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International Covenant on Civil and Political Rights

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Views

Communication No. 1623/2007

Submitted by:	José Elías Guerra de la Espriella (not represented by counsel)
Alleged victim:	The author
State party:	Colombia
Date of communication:	23 January 2007 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 27 November 2007 (not issued in document form)
Date of adoption of Views:	18 March 2010
Subject matter:	Conviction of a person in a trial with faceless judges
Procedural issues:	Abuse of the right to submit communications; failure to exhaust domestic remedies
Substantive issue:	Violation of the right to a fair trial
Articles of the Covenant:	14
Articles of the Optional Protocol:	3 and 5, paragraph 2 (b)

On 18 March 2010 the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1623/2007.

[Annex]

* Made public by decision of the Human Rights Committee.

Annex

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

concerning

Communication No. 1623/2007*

Submitted by:	José Elías Guerra de la Espriella (not represented by counsel)
Alleged victim:	The author
State party:	Colombia
Date of communication:	23 January 2007 (initial submission)

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

Meeting on 18 March 2010,

Having concluded its consideration of communication No. 1623/2007, submitted by Mr. José Elías Guerra de la Espriella under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1. The author of the communication, dated 23 January 2007, is José Elías Guerra de la Espriella, a Colombian citizen born on 19 June 1954, who alleges he is a victim of a violation by Colombia of article 14 of the Covenant. The Optional Protocol entered into force for the State party on 23 March 1976. The author is not represented by counsel.

The facts as submitted by the author

2.1 The author alleges that, on 3 May 1995, the Supreme Court of Justice ordered him to be investigated within the framework of investigations being carried out against the Rodríguez Orejuela brothers, who were "drug lords" in the town of Cali. Neither he nor his counsel was officially informed of the investigation under way until criminal investigation

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

In accordance with article 90 of the Committee's rules of procedure, the Committee member Mr. Rafael Rivas Posada did not participate in the adoption of these views.

proceedings were formally opened on 23 May 1995. Having learned of it unofficially, the author requested the opportunity to testify, and did so on 12 June 1995.

2.2 After much testimonial evidence had been gathered (a process in which the defence was not permitted to participate), the author was summoned for questioning on 21 June 1996, at which time he denied any connection with the Orejuela brothers. On 9 July 1996, the Supreme Court ordered him to be placed in pretrial detention for the offences of illicit enrichment (amounting to 10,000 pesos, or approximately $14,000), as well as forging of a private document (involving invoices for the purchase of a vehicle) as principal, and fraud for having received benefits in the form of services and money from companies belonging to the Rodríguez Orejuela brothers.

2.3 Owing to the fact that he was a Senator and his trial was to be conducted before the Supreme Court, without higher appeal, the author decided to give up his office and the accompanying form of jurisdiction. That would allow the case to be heard by a divisional prosecutor's office, in accordance with article 127 of the Code of Criminal Procedure, and at a second instance if necessary by a deputy prosecutor assigned to the Higher Court of the District of Bogotá. This did not come about, however, as the Court transferred the trial to the system of Regional Justice Courts (also called Public Order Courts). Contrary to the law, the Director-General of the Public Prosecutor's Office especially assigned the case to be heard by the Chief of the Public Prosecutors Unit of the Supreme Court. The author lodged a request for annulment (*recurso de reposición*) and an appeal against the decision (*recurso de apelación*) before the Attorney General, who confirmed the original decision.

2.4 Throughout the pretrial hearing in the Public Prosecutor's Office, the author underwent questioning in darkened rooms, in front of one-way mirrors concealing the person, who spoke with a distorted voice and questioned him through a loudspeaker, while he had to reply into a microphone. The charges were formally brought in an order dated 6 March 1997, on the above counts. Regarding the charge of illicit enrichment, in addition to the acts with which he had already been charged (acquisition of a vehicle for half its price), the author was also accused of acquiring an amount of 20,000 pesos (approximately $28,000), derived from drug trafficking, for use in electoral campaigns. The author denies all the charges and asserts that although he presented conclusive evidence to refute them, that evidence was not considered. The author attempted to appeal against the charge (*recurso de apelación*), but was unable to do so because the senior judge was absent. Instead, he lodged a request for annulment (*recurso de reposición*), alleging, among other reasons, that the case was time-barred. The request was rejected on 9 April 1997.

