecy of the attorneys' telephones, and we emphasize that Art. 5, XII of CR and L. 9,296/06 set forth that telephone tapping is an exception, while the federal legislation provides for the possibility of invalidating a recording that is of no interest to a case.*" Its Rio de Janeiro chapter described it as "*a typical act of police states*" and an attack on democracy (*"The ends do not justify the means"*).

43. The Association called for Moro to be reprimanded for authorising the tapping and releasing the transcripts, but this has not happened because neither lawyer nor client have an effective remedy. Twice before, Moro has been censured by the Federal Supreme Court for breaching attorney-client privilege by authorising such intercepts, but the disciplinary body, the National Court Council (CNJ – *Conselho Nacional de Justiça*), as previously mentioned, has taken no action. Neither has the Federal Attorney's Office. As the HRC has said, in *Pratt and Morgan v Jamaica*;

"*That the legal remedies rule does not require resort to appeals that objectively have no prospect of success, is a well established principle of international law and of the Committee's jurisprudence."*[12]

The HRC has noted that the lawyer/client relationship is protected by a privilege which "*belongs to the tenets of most legal systems... intended to protect the client."*[13]

44. There were many conversations between Lula (LILS on the transcripts) and his attorney Roberto Teixeira, and a number of them were disclosed to the media. One example is exhibited: the client asks his lawyer for advice about the Sao Paulo Attorney's office filing an information against him, and the lawyer gives it in robust terms. The intercepted conversation has no reference to 'Car Wash', but Moro's order required it to be intercepted and he ordered its disclosure, both as a transcript and in audio form. (Exhibit G). In his judgement on the Suspicion Motion, Moro seeks to excuse the tapping of the law firm on the basis that the conversations were transcribed because they were not relevant. This fact does not excuse him putting the interception in place. Moro repeats his accusations against Lula's lawyer, which have been answered fully by Roberto Teixeira (Exhibit H).

Complaint 4: Article 14(1) – The Right to an Impartial Tribunal

45. The right to an unbiased judge is central to the fair trial rights enumerated in Article 14 of the ICCPR. It is an entitlement of the individual "*in the determination of any criminal charge against him"* as well as in the determination "*of his rights and obligations in a suit at law."* It has already been observed that criminal procedure in Brazil does not effectively differentiate between the stages of investigation and trial: once a judge assumes jurisdiction over a case, and opens an investigation file in respect of an alleged suspect in relation to a particular crime, that judge is responsible for authorising prosecution requests for extraordinary measures (such as search and seizure warrants, bench warrants, telephone tapping and the like); for approving criminal charges and then for trying the case without a jury (except in intentional crimes against life) and without other judges or assessors. This procedure is not in itself a breach of Article 14, but as the European Court of Human Rights held in the

[12] 210/86, 225/87, paragraph 12.3
[13] *Van Alphen v Netherlands,* 305/88, paragraph 5.7

leading case of *Hauschildt v Denmark*,[14] pre-trial decisions made by a judge in this position may indicate a bias against the defendant or give rise to a reasonable apprehension of bias, and thus require the judge to recuse himself before the stage is reached where he determines guilt or innocence.

46. In his decision on the suspicion motion, Judge Moro relies on the normal procedure which permits a judge who gives decision at the investigative stage to sit as the trial judge. But this cannot, of course, be permitted if those earlier decisions have given the impression or the perception that he lacks impartiality in respect of the defendant. His self-assessment of his impartiality cannot be allowed to prevail: the test is objective, not subjective, and it turns on a perception of bias and not actual bias. To this extent, it is relevant that the public perception is that Moro will arrest and convict Lula. He may, if his evidence permits, arrest Lula, but he is manifestly disqualified from trying and convicting him.

47. Lack of impartiality may be detected in many ways. The rule derives from the principle that justice must be seen to be done, i.e. that reasonable lay observers should not perceive that the judge would have a preconceived opinion about the guilt of the defendant. In the *Hauschildt* case itself that was because the judge had, at an initial stage, denied bail to the defendant on the grounds that there was strong evidence of his guilt. In this case, the indicia of partiality on the part of Judge Moro towards Lula are much stronger and more numerous. Several have been highlighted by the earlier complaints, viz

    (1) Deliberately issuing an unlawful bench warrant to detain him publicly and unnecessarily,

    (2) Tapping his telephones and those of his family, and unlawfully and maliciously releasing transcripts to the media, and in particular by releasing unlawfully intercepted calls with the President.

