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Seventy-fourth session
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VIEWS

Communication No. 678/1996

Submitted by:	Mr. José Luis Gutiérrez Vivanco (represented by APRODEH, a non-governmental organization)
Alleged victim:	The author
State party:	Peru
Date of the communication:	20 March 1995 (initial submission)
Document references:	Special Rapporteur's rule 91 decision of, 1996 (not issued in document form)
Date of adoption of Views:	26 March 2002

On 26 March 2002 the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 678/1996. The text of the Views is appended to the present document.

[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

Seventy-fourth session

concerning

Communication No. 678/1996*

Submitted by:	Mr. José Luis Gutiérrez Vivanco (represented by APRODEH, a non-governmental organization)
Alleged victim:	The author
State party:	Peru
Date of the communication:	20 March 1995 (initial submission)

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

Meeting on 26 March 2002,

Having concluded its consideration of communication No. 678/1996, submitted by Mr. José Luis Gutiérrez Vivanco under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all the information submitted to it in writing by the author of the communication and by the State party,

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Abdulfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The text of an individual opinion signed by one Committee member, Mr. Ivan Shearer, is appended to this document.

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

1. The author of the communication dated 20 March 1995 is Mr. José Luis Gutiérrez Vivanco, a Peruvian citizen who was sentenced to 20 years' imprisonment for a terrorist offence and later pardoned on humanitarian grounds on 25 December 1998. He states that he is a victim of violations by Peru of articles 7 and 14 (1), (2) and (3) (b), (c), (d) and (e) of the International Covenant on Civil and Political Rights. He is represented by the Pro Human Rights Association (APRODEH), a non-governmental organization.

The facts as submitted by the author

2.1 The author was a student in the Faculty of Biology in San Marcos University, Lima, until the time of his arrest. He lived with his parents and seven brothers and sisters. He suffered from a chronic cardiac insufficiency, which prevented him from engaging in strenuous physical exercise.

2.2 On 27 August 1992, the author was arrested at the home of Luisa Mercedes Machaco Rojas, his fiancée. While he was in her house, the police arrived with his fiancée, and both were arrested and taken in a police van to the offices of the National Directorate against Terrorism (DINCOTE). In those offices the author was beaten and later taken back to the van, where the ill-treatment continued. He was then taken back to the DINCOTE offices. As a result of the ill-treatment, he had to be taken to the police hospital, where, owing to his chronic cardiac insufficiency, he was transferred immediately to the Dos de Mayo public hospital. He remained in custody in this hospital during the 15 days of police investigation, as stipulated for terrorism cases by the relevant legislation, namely, Decree-Law No. 25,475 of 6 May 1992.[1]

2.3 During this period of police custody the author was not represented by a defence lawyer. However, since he had been hospitalized, he was not asked to make any statement. He was accused by the police, on the basis of statements by other persons charged with him, of having taken part in subversive attacks against the Bata shoe shop and a restaurant.

2.4 The judicial examination was carried out in the offices of the Lima Tenth Criminal Court, which at that time specialized in terrorism cases. In his statements before that court, the author alleged that he had been subjected to physical ill-treatment. During the examination stage, he was represented by a lawyer of his choice.

2.5 The oral proceedings were held at private hearings in a room at Miguel Castro Castro Maximum Security Prison,[2] Lima, between 7 April and 17 June 1994, without the presence of witnesses or experts. The court was composed of secret judges who conducted the proceedings behind special windows which prevented them from being identified and with loudspeakers which distorted their voices. In addition, the judges were not necessarily specialists in criminal matters, but could be chosen from among all High Court and Labour Court judges. During this stage of the proceedings, the author was assisted by a lawyer, who was engaged by his mother on the day when the hearings began; this lawyer was in fact representing another defendant in the same proceedings. At the hearings, the senior government prosecutor, when making his oral charges, stated that he did not find the author criminally liable, but even so he was bringing charges against him pursuant to the law.[3]

2.6 On 17 June 1994, the Special Terrorism Division of the Lima High Court sentenced the author to 20 years' imprisonment; this sentence was subsequently confirmed by the Supreme Court of Justice on 28 February 1995. The Special Terrorism Division's sentence stated that the author's criminal responsibility had been proved in the interview with Lázaro Gago, one of the co-defendants, who stated that he not only knew the author and his fiancée, but had also made his home available for them to leave the goods taken during the subversive attacks on the Bata shoe shop. In addition, the sentence stated that the author's congenital illness could not serve as a legal basis for exempting him from all responsibility for the offence since several of the defendants had said that he was a member of Shining Path.