2.5 According to the author, during both the pretrial hearing and the trial, the testimony of a witness in the United States, who accused him of having received money from the Rodríguez Orejuela brothers, was used as key evidence. Since the witness was outside the country, the author could not refute the testimony. Moreover, the trial was handled by a faceless judge in the Regional Justice Court of Bogotá, whom he was not able to see at any moment during the trial, and there was no public hearing. He was sentenced on 17 April 1998 to 90 months' imprisonment, a fine of 30,050,000 pesos and to deprivation of his rights and a ban on holding public office for the duration of the prison sentence, for the offences of illicit personal enrichment, falsification of a private document and fraud. He was also sentenced to pay 6,282,860 pesos to the Senate for material damage.

2.6 The author appealed the decision before the National Court, which was made up of eight faceless judges. At this stage too, there was no public hearing. On 30 December 1998, the Court confirmed the decision of the first instance, but reduced the prison sentence to 72 months. The author acknowledges that he did not lodge an appeal in cassation (*recurso de casación*), on the grounds that the members of the Criminal Cassation Chamber of the Supreme Court could not be impartial, since they were the ones who had first ordered his pretrial detention, without the possibility of release on bail. The author filed an application

for legal protection (*tutela*) before the Constitutional Court, on the grounds that the Regional Justice Court and the National Court had violated his fundamental rights to due process, defence, the presumption of innocence and freedom. The Court rejected the application on the grounds that the author's complaints should have been voiced in an appeal in cassation before the Supreme Court.

2.7 Lastly, the author lodged an appeal for special review of the final judgement (*recurso de revisión extraordinaria*) before the Supreme Court, on the grounds that new evidence had emerged from a subsequent decision of the National Court, acquitting the person who had been convicted for acting as a front man for the Rodríguez Orejuela brothers and who had supposedly been the source of his illicit enrichment. That application was rejected on 4 September 2003. According to the decision, provided by the author, the Court absolved that person of criminal responsibility on some counts but not on those related to the acts with which the author was charged. Accordingly, the decision could not be considered as new evidence for the purpose of the appeal for review. The author asserts that the decision concerning that appeal was signed by the same judges of the Court who had ordered his pretrial detention, which he considers violates the principle of impartiality.

The complaint

3. The author alleges that he was the victim of a violation of article 14, paragraph 1, of the Covenant, on the grounds that his rights to a public hearing and to due process were denied. He further alleges that his rights under article 14, paragraph 3 (d) and (e) were violated, on the grounds that he was convicted in first instance in a trial that took place in his absence and that of his counsel, with neither a public hearing nor an opportunity to challenge or cross-examine the prosecution witness or to refute the evidence against him, and in which no satisfactory or reasonable answers were given to the concerns, reasoning or questions of his counsel. He had no personal contact with the prosecutor who charged him, or with the judges who convicted him in first and second instance. The judges who convicted him never heard him, whether in private or in public. He was neither given a public hearing in second instance nor was he present at the moment of the verdict.

State party's observations on admissibility

4.1 In a note verbale dated 20 February 2008, the State party challenged the admissibility of the communication. It pointed out that if the author believed that the sentences handed down at first and second instance constituted a violation of his right to due process, he could have made use of the special remedy of cassation (*recurso extraordinario de casación*), a mechanism which would have allowed him to redress the alleged violations he was bringing before the Committee. This effective and practicable remedy would have allowed the author directly to restore the rights that had allegedly been breached. According to article 219 of the Code of Criminal Procedure, "the main purpose of the special remedy of cassation is to give effect to material law and the guarantees owed to persons taking part in criminal proceedings, to provide compensation for loss or injury to the parties caused by the sentence under appeal, and to unify national case law".

4.2 The State party also argues that the author could have challenged the judges of the Supreme Court whom he believed would not be impartial. Nor is it clear why the author felt he should invoke his doubts about the impartiality of the Supreme Court in his decision with respect to the remedy of cassation, but not invoke those doubts when he brought his appeal for review of the final judgement before the same Court. The State party recalls the Committee's jurisprudence in the sense that mere doubts about the effectiveness of domestic remedies do not absolve the author from exhausting them. It therefore concludes that the communication should be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.3 The State party also argues that the communication should be deemed inadmissible on the grounds of abuse of the right to submit communications owing to the time that elapsed between the events and the submission of the communication. The final criminal sentence was handed down on 30 December 1998, and the communication was transmitted to the Committee on 23 January 2007, that is, 8 years and 23 days later. In view of the requirement for legal certainty and uniformity in all decisions adopted at the domestic level, and since the author provides no convincing explanation for the time elapsed, the State party considers that the communication should be declared inadmissible.