    (3) Intercepting and releasing to the media confidential calls with his lawyer, and making allegations of criminal conduct against his lawyer.

    It is quite clear to reasonable observers from these actions alone that Judge Moro has formed an *animus* against Lula and has a view about his guilt, and is striving – to the point of acting illegally – to obtain the evidence to justify it. There are many more

[14] *Hauschildt v Denmark*, no.10486/83, ECHR (1989)

actions by Judge Moro, over the past year, which have served to enhance this perception.

48. In his judgement on the Suspicion Motion, Judge Moro brushes aside Judge Zavascki's findings against him as merely "part of the judicial system of mistakes and successes." But his identified mistake – in releasing for public delectation the intercepted calls, including calls the interception of which was illegal, were so serious, especially in their foreseeable consequences for Lula, that they obviously called his impartiality into questions. Some indication of that damage can be appreciated from examples of the publicity (Exhibit I).
49. For the purposes of this complaint, we refer to Moro's repeated acceptance of invitations to attend and speak at events run by groups politically hostile to Lula which are calling publicly for his arrest and conviction. Thus he participates in events run by or on behalf members of the Brazilian Social Democratic Party (a main opponent of Lula and The Workers Party), events organised by the publisher of *Editora Abril*, a paper that has repeatedly called Lula corrupt and demanded his arrest and conviction, and notably an event sponsored by *Veja* magazine, so hostile to Lula that it has published a doctored front cover picture of him in a convicted prisoner's uniform. By repeatedly placing himself with Lula's enemies, Moro publicly signals where his sympathies lie – i.e. against Lula and The Workers Party. In his judgement on the suspicion motion, Judge Moro denies having participated in 'political events' but whether such events are 'political' is not the point – the fact is that these events are promoted by Lula's enemies, including an event organized by LIDE, a private organization owned by João Doria Junior, who declared himself candidate (contrary to Judge Moro's claim) in the city of São Paulo against the Workers' Party prior to the event he attended.
50. An outrageous example of bias was Judge Moro's attendance, as quest of honour, at a party to launch a book about his Car-Wash investigation, which portrays him in a hagiographic light and defames Lula by claiming that he is guilty of corruption. Judge Moro – the judge at any trial – posed for pictures, subsequently published (See below, & Exhibit J) with the author – a Globo journalist, and the author's mother who is well-known for condemning Lula. Press reports indicate that he was treated as a celebrity and he actually signed copies of the book which condemned Lula. By these actions he publicly endorsed a book which argued the guilty responsibility of a man

that he has the power to arrest and in that case intends to try. As a result of these actions, there cannot possibly be other than a reasonable apprehension of bias. He should not, while he is judging Lula, associate with people who urge his prosecution, especially if they are honouring him or complimenting him on an investigation in which he has made Lula a suspect. Judge Moro has on several occasions travelled to America to give lectures on his work and to bask in favourable comments about it from American publications such as Time and Fortune. It is wrong for him to seek publicity for himself in relation to his work investigating and hearing corruption cases whilst at the same time insisting upon sitting as a trial judge. It is emphatically wrong for him to do so while claiming the right to arrest Lula and to try him.

Image: Moro (Center) launching the 'Lava Jato' book which condemns Lula. (Image taken from Gazeta do Povo Article of 21st June 2016 (See Exhibit J)

51. It is impossible to divorce the perception of Moro's actions against Lula from his much-publicised theory of the crusading pro-active "*attack judge"* which he advances in his public lectures (See Exhibit K). In a nutshell, he identifies corruption in Brazil with corruption in Italian politics in the early 1990's, and calls for a *mani pulite* operation to attack it. Central to his thesis – which he sees himself implementing – is that the effective prosecution of political corruption requires the breach of certain fundamental human rights, namely by locking suspects up in pre-trial detention until they confess; offering "*plea bargains"* in terms of light sentences if they do confess; manipulating public opinion through leaks of evidence to the biased media so that