2.7 After the sentence, the author's mother was informed that he must change his lawyer, since the new legislation stipulated that in trials involving a terrorist offence, defence lawyers in Peru could not represent more than one accused person at the same time, with the exception of court-appointed lawyers.[4]

2.8 The author's mother, representing her son, lodged an application for judicial review of the facts with the Supreme Court in 1996. This court's proceedings were written and there were no public or private hearings. The application was dismissed on 21 April 1999.[5]

2.9 On 25 December 1998, Supreme Decision No. 403-98-JUS granted the author a pardon on humanitarian grounds, stating that as a consequence of his illness "the above-mentioned prisoner may suffer serious events and, in addition, he is suffering from serious organic disabilities; consequently, his release will not constitute a threat to social peace and collective security".

The complaint

3.1 The author alleges that he was subjected to ill-treatment at the time of his arrest, which constitutes a violation of article 7 of the Covenant. He adds that no investigation was undertaken into this matter, even though he reported it during the judicial examination stage.

3.2 The author alleges that there has been no trial with due guarantees, which constitutes a violation of article 14 (1) since the trial was held in private in a court composed of faceless judges, because the senior government prosecutor had an obligation under law to charge the defendants even if he considered them innocent and also because a false confession of guilt was included as evidence.

3.3 The author alleges a violation of article 14 (2) since, during the trial, account was taken only of his presence in his fiancée's home and the statement by one of his fellow defendants; no consideration was given to other evidence such as the statement by the witnesses during the police phase, the records of the body search and house search which yielded no grounds for charging him, and the medical examinations, which demonstrate that he cannot even run 50 metres without endangering his life.

3.4 The author maintains that there was unwarranted delay in reaching a decision on the application for judicial review, in violation of the provisions of article 14 (3) (c) of the Covenant.

3.5 The author alleges that he was never able to conduct his defence during the police stage since he was not present and that during the trial the law did not allow him to be defended by a lawyer of his choice, contrary to article 14 (3) (b) and (d).

3.6 He further alleges that the people who arrested him were never interrogated since the law does not allow this and that no witnesses ever appeared during the oral proceedings to challenge the statements by the fellow defendants, which may raise questions in the light of article 14 (3) (e).

Observations by the State party

4.1 In its observations of 6 January 1998 on admissibility and merits, the State party argues that the communication should be declared inadmissible in conformity with article 5 (2) (b) of the Optional Protocol since the doubts expressed by the author regarding the validity of the evidence raise a question which should be taken up nationally before a Peruvian court.

4.2 The State party considers that in the complaint it is not clearly explained which actual events and legal reasoning lead the author to conclude that there has been a violation of article 14 (1) of the Covenant. In addition, the State party declares that there is no need to demonstrate that the guarantees of due process have been complied with since respect for minimum guarantees was implicit in the normal development of the criminal proceedings against the author, in conformity with the pre-established procedures. In addition, if there were any comment relating to the proper development of the trial, the submission of an appeal to this end would be recorded in the relevant file, but this has not been done. For this reason, the State party maintains that there has been no violation of the provisions of article 14 (3) (b), (d) or (e).

4.3 The State party maintains that the presumption of the author's innocence was undermined by the police statement made by his fellow defendant, Lázaro Gago, who recognized the author and his fiancée as the persons who were keeping goods taken in the subversive attacks on the Bata shoe shop. In addition, Luisa Machaca Rojas, the author's fiancée, declared in her police statement that she was a member of the Peruvian Communist Party - Shining Path, together with her fiancé, giving details of all the actions in which they had participated together. Lastly, account was taken of the police statements by Daniel Prada Rojas and Jayne Taype Suárez, two fellow defendants.

4.4 As regards article 14 (3) (c), the State party affirms that although there was a certain delay in reaching a decision on the application for review, "undue" or "unwarranted" delay should have been determined by the Peruvian court competent to consider a complaint about what is claimed to be unwarranted delay in reaching a decision on an appeal. In other words, there exists within the Peruvian judicial system appropriate remedies for claiming "undue" delay in the administration of justice, and it is for a Peruvian court to consider a question of this type. In the present case, the relevant procedures were not used.

4.5 On 21 January 1999, the State party declared, in a note verbale, that the author had been granted a pardon on 25 December 1998 and had been released immediately.

Comments by the author

5.1 In his comments of 17 October 2000, the author responds to the State party's arguments and points out that, during the police investigation, article 6 of Decree-Law No. 25,659 was still in force and expressly prohibited applications for guarantees, habeas corpus and amparo. Consequently, there was no effective remedy which he could exercise in order to protect his rights to freedom and physical safety.