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

5.1 In his comments of 5 March 2008, the author reiterates that he was not informed that a preliminary investigation had been opened against him, in breach of article 324, paragraph 3, of the Code of Criminal Procedure. In a ruling dated 24 July 1995, the Court refused to halt the criminal investigation and ordered that the preliminary investigation should go forward; it then ordered of its own motion the examination which was done without the participation of the author or his counsel, who were nevertheless notified of the decision, on the grounds that the proceedings were still in the hands of the pretrial judge. The author reiterates his original allegations. He contends that, given the composition of the Supreme Court, it would have been useless to lodge a remedy of cassation, and he points out that the judge who took the decision on the appeal for review was one of the judges who had earlier issued the order for pretrial detention. He also asserts that the remedy of cassation is special, and therefore not obligatory. The remedy of review is also special, and could have been effective if new evidence had come to light that was not available during the trial. Under the circumstances, it should be recognized that domestic remedies have been exhausted.

5.2 The author insists that during the preliminary phase evidence was deliberately gathered behind the back of the defence. Despite the complaint regarding this irregularity, the Court accepted the evidence. The few occasions on which the defence was allowed to participate related to evidence of no importance. By way of example, the author cites the testimony of the accountant of the Cali cartel, which was taken in the United States without either his or his counsel's presence. Although their request for him to testify again to allow them to cross-examine him was accepted, it was not complied with. Ostensibly, this was a breach of article 14, paragraph 3 (e), of the Covenant.

5.3 The author alleges that his right to due process and his right to defence were violated, on the grounds that he was investigated, tried and sentenced by a Regional Justice Court and the National Court, which, under the Code of Criminal Procedure and decree No. 2700 of 1991, were not competent in respect of the alleged facts that took place on and after 24 April 1992. These ad hoc judicial entities began to operate only after 1 July 1992. This constitutes a violation of the natural judge principle and the principle that all persons are equal before the courts of law, since those courts acted as emergency courts, parallel to the normal courts, with special, prejudicial and restrictive rules. In this regard, the author cites the Committee's Views on communication No. 848/1999 of 23 July 2002. Decree No. 2790 of 1990 (Defence of Justice Statute) established the Public Order Courts, as faceless, emergency courts, competent in terrorist crimes, which were incorporated into the 1991 Code of Criminal Procedure. The provisions regarding secret trial proceedings, with no public hearing, were repealed by Act No. 504 of 1999.

5.4 The author reiterates that he was deprived of the right to a public trial with a public hearing, in the presence of his counsel and the public prosecutor, in breach of article 14, paragraph 1, of the Covenant.

5.5 The author submits that the decision on the review of the final judgement was issued on 4 September 2003, and that therefore only three years and four months had elapsed

before his submission of the communication to the Committee. During that period he conducted inquiries, and awaited the result of communication No. 1298/2004,[1] involving a similar case that was intimately linked to the charges brought against him. The admissibility of that case reassured him as to the efficacy of the process.

State party's observations on the merits

6.1 On 12 February 2009, the State party reiterated its arguments against admissibility. Regarding the question of abuse, it rejects the author's attempt to calculate the time frame for submitting the communication from the date of the decision dismissing the special review of the final judgement, while at the same time maintaining that cassation is a special remedy which does not need to be exhausted.

6.2 The State party asserts that the author was investigated, tried and convicted in accordance with the rules of procedure in place at that time, with the protection of procedural guarantees. Decree No. 2700 of 1991 (amended by Act No. 81 of 1993) guaranteed the adversarial nature of the preliminary proceedings and the trial. Article 323 of the Code of Criminal Procedure authorizes the compilation of all the evidence necessary to clarify the facts, and allows the individual under criminal investigation to submit a free statement (*versión libre*), which gives him the right to be informed of the content and scope of the charges against him, which, even in the preliminary phase, may already have been established.

6.3 In the author's case, on 3 May 1995, the Supreme Court decided to initiate a preliminary investigation on the basis of copies transmitted by the Department of Public Prosecutions of Bogotá of the findings of investigations carried out in Cali in connection with the so-called "8000" proceedings. When the preliminary investigation commenced on 24 May 1995, the author asked to give a *versión libre* statement, which he did on 12 June 1995, with the assistance of his personal counsel and after transmittal of all requested documents had been authorized.