angry demonstrations dissuade politicians from passing laws to curb prosecutorial abuses. His lectures associate Lula with Italian Prime Minister Bettino Craxi (a target of *Mani Pulite*), and he endorses public demonstrations against suspected political leaders (citing with approval how a mob "*gathered in front of Mr Craxi's house, throwing stones and coins at him when he left for a television interview.")*(Exhibit L). He says that it is naive to believe that prosecutions against public figures can be conducted "*normally"* (i.e. by respecting their rights) because they require "attack judges" prepared to put pressure on suspects, e.g. by detaining them in prison, until they confess. He claims that there is "*no moral obstacle"* for judges and prosecutors to use such techniques, including leaking evidence to the media, even though he concedes that "*there is always a risk of undue harm to the honour of an investigated person."* Indeed, he goes on to admit that because it is difficult to convict corrupt agents, "*public opinion may be a healthy substitute"* instead of convictions of suspect politicians, by "*condemning them to ostracism"*. He decries the presumption of innocence, a principle which in his view is not binding.

52. These rejections of fundamental human rights in the investigation of political corruption cannot be the public philosophy of judges engaged in corruption investigations and trials, who are bound by a constitution and by an international human rights law that requires them to abide by fundamental rights. No complaint is made about Moro as a crusader against corruption: the complaint is that while he does so by campaigning against fundamental rights he cannot be perceived as impartial when he sits as a judge and breaches these rights. When he speaks of Craxi, and then of the same conditions in Brazil, the analogy implies Lula's guilt. The very fact that his own office "*leaks like a sieve"* to the media, as does the prosecution office, is evidence that he is out to destroy Lula's honour and reputation: his leaks have whipped up the same kind of demonstrations against Lula that he applauds against Craxi. Were he a private citizen he would be entitled to advance these arguments (although other countries have tackled political corruption effectively in ways that do not destroy fundamental rights). Because he uses his office to advance them, he thereby disqualifies himself as a judge.
53. The complainant filed a motion to seek Moro's recusal, but this had no prospect of success as it was decided by Moro himself (see later). There seems no prospect that the Federal Regional Court of the 4th Circuit, to which Moro is connected, will act to remove him from Lula's case, or that the High Council of Justice (*Conselho Superior*

de Justiça) will do so. Any consideration of the Federal Regional Court of the 4th Circuit will be delayed beyond the time when he can, acting as a biased judge, order Lula's arrest and subsequently preside over his trial, then convict and sentence him. Against this prospect, there is no timely or effective remedy

54. As a final and clinching argument for Moro's perceived bias, there are exhibited a number of newspaper articles over the last few months (and also a voter preference poll conducted in view of this scenario) (Exhibit K), which expect or encourage Judge Moro to stand for the Presidency of Brazil in 2018, an election at which Lula will again be eligible to stand so long as he has not been convicted – by Judge Moro. The Judge has not ruled out the ambition imputed to him by these (and many other) articles, and must therefore be objectively considered as a potential candidate. There could be no stronger case of perceived bias for a potential presidential candidate to sit as a Judge on the case of a rival candidate, with a strong interest in convicting (and therefore disqualifying) that candidate. Judge Moro decided that this objection to him "lacked seriousness" because he was not responsible for acts of third parties. But if he is to sit as trial judge he must remove any public apprehension that he may stand for President, and he has, notably, not done so by denying these media stories.
55. HRC jurisprudence upholds the principle that justice must be seen to be done by a judge whom reasonable observers recognise to be impartial. Involvement of judges in preliminary proceedings wherein they form an opinion about a defendant is incompatible with the requirement of impartiality in Article 14: *Larranga v Phillipines* 1421/05, paragraph 7.9. Judges must not only be impartial: objective facts giving rise to a perception of bias requires their disqualification: *Lagunas Castedo v Spain* (1122/02) paragraph 9.7. Moro's decisions to issue a bench warrant and to disclose to the media the transcripts disqualify him from having any further power over Lula's cases.

Complaint 5: Article 9 - Liability to Indefinite Pre-Trial Detention

56. As explained above, Judge Moro is a strong advocate of placing suspects in detention until they confess and make a plea bargain. In 'Operation Car Wash' he has put in to practice what he preaches, and has confined many arrested suspects in prison until they have plea-bargained, whereupon they are released and later convicted but given light sentences. This practice is, it is submitted, contrary to Article 9. Although there have been legislative attempts to make better provision for *habeas corpus*, these have

been publicly opposed by Judge Moro and have not yet passed in Parliament. Although Article 9(3) of the ICCPR lays down that "*it shall not be the general rule that persons awaiting trial shall be detained in custody...*" it has been a general rule applied by Judge Moro to 'Car Wash' defendants.