5.2 The author maintains that the purpose of the communication submitted is not to assert his innocence; consequently, the State party's objections referring to supposed allegations about the validity or otherwise of the evidence in determining his involvement should be dismissed.

5.3 The author refers to the State party's observations to the effect that the determining factors considered in establishing his responsibility were the police statements by the defendants, and maintains that those statements were taken at a stage when guarantees of due process do not exist. These guarantees include access to the evidence for the prosecution, the right to interrogate witnesses for the prosecution and the right to furnish evidence in one's defence.

5.4 The author says it should be borne in mind that as of the date of his arrest article 12 of Decree-Law No. 25,475 was in force; this provision allowed the police to hold detainees incommunicado without judicial authorization. In the present case, all the detainees said that they had been ill-treated while in police custody, with the result that the validity of the statements is doubtful, especially since there has been no investigation into this torture. The author accordingly maintains that the judicial proceedings against him were a mere formality whose only purpose was to validate the improper action of the police without paying the slightest heed to the judicial action taken. It was on this basis that the conviction was handed down, and this constituted a violation of the principle of innocence.

5.5 In relation to the possibility of lodging an appeal on the grounds of unwarranted delay in reaching a decision on the application for judicial review, the author points out that the State party has referred to the existence of a "competent Peruvian court" without saying which court this is. In his view, it is for the State party to say specifically which courts these are and to express its acceptance of internationally recognized rights. Furthermore, requiring an appeal against delay in reaching a decision on an application for review would lead to a never-ending succession of appeals.

Issues and proceedings before the Committee

6.1 In conformity with rule 87 of its rules of procedure, before considering any claims made in a communication, the Human Rights Committee must decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 As to the requirement of exhaustion of internal remedies, the Committee takes note of the State party's challenge of the communication, maintaining that these remedies have not been exhausted and declaring the existence of available remedies before the competent Peruvian courts. However, the Committee considers that the State party has not specified what type of applications the author may submit and before which courts. Consequently, the Committee considers that in this case it has not been demonstrated that the internal judicial remedies were available.

6.4 With regard to the arguments relating to the violation of article 7 of the Covenant, the Committee observes that the State party has not touched on this question. However, the author has not provided any details of the ill-treatment received after his arrest, nor have the medical examinations carried out by the hospital given rise to any record of such ill-treatment. Consequently, in the present case, the Committee considers that this part of the communication is inadmissible through lack of substantiation under article 2 of the Optional Protocol.

6.5 With regard to the arguments relating to the violation of the principle of the presumption of innocence set forth in article 14 (2), the Committee considers that the arguments have not been sufficiently substantiated for the purposes of admissibility, and therefore declares them inadmissible under article 2 of the Optional Protocol.

6.6 With regard to the author's arguments that he was never able to exercise his right to defence during the police investigation, the Committee considers that the author has been unable to substantiate for the purposes of admissibility that this constitutes a violation of article 14 (3) (b); it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.7 The Committee accordingly declares the rest of the communication admissible and will consider it as to the merits in the light of the information furnished by the parties, in conformity with the provisions of article 5 (1) of the Optional Protocol.

Consideration as to the merits

7.1 The author maintains that there has been a violation of article 14 (1) because the trial at which he was convicted of a terrorist offence was not conducted with due guarantees: the proceedings took the form of private hearings in a court composed of faceless judges; he could not summon as witnesses the police officers who arrested and interrogated him or question other witnesses during the oral stage of the proceedings, because the law does not allow this; his right to have a lawyer of his choice was restricted; and the government prosecutor was obliged by law to bring charges against the prisoner. The Committee takes note of the State party's declaration that the trial was conducted with minimum guarantees, since these are contained in the pre-established procedures and the author was tried in accordance with these procedures. Nevertheless, the Committee recalls its decision in the Polay Campos v. Peru case[6] regarding trials held by faceless courts, and trials in prisons to which the public are not admitted, at which the defendants do not know who are the judges trying them and where it is impossible for the defendants to prepare their defence and question witnesses. In the system of trials with "faceless judges" neither the independence nor the impartiality of the judges is guaranteed, which contravenes the provisions of article 14 (1) of the Covenant.

7.2 With regard to the author's claim that there was a violation of article 14 (3) (c), the Committee considers that the State party has confined itself to maintaining that the said delay ought to have been complained of in the national courts and has not succeeded in demonstrating why, in the circumstances of the case, no decision was taken on the application for review until 1999; that application had been made in 1996. The Committee accordingly considers that there has been a violation of article 14 (3) (c).

8. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts which have been set forth constitute violations of article