6.4 Later he was asked to clarify his *versión libre* statement, which he did on 4 September 1995. On that occasion all the evidence against him was produced; he was asked to give explanations, and new copies of the records were provided. On 18 December, the lawyer was provided with copies of evidence produced by various investigations into alleged commercial relations between politicians and persons involved in or companies belonging to the Cali cartel. On 15 January 1996, the author's counsel submitted a request for several items of evidence to be produced, to which the Supreme Court agreed on 6 February 1996. Copies of the most recent evidence received by the Court were provided to the author's counsel on 12 January 1996. After the pretrial hearing was formally declared open, on 23 May 1996, the author's counsel participated in the gathering of a wealth of testimonial evidence and in judicial inspections; he also requested copies of the records, which he was always given. The State party considers that the author has failed to demonstrate that his right to due process was violated, by making vague, generalized statements, couched in abstract phrases that fail to reflect the reality of the criminal investigation proceedings.

6.5 The State party asserts that in the course of the proceedings, the author was assisted by his defence counsel and had the opportunity to be heard on several occasions during the investigation phase. In addition, he was able to submit written documents and other evidence before the Regional Justice Court, as attested by his communication of 6 June 1997, in which he submitted a first-person account of the facts on which the charges against

[1] Communication No. 1298/2004, *Becerra v. Colombia*, Views of 11 July 2006.

him were based. It is true that there was no public hearing during his criminal proceedings. However, the Constitutional Court, in a ruling on constitutionality handed down in 1996, found that the rule preventing public hearings in cases dealt with by the Regional Justice Courts complied with the Constitution, and noted that the replacement of such hearings by a special procedure was a suitable means of ensuring the safety of the persons involved in the proceedings. In another ruling on constitutionality, issued in 1997, the Constitutional Court recalled that due process involved rights that could be limited during states of emergency, since they were not among the non-derogable rights listed in article 4 of the Covenant. The omission of public hearings in these types of proceedings does not undermine the basic purpose of criminal trials. According to the Constitutional Court, the Covenant enshrines the right to be present, which implies the right to a hearing. However, that hearing does not have to be public, and appropriate technical measures can be used to protect the identity of the judge and prosecutor.

6.6 The State party contends that the author's statement that he had no contact with the prosecutor who charged him is not true. The criminal investigation was not carried out by the Regional Prosecutor's Office, but rather by the public prosecutor assigned to the Supreme Court, a situation of which the author was aware at all times. The fact that the trial was transferred to the Regional Justice Court did not in itself constitute a violation of due process, since each of the judicial decisions taken had a sound legal basis, and provided remedies whereby the author could have the facts and evidence reviewed by another judicial body, without it being necessary for him to know the identity of the judge.

6.7 The State party points out that the author had the possibility, through his counsel, to request, review and refute evidence, as well as to question witnesses, and provides a list thereof. In refusing to take new testimony from the witness who was in the United States, the Public Prosecutor's Office considered that the fact that the defence had not been present while the testimony was given was not a sufficient reason to call for a further testimony. That in no way affected the right to defence, since at all times the author had the opportunity to request and refute evidence.

6.8 The State party contends that, at both the first and the second instance, the various applications made by the author's counsel were studied and assessed one by one, and gives details of their content and the replies thereto. The fact that the judgement did not concur with the arguments set forth by the author is simply attributable to the evaluation made by the judicial officials of the elements brought before the Court. The State party concludes that no article of the Covenant was violated.

Author's comments on the State party's observations

7. On 24 March 2009, the author reiterated his earlier allegations and repeated that no action had been taken on his request for further testimony from the key prosecution witness, who was in the United States; nor had he been informed that the preliminary investigation had begun. He was not able to refute the evidence produced at the outset, because most of it was brought over from another trial (the so-called "8000" proceedings). He also asserts that that witness was not properly identified, which should have been sufficient to exclude him as a proper source of evidence. He points out that his trial was more political than legal, on account of which respect for the principles of due process by judicial bodies was merely formal and not real. He also observes that the appeal for review was an appropriate remedy that should be taken into consideration by the Committee for the purpose of calculating the time elapsed between the exhaustion of domestic remedies and the submission of his communication to the Committee.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