57. This complaint is made *de bene esse*, in the sense that at time of writing the complainant has not been arrested and detained. However as the target of investigations aimed at him, he is liable to be placed in detention once Judge Moro directs his arrest. In other words, he has been formally identified as a suspect (in a number of investigations) and is currently undergoing a procedure (so far, including searches and seizures, interrogation and telephone tapping) which will in all likelihood lead to his arrest and indefinite detention without any effective remedy. On this basis, it is submitted that he is entitled to complain of imminent violation of his rights. He is a 'victim' under the Committee's jurisprudence, because there is a real risk of the violation of his ICCPR rights by the State: *Kindler v Canada* (470/91) paragraph 13.2.

58. Preventive detention, as exemplified by the Brazilian plea-bargaining practices of "*delação premiada"* and *colaboração premiada*, is strictly circumscribed by international law, because pre-trial detention is a form of punishment. The Committee Against Torture has expressed concern about lengthy pre-trial detention of the kind being ordered by Judge Moro,[15] and in 2007 the UN High Commissioner noted that the high proportion of Brazil's prison population being held in pre-trial detention was a matter of special concern.[16] In 2013 the Inter-American Court of Human Rights reported adversely on pre-trial detention throughout the region, pointing out that under Article 7(5) of the American Convention on Human Rights "*the sole legitimate grounds for pre-trial detention (are) the risk of the accused attempting to escape justice or hindering the judicial investigation"*.[17] It went on:

"*[States should] use pre-trial detention only when there are no other means to ensure the appearance of the accused at trial and to prevent tampering with evidence; interpret restrictively the circumstances in which pre-trial detention can legally be ordered; review the laws and judicial practices to ensure that the measure is used*

[15] See its concluding observations, official Records of the general Assembly, 56th Session, Supplement No.44 (A/56/44) paragraph 119(c)
[16] Press Release, 5th December 2007
[17] ICHR Report, p.45 paragraph 106 & p.61 paragraph 144

only in exceptional cases and for the shortest time possible; implement other precautionary measures, such as bail, house arrests, or electronic bracelets..."

Consistently with this approach, the IACHR has ruled that the presumption of innocence requires the State to bear the burden of proving that the pre-conditions for pre-trial detention exist,[18] and where it is strictly necessary to curtail liberty "*to ensure that (the defendant) will not impeded the efficient development of an investigation and that he will not evade justice"*.[19]

59. The Court has emphasized that "*the personal characteristics of the supposed author and the gravity of the offence he is charged with are not, in themselves, sufficient justification for preventive detention."*[20] It follows that it cannot be sufficient to show that a particular accused is wealthy or has rich supporters or is accused of serious corruption. It certainly cannot be relevant for an investigative judge to use it as "*a way to highlight the seriousness of the crime and demonstrate the effectiveness of judicial action especially in lengthy judicial systems"* - all reasons that Judge Moro has given for using it.[21] That approach does not focus on the facts of the case but uses the detention as a device to demonise the defendant in the public eye. Judge Moro's approach in other cases has been to impose pre-trial detention because the defendant has not acknowledged guilt, and in the case of the lack of such acknowledgement, there is a danger that the defendant will if set at liberty continue the corrupt activities.[22] In other words, Moro declines to apply the presumption of innocence, because he assumes that the facts he has to prove by evidence are proved simply because of his belief in the truth of those factual assumptions.
60. It is quite clear that international law prohibits detention when the purpose is to pressure a defendant or witness to confess. Nonetheless, Car Wash prosecutor Manoel Pastana has stated that "*for the bird to sing it has to be caged"* and that pre-trial detention has "*the important function of convincing the criminal offenders to cooperate with the unveiling of penal illicit acts, obtaining the possibility of*

