



**International covenant
on civil and political
rights**

Distr.
RESTRICTED*

CCPR/C/87/D/1298/2004
10 August 2006

ENGLISH
Original: SPANISH

HUMAN RIGHTS COMMITTEE
Eighty-seventh session
10 - 28 July 2006

VIEWS

Communication No. 1298/2004

<u>Submitted by:</u>	Mr. Manuel Francisco Becerra Barney (not represented by counsel)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Colombia
<u>Date of communication:</u>	11 April 2003 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 29 June 2004 (not issued in document form)
<u>Date of adoption of Views:</u>	11 July 2006

* Made public by decision of the Human Rights Committee.

Subject matter: Trial and conviction of a person involved in the illegal financing of a presidential campaign

Procedural issues: Failure to exhaust domestic remedies, insufficiently substantiated claim

Substantive issues: Violation of the right to due process

Articles of the Covenant: 2 and 14

Articles of the Optional Protocol: 2 and 5, paragraph 2 (b)

On 11 July 2006, the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1298/2004. The text of the Views is appended to the present document.

[ANNEX]

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**

Eighty-seventh session

concerning

Communication No. 1298/2004*

Submitted by: Mr. Manuel Francisco Becerra Barney (not
represented by counsel)

Alleged victim: The author

State party: Colombia

Date of communication: 11 April 2003 (initial submission)

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

Meeting on 11 July 2006,

Having concluded its consideration of communication No. 1298/2004, submitted to the
Human Rights Committee on behalf of Mr. Manuel Becerra Barney 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:

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanut, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Rafael Rivas Posada did not participate in the adoption of the present decision.

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

1.1 The author of the communication, dated 11 April 2003, is Manuel Francisco Becerra Barney, a Colombian citizen born in 1951. He claims to be the victim of violations by Colombia of article 2, paragraphs 1 and 3 (a) and (c), and article 14 of the Covenant. He is not represented by counsel.

1.2 The Optional Protocol entered into force for the State party on 29 January 1970.

Factual Background

2.1 The author was Comptroller-General and former Colombian Minister of Education, at the time of the events he relates. After the 1994 presidential elections, the Colombian Prosecutor-General launched investigations into the financing of the election campaign run by the President-elect, Ernesto Samper Pizano, who was said to have received drug-trafficking money in the form of donations from members of the Cali cartel. The investigations, of ministers and members of Parliament for the most part, led to what became known as the “8000 trial”. They included an inspection of the offices of Chilean citizen Guillermo Alejandro Pallomari González, the main person responsible for the financing of the Cali cartel, during which books were seized and the organization’s financial movements were revealed. When questioned, Pallomari incriminated the author in the illegal funding of Ernesto Samper’s presidential campaign.

2.2 On 31 January 1996, the author was detained by order of the Prosecutor-General. He states that he was questioned from behind mirrors and was never able to see the individuals questioning him. Once the investigation phase was over, the case was forwarded to the competent government prosecutor’s office. By decision dated 26 September 1996, the prosecutor charged the author with receiving drug-trafficking money to finance the election campaign of the then presidential hopeful, accusing him of “illicit enrichment of individuals for the benefit of third parties” and impounding some of the property he owned.

2.3 By a collegial decision dated 22 August 1997, the Cali Regional Court, which was made up of faceless judges, found the author guilty of illicit enrichment of individuals for the benefit of third parties and sentenced him to 5 years and 10 months in prison, a fine of 300 million Colombian pesos (approximately US\$ 125,000), the equivalent of what he was said to have received unlawfully, and disqualification from public office or functions for the duration of his sentence. The author states that the trial was held behind closed doors in Cali, and that he was neither present nor represented there, being held in custody in Bogota, some 550 km away. He further states that, although the statements given under interrogation by prosecution witness Guillermo Pallomari were regarded as key evidence during the pretrial proceedings, that evidence has never been presented and his lawyer has, therefore, never been able to question the person who incriminated him. He states that the judge’s identity was kept secret.