8.3 The Committee takes note of the State party's argument that the communication should be considered inadmissible on the grounds of abuse of the right to submit communications, owing to the time that has elapsed between the last criminal sentence, handed down on 30 December 1998, and the submission of the communication to the Committee, on 23 January 2007. The Committee also takes note of the author's explanations in this regard, in particular the fact that he lodged an appeal for review, that was decided on 4 September 2003, an appeal which did not solely pertain to procedural issues, but also to substantive issues directly related to the facts on the basis of which the author was convicted. The Committee reiterates that the Optional Protocol establishes no time limit for the submission of communications and that the passage of time, other than in exceptional cases, does not in itself constitute an abuse of the right to submit a communication. In the present case, the Committee does not consider that a delay of three years and five months since the last judicial decision constitutes an abuse of the right to submit a communication.[2]

8.4 The Committee also takes note of the State party's observations that the author failed to exhaust domestic remedies because he did not lodge an appeal in cassation with respect to his complaints concerning the violation of his right to a trial with due process in the normal trial courts. The State party also asserts that the author could have challenged the judges of the Supreme Court whom he believed would not be impartial. In the Committee's View, the author's complaints are of two types. The first has to do with the taking of evidence, the way in which the evidence was weighed by the courts, and the impartiality of the judges of the Supreme Court. The second refers to the fact that he was tried by a faceless judge and a faceless court, that the trial was conducted without a public hearing, without his presence or the presence of his counsel, that he had no personal contact with the prosecutor who charged him or the judges who convicted him, and that those judicial bodies acted as an emergency court, established on 1 July 1992, or in other words after the acts for which he was accused.

8.5 With regard to the first type of complaints, the Committee observes that those complaints were set out in an application for legal protection that was dismissed by the Constitutional Court on the grounds that they should have been raised in an appeal in cassation. The Committee recalls its jurisprudence that mere doubts about the effectiveness of a remedy do not absolve the author from the obligation to attempt it. The Committee therefore considers that domestic remedies had not been exhausted and that this part of the communication should be considered inadmissible in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

8.6 With regard to the second type of complaints, concerning the functioning of the Regional Justice Court, the Committee observes that this court was established by law in

[2] See, for example, communication No. 1479/2006, *Persan v. Czech Republic*, Views of 24 March 2009, para. 6.3.

1992, and that, as the State party indicated, the Constitutional Court had pronounced it constitutional. The Committee therefore considers that the exhaustion of domestic remedies rule cannot be applied in respect to these complaints. There being no further obstacles to their admissibility, the Committee declares them admissible insofar as they raise issues in relation to article 14, paragraphs 1 and 3 (d) and (e).

Examination of merits

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

9.2 The Committee takes note of the author's complaints that he was tried by a faceless judge and a faceless court established after the acts with which he was charged, in trials with no public hearing, at which neither he nor his counsel were present; that he had no personal contact with the prosecutor who charged him or the judges who convicted him; and that he was interrogated in darkened rooms, in front of one-way mirrors concealing his questioner, whose voice was distorted. The Committee also takes note of the observations of the State party confirming that there was no public hearing during the trials conducted in the Regional Justice Courts, a measure which the Constitutional Court declared constitutional for the purpose of ensuring the safety of participants in the trial. The State party also affirms that the identity of the prosecutor was known to the author and that hiding the identity of the judges did not prevent the submission of evidence by the accused or appeals against decisions with which he did not agree.

9.3 The Committee recalls paragraph 23 of its general comment No. 32 on article 14 of the Covenant, and observes that, in order to guarantee the rights of the defence enshrined in article 14, paragraph 3, and in particular those contained in subparagraphs (d) and (e), all criminal proceedings must provide the accused with the right to an oral hearing, at which he or she may appear in person or be represented by counsel and may bring evidence and examine witnesses. Taking into account the fact that the author did not have such a hearing during the proceedings that culminated in his convictions and sentencing, together with the manner in which the interrogations were conducted, without observing the minimum guarantees, the Committee finds that there was a violation of the author's right to a fair trial in accordance with article 14 of the Covenant.[3]

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose a violation of article 14 of the Covenant.

11. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party must provide the author with an effective remedy, including appropriate compensation. The State party is also under an obligation to ensure that similar violations do not occur in future.

12. Bearing in mind that, by becoming party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to these Views. The State party is also requested to publish the Committee's Views.

[3] See communications Nos. 848/1999, *Rodríguez Orejuela v. Colombia*, Views of 23 July 2002, para. 7.3; and 1298/2004, *Becerra v. Colombia*, op. cit. para. 7.2.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]