[18] *Uson Ramirez v Venezuela, 20 November 2009, Series C No.207 paragraph 144*
[19] IACHR Report, p.60 paragraph 74
[20] *Bayarni v Argentina*, 30th October 2008, Series C, No.187 paragraph 74
[21] *Means and Ends*, 5th January 2015
[22] See *Alencar* decision, 24th June 2015

influencing them to helpfully cooperate in the determination of liability."[23] This amounts to an admission, by a member of the "Car Wash" apparatus, that the real reason for pre-trial detention is to extract a confession. It goes without saying – it is forensic experience throughout the world – that confessions extracted in these circumstances are likely to be unreliable, and should not be used as the basis for findings of guilt. The 'strategy' used by Judge Moro thus breaches the rule against self-incrimination, a sub-rule of the presumption of innocence.

61. Article 312 of the Brazilian Code of Criminal Procedure provides that preventive detention may be ordered "*to maintain public order, economic order, for the convenience of a criminal investigation or to secure the enforceability of the criminal law, whenever there is evidence of a crime and sufficient indication of who committed it."*

62. These provisions are, in their generality, wider that international law permits and must be construed restrictively and consistently with Human Rights treaties. The ICCPR requires pre-trial detention to serve one of a number of precise purposes: to prevent flight, or interference with evidence, or commission of further crimes. The HRC has therefore condemned states which have held defendants in custody to make them co-operate.[24] The "*maintenance of public order"* – the exception under which most 'Car Wash' suspects have been ordered to be detained– is vague, and must be confined to emergency situations. Similarly, the 'convenience' of a criminal investigation should be interpreted as a situation where the detainee is likely, if released, to frustrate the investigation by fleeing or interfering with witnesses, or can be shown (from his criminal record or his recent intentions) to be likely to commit further serious crimes. It is submitted that Article 312 does not comply with Article 9: it lacks the 'strict criteria' to regulate detention to obtain testimony, which is an exceptional measure that must be carefully and precisely regulated.[25]

[23] This statement was given by Manoel Pestana in his opinion on Habeas Corpus C 5029050-46.2014.404.0000. Item 2, headnote of the Federal Attorneys' Office statement.
[24] *Van Alphen v The Netherlands* 305/88
[25] *John Campbell v Jamaica* 307/88 paragraph 6.4

Complaint 6: Article 14(2) - Breach of the Right to be Presumed Innocent

63. It is well accepted in international law that a virulent press campaign can have an impact on the presumption of innocence (See *Ninn-Hansen v Denmark;*[26] *Beggs v UK*).[27] The fact that public officials pre-judge the defendant's guilt, either by public statements or 'leaks' to the press, is also capable of breaching the presumption (e.g. *Allenet de Ribemont v France*).[28]
64. Police have suspicions that Lula may own an apartment and a farm on which work has been done by construction companies as a favour to him for services rendered. Lula denies any ownership rights in either property, and in any event the impugned work was allegedly done years after he left office. Police also suspect corruption from the fact that several large construction companies paid him to give lectures, but so did Microsoft and many other companies, even the *Globo* media network which has been his main media accuser. Again, these lectures were given years after he left office. Police and prosecutors have nonetheless 'leaked' their suspicions and their assumptions to the media, which has published them as fact and without critical analysis, in order to create a public expectation that Lula will be arrested and found guilty.
65. Many Car Wash suspects have been held in detention until they plea-bargain, and the details of the plea-bargain whenever they mention Lula or his associates are leaked to the media, which deploy the leaked information, no matter how unreliable, to add to the public demonization of Lula and the expectation that he will be found guilty of corruption.
66. The main Brazilian media – newspapers, magazines and television – are all hostile to Lula. They are led by the *Globo* media franchise, which is the most powerful and most hostile to the Workers Party. Although Lula is formally a subject of investigation, Brazilian law gives no protection to his honour and reputation in this period, e.g. by contempt of court laws preventing the media from prejudging his guilt.
67. Judge Moro has done nothing to discourage the slander, because of his notion that 'public opinion' must demonstrate its support for prosecutions (to the extent of stoning suspects and their houses – see his Craxi example). This may be why he is

[26] Decision No.28971/95 ECHR 1999
[27] Decision No.15499/10, 16th October 2012
[28] 10th February 1995, paragraphs 39-31, Series A No.308

prepared to destroy reputations and invade privacy. As he said to the audience at the end of a recent press conference:

"*These cases involving severe corruption crises, powerful public figures, only proceed if supported by the public opinion and the organised civil society. And this is your role. Thank you!"* [29]

68. Having in this way encouraged demonstrations against Lula and other suspects, Judge Moro at a public event saw fit to thank and congratulate the demonstrators, who were hailing him as a hero:

"*Today, the 13th of March, the Brazilian people took the streets. Among the many reasons, to protest against the corruption which has penetrated in many of our institutions and in the market. I was moved by the support to the investigation of so-called Operation Car Wash.*

Despite the references to my name, I attribute to the kindness of the Brazilian people the current success of a solid institutional work involving the Federal police, the Federal Attorney's Office and all the bodies of the Judiciary Power. It is important that the elected authorities and the parties listen to the voice of the streets and also commit to fighting corruption, reinforcing our institutions and weeding out the bad apples completely..."[30]

69. Moro's desire to whip up public opinion so that people who believe in the guilt of Lula shout that belief in the streets, is shared by his Car Wash 'apparatus', namely the Federal prosecutors and the police. It is clear from the Committee's jurisprudence and from *General Comment 32* on the Presumption of Innocence that "*It is a duty for all public authorities to refrain from pre-judging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilty of the accused."*[31] This principle was applied in *Gridin v Russian Federation*, where public assertion of guilt by a high ranking prosecutor at a public meeting, together with prosecution leaks to a hostile media were held to breach Article 14(2).[32] The same case establishes that

[29] This statement was made in a lecture held in São Paulo, which was attended by several businessmen and authorities. Link: https://www.youtube.com/watch?v=hYlKkjAOv-g

[30] 13th March 2016, Judge Moro - Available on: <http://gl.globo.com/politica/blog/cristiana-lobo/post/sergio-moro-diz-que-ficou-tocado-com-apoio-da-populacao-lava-jato.html>

[31] Communication No.770/1997, Repeated in *Kozulia v Belarus* No.1773/2008 and *Zinsou v Benin* No.2055/2011

[32] 770/97, paragraph 8.3

media comment can prejudice a fair trial if there is a failure by the state to use its powers to curb it. Similarly in *Saidov v Uzbekistan*,[33] Article 14(2) was breached through extensive and adverse pre-trial comments by 'state directed' media. It is significant when there is a link between the adverse media coverage and the state: here the link is in the fact that the coverage is of matter 'leaked' from the office of prosecutors – agents of the state, who provide information to the press in order to assist it in vilifying the defendant. Lula's lawyers have requested both prosecutor and judge to have these 'leaks' stopped, but to no avail. They have no effective remedy, and indeed no remedy at all.

70. The complainant has made every available effort to stop the leaks and to stop the Federal Prosecutors from continuing to make public statements asserting Lula's guilt. But these efforts have been to no avail. The only remedy available against the latter abuse is a complaint to the Prosecutor's National Council. This Council was addressed by lawyers on behalf of the complainant on 31st May 2016. They pointed out that Lula was being formally investigated in legal secrecy, but one of the heads of that investigation, Carlos Fernando dos Santos Lima, was going on the media and affirming Lula's guilt. For example, he told Radio Station Jovem Pan on March 27th:

> "*We clearly see payments by construction companies benefitting the former President and his family... others who co-operated (i.e. by plea-bargains) confirm the former President already knew about the scheme and approved it... And he also knew about everything, he had the power and ability to hinder the result... so in this sense he was not just being part of it, and that's why saying he ruled over it is correct. He is the author of the crime"*

71. These verbatim statements by one of the Prosecutors acting in Car Wash, presuppose and urge the complainant's guilt in a way which is contrary to HRC General Statement 32 and to a number of HRC decisions which were drawn to the attention of the National Council of Prosecutors. But they took no action on the grounds that they could not reproach a member of the Federal Attorney's Office. The Council remitted the matter for "internal investigation" – a prolonged process which is merely disciplinary and will not curb such conduct. In fact, Brazil's Attorney General, Rodrigo Janot, who also acts in Car Wash, gave an interview on June 22nd to the 'Washington Post', agreeing that he (Janot) was "the man who makes Brazil shiver".

[33] 964/01, paragraph 6.06

Janot suggested that Lula was at the top of a criminal organisation pyramid and that his investigation was now 'near the top'.