2.4 The author appealed his sentence before the National Court, claiming procedural irregularities, in particular the fact that the judgement was based on statements made by a witness who was not under oath and in disregard of the principle of adversarial proceedings, and that the trial had been conducted without proper guarantees of due process. He states that the National Court was also made up of faceless judges, that it did not consider the case in a

public hearing, and that neither he nor his lawyer was present. By decision dated 24 July 1998, the National Court dismissed the appeal and increased the prison sentence handed down by the lower court to seven years. This, the author maintains, is contrary to the principle of *non reformatio in peius* acknowledged in article 31 of the Colombian Constitution, which prohibits any increase in the sentence handed down in first instance when, as in this case, the convicted individual is the only party to appeal.

2.5 The author applied to have the National Court's ruling quashed, again claiming procedural irregularities besides violation of the principle of *non reformatio in peius*. The Criminal Cassation Chamber of the Supreme Court dismissed the appeal on 2 October 2001.

2.6 On 19 November 2001, the author applied to the Constitutional Court for protection (*tutela*) against the sentences handed down by the appeal court and in cassation proceedings, claiming a violation of the right to due process, equality before the courts and access to the administration of justice. In a ruling dated 3 December 2001, the Disciplinary Jurisdictional Chamber of the Cundinamarca Division Council of the Judiciary granted *tutela* and revoked the sentence handed down by the Supreme Court in cassation proceedings on the grounds that the ban on *reformatio in peius* when the convicted individual is the only party to appeal had been broken. It gave the Cali Court 48 hours to return the case file to the Criminal Cassation Chamber of the Supreme Court for a fresh ruling that fully respected the principle of *non reformatio in peius*.

2.7 By decision dated 19 March 2002, the Supreme Court declined to give effect to the *tutela* ruling, arguing that since the Supreme Court was the highest court of ordinary jurisdiction its judgements had the force of *res judicata* and a remedy of *tutela* was not, therefore, competent. The author points out that this was the first time the Supreme Court had ever declined to give effect to a protective ruling, stressing that previously, in similar cases, the Court had always accepted applications for protection. This refusal to give effect to the ruling, the author says, led to what became known as the "train crash", a face-off between the different public powers, especially between the Supreme Court and a Constitutional Court, resulting from the entry into force of the new Colombian Constitution of July 1991.

2.8 On 17 May 2002 the Branch Council of the Judiciary declared it had no jurisdiction to consider the complaint for contempt of court which the author wished to lodge against the Criminal Cassation Chamber of the Supreme Court, and referred the application for disciplinary action to the House of Representatives in Congress. To date, the Charges Committee of the House of Representatives has not pronounced on the matter of what penalties, if any, should be imposed on the justices of the Criminal Cassation Chamber for failure to accept the protective ruling.

The complaint

3.1 The author claims to be a victim of a breach of article 14, since he was found guilty in first instance and on appeal by faceless judges, both trials were held behind closed doors and he was denied the right to be heard publicly, to defend himself and to question the prosecution witness.

3.2 The author also alleges a violation of article 2, paragraph 1, in the form of discrimination against him by the Supreme Court when it declined to accept the protective ruling awarded in his favour, thereby departing from its previous practice in similar cases.

3.3 Lastly, the author alleges a violation of article 2, paragraph 3 (a) and (c), because the Supreme Court declined to accept the protective ruling, leaving the author without an effective remedy for the violation of his rights as acknowledged in the Covenant.

Observations by the State party on admissibility and comments by the author

4.1 In observations submitted on 1 November 2005, the State party comments that the House of Representatives has yet to pronounce on the complaint for contempt of court lodged by the author against the Criminal Cassation Chamber of the Supreme Court. It adds that a justice of the Supreme Court has lodged an appeal against the protection ruling before the Cundinamarca Division Council of the Judiciary but that appeal has not yet been settled, and as a result the protective ruling is not yet fully in effect. The State party claims that the remedies available under domestic law have not been exhausted, and the communication should therefore be declared inadmissible.

4.2 The State party further maintains that the author's allegations are not adequately grounded in any injury liable to be accepted as a violation of the human rights acknowledged in the Covenant and that, therefore, his complaint is inadmissible.

4.3 On the merits, the State party notes that the Committee has no jurisdiction to determine whether there has been a violation of article 2, paragraphs 1 and 3, since those paragraphs refer to a general commitment made by the State party upon signing the Covenant from which no specific right that individuals may invoke in isolation can be deduced.