72. In respect of this complaint, the Human Rights Committee is invited to apply a 'horizontal' or *Drittwirkung* approach, requiring the state to protect against violation of a suspect's rights by laws (such as contempt of court) which prevent third parties such as the media from presenting a suspect as guilty, and thereby prejudicing his trial. Here, we have a case where confidential information is supplied or 'leaked' by state agencies to the media so that they can deploy it to demonise a suspect and create an expectation that he will be found guilty – which will make it easier for the public to accept Judge Moro's decision to find Lula guilty.
73. This would not happen if Brazil adopted a law that prevented a campaign of vilification against suspects prior to their trial; a law which prevented prosecutors from publicly urging the guilt of people they are in the process of prosecuting and a provision that excluded prosecutors from a case if they have been found to have publicly presumed the suspect or defendant's guilt. This follows from *General Comment 16*, in which the HRC ruled that protection must be guaranteed against all arbitrary or unlawful interferences or attacks, whether they emanate from state authorities or from natural or legal persons (i.e. media companies). Article 17(2) requires states to protect those within its jurisdiction, by ensuring that everyone has the protection of law against arbitrary attacks on their home or reputation. The behaviour of the Federal Prosecutor and Federal Judge, in 'leaking' confidential facts discovered in the course of the investigation to the media, constitutes a breach of the presumption of innocence. There is no remedy, because requests (even from Supreme Court Judges) to investigative and punish the leaks, have received no response from the relevant authorities.[34] That is because the relevant authorities are the Federal Prosecutor and Judge Moro.
74. A chronological spread-sheet of popular magazine covers, featuring stores based on these leaks, is exhibited, from which it can be seen how, in 2015-16, the complainant has suffered from a prosecution-initiated campaign of disparagement and presumption of guilt (Exhibit M). Also exhibited (Exhibit N) is a statement by Professor Luiz

[34] Petition 6171, currently before the Federal Supreme Court, which requests investigation into leaks of confidential information. Although the contents were confidential, the newspaper "Estadão" published the following news: "The Atibaia Countryside House" Complaint will be the first charge against Lula in Operation Car Wash".

Moreira Gomes Junior explaining how the virulence of the press campaign against Lula has put pressure on the judges and denied him a fair trial.

PART IV

EXHAUSTION OF DOMESTIC REMEDIES

1. The arbitrary detention on 4th March

75. Lula was arrested at 6am on a bench warrant that the issuing judge should have known to be illegal. He was taken for compulsory interrogation to a police compound in an airport. The prosecutors leaked the arrest to the press before it took place so that the media would arrive at his house and then at the airport, and sensationalise the story. He was released after 6 hours of police detention, having been given no alternative but to comply with the interrogation. He was not given the opportunity to challenge the bench warrant at the time, and the damage done to him by the publicity was irreversible. Any complaint against Judge Moro, however, would merely be sent for "internal investigation" by a council of judges which would not result in an effective remedy. Any subsequent constitutional action would be met by the argument that the litigation was a "*brutum fulmen"*, i.e. futile, because the case was in the past and the damage was irreversible. Lula might sue for civil damages, but trial would be long delayed. This illegality perpetrated by an investigatory judge through the issue of an unlawful bench warrant has no satisfactory remedy in Brazilian law. In other jurisdictions, it would be the subject of a Court declaration of unlawfulness, and an order for costs and compensation. That is what Article 9 ICCPR requires. In any other jurisdiction, it would disqualify Moro from sitting as trial judge, but an application to this effect had to be decided by Moro himself, and an appeal could be delayed until after he could order Lula's arrest and could convict Lula himself.

2 & 3. The telephone taps and their illegal release, 13th May 2016

76. Not only was evidence for the warrant for these interceptions (including the interception of Lula's lawyer) insufficient, but the transcripts were unlawfully disclosed to the media by Judge Moro to the great damage of the complainant and his family. Some of the transcripts were of tapes that had been recorded after the judge himself had ordered the taping to stop: he knew they were illegally made, but nonetheless disclosed their contents in the knowledge that they would arouse public hostility against the complainant. There was no remedy available to the complainant and his family, other than a civil action which will take years to come to trial. There

were transcripts of calls between the complainant and the President (Ms Dilma Rousseff) and for this reason alone the Supreme Court had jurisdiction to entertain a complaint by her. On 22nd March Judge Zavascki ruled that the release of these transcripts was unlawful and that the interception lacked any justification, but nonetheless "*we must recognise the irreversibility of the practical effects arising from the undue disclosure of the taped telephone conversations."* On 13th June he further ruled (1) that Moro had unlawfully refused to forward the intercepted conversations of the Supreme Court and (2) had unlawfully lifted the confidentiality of the illegally intercepted conversations with the President. These rulings provided no remedy or redress to Lula, as they covered only the release of the taped conversation with the President, and accepted that the effects of the illegality were "*irreversible"*. No action was taken by judicial or government authorities to recuse or remove judge Moro, despite the unlawfulness of his actions, and (as pointed out above) the only appeal is to Moro himself. In any country that purports to abide by the rule of law, a judge who breaches the law in this way would probably be removed from office, and certainly recused from judging the case of his victim. There is no effective way the complainant can require action by government or by the Judicial Council. (see paragraphs 35-37 above)

4. Lack of impartiality by Judge Moro

77. There is no effective or expeditious way in which this judge can be recused for his obvious bias (see paragraph 49 above). That is because the appropriate motion to recuse can only be filed before the judge himself (who is obviously an interested party) or by a complaint petition directed to the Attorney General (Rodrigo Janot) who has himself, in his role as Federal Prosecutor, accused Lula of being guilty. In any event, the Attorney General merely has a discretion to initiate government action, which does not amount to a remedy that is effective, for the complainant. Due to the evident violation to the principle of the impartial judge, a Motion to Reject Jurisdiction of the Judicial District of Curitiba (i.e. Judge Moro) was filed and was duly rejected by Judge Moro. This "remedy" is obviously not efficient to guarantee a trial with an impartial judge, as it hinges on the decision of the very judge to whom objection is taken.

5. Detention without trial

78. The complainant is under formal investigation as a defendant: he is therefore liable at any time to be arrested and detained by order of Judge Moro, and this action by the judge is reasonably foreseeable. This judge is notorious for holding suspects arrested in the Car Wash operation in indefinite detention until they make a plea bargain. They have no right to *habeas corpus*, or to access to a court to order their release, other than to a 'court' comprising of Judge Moro himself. Although the complainant has not yet been arrested, as a declared suspect he is vulnerable to arrest at any time and is therefore a person likely to be subject to arbitrary detention. The statute law and case of Brazil does not provide him with an available remedy, because the law itself is so broad that it does not comply with Article 9. It does not confine pre-trial detention to cases where there is likelihood of flight or interference with evidence: its grounds for pre-trial detention are so broad that they have been interpreted as enabling detention in order to obtain a confession (i.e. a plea bargain).

6. Right to be presumed innocent

79. This Right is put in jeopardy by the persistent leaking by the prosecution to the press of its investigative theories, seized documents, interview transcripts and plea bargains, with the intention or at least the consequence of creating a public expectation of Lula's guilt and whipping up public hatred against him. There has been no attempt by the authorities to stop these leaks, which have been approved by judge and prosecutor, and Brazilian law does not contain any provision against contempt of court or the like to prevent the media from pre-judging guilt. Complaints were made on behalf of Lula to the National Council of Prosecutors about the behaviour of the Federal Prosecutor, in publicly alleging that Lula was guilty, but this complaint was not accepted (see above). The council merely sent it for "internal investigation": a lengthy complaints procedure which is merely administrative and does not satisfy the test for an effective remedy, because it is a discretionary disciplinary proceeding; see *Coronel et al v Colombia*, Communication 778/1997, UN Doc CCPR/C/76/D/778/1997 (2002). Moreover, it has no reasonable prospect of success (see *Patiño v Panama*, Communication 437/1990 UN Doc CCPR/C/52/D/437/1990 (1994)).

7. Current Position

80. By Order of the Federal Supreme Court on June 13th 2016, all investigations of Lula (now numbering thirteen) were returned to Judge Moro, who on June 24th ordered that the proceedings should resume. Lula's suspicion motion (Exhibit O) that Moro should recuse himself was rejected on 22nd July 2016 (Exhibit P).