4.4 In connection with the author's complaints relating to article 14, the State party asserts that there is not enough information to establish whether there has been a violation of the right to equality before the courts, the author having presented no evidence to indicate that the Supreme Court has actually taken a different course in applications for protection similar to those brought by the author: the allegation is thus baseless.

4.5 Regarding the alleged violation of the right to be publicly heard with all due safeguards, the State party refers to Constitutional Court ruling No. C-040 of 1997 on the legality of proceedings conducted by the regional courts operating at the time of the events in question, among them the proceedings against the author. The State party points out that the Court indicated at that time that a public hearing was not a constitutional requirement of proceedings and was not necessary or obligatory. The legislature was thus entitled to do away with that stage of a trial, as it then did by adopting rules to govern the "Public Order Court" which allowed the court anonymity. The State party says that the expression "to be present" does not, in the Constitutional Court's interpretation, necessarily require the accused to be physically present at the proceedings but rather to be involved for the purpose of exercising the right to a defence. It concludes by saying that the judicial formalities both in first instance and on appeal were completed in the presence of the author's attorney, and the author's right to a defence was thus guaranteed.

5.1 In his comments of 4 January 2006, the author states that he has brought 10 different procedural actions since being convicted in 1996 (10 years ago), including all the ordinary and extraordinary remedies available, and the State party cannot claim that domestic remedies have not been exhausted. He points out that the complaint of contempt of court is not a domestic remedy but a disciplinary measure directed at justices who fail to uphold the constitutional rights to *tutela* or protection, the only effect of which would be to impose penalties on the justices concerned.

5.2 The author challenges the State party's claims that his representative was given a hearing during the trials in first instance and on appeal. He insists that both trials were held behind closed doors, that there was no oral or public hearing at any time, and that neither he nor his representative was allowed to be present, especially since the identity of the judges who handed down the various sentences was kept secret. He draws attention to the contradiction between the State party's claims acknowledging and justifying the practice of conducting trials without a public hearing and the later claim that his lawyer was given a hearing. He reaffirms, as stated in his initial claims, that his defence was always conducted in writing, that he never knew who his judges were, and that his lawyer was never permitted to question the prosecution witness.

Issues and proceedings before the Committee

Material issues and special pleas

6.1 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 the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 On the exhaustion of domestic remedies, the Committee notes the State party's assurance that a complaint of contempt of court against the justices of the Criminal Cassation Chamber of the Supreme Court is under consideration in the House of Representatives. However, the Committee also notes the author's statement that this complaint is a disciplinary measure directed against those justices and not an appeal which would allow his case to be reviewed. The State party cannot, therefore, claim that the author should wait for the House of Representatives in Congress to pronounce on his complaint before the Committee can consider the case under the Optional Protocol, especially when the complaint has been pending before the House for four years and does not afford a real opportunity for the author's case to be reconsidered.

6.4 The Committee further notes the State party's allegations that the protective ruling (*tutela*) has been challenged by a Supreme Court justice and that, therefore, domestic remedies have not been exhausted. The Committee observes that the challenged ruling granted protection to the author and that it is that very ruling which the Supreme Court declined to give effect to. That being so, the challenge to this ruling is irrelevant for the purpose of affording the author an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

Consideration of the merits

7.1 The Committee has considered this communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee takes note of the author's claims that he was tried and convicted in first instance and on appeal by courts made up of faceless judges, without the due safeguards of a public hearing and adversarial proceedings, and in particular that he was not allowed to be present and defend himself during the trial, either personally or through his representative, and had no opportunity to question the prosecution witness. It points out that, to satisfy the requirements of the right to defence guaranteed under article 14, paragraph 3, of the Covenant, all criminal proceedings must allow the accused the right to an oral hearing at which he or she can appear in person or be represented by legal counsel, submit such evidence as he or she deems relevant and question the witnesses.¹ Bearing in mind that the author was not given such a hearing during the proceedings which culminated in his conviction and sentencing, the Committee concludes that his right to a fair trial as established in article 14 of the Covenant was violated.

7.3 In light of the above findings, the Committee does not consider it necessary to deal with the complaint in respect of article 2, paragraph 3, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it constitute a violation of article 14.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy.

10. Bearing in mind that, by becoming a State 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 guarantee 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 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

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

¹ Communication 848/1999, *Rodríguez Orejuela v. Colombia*, decision dated 23 July 2002, paragraph 7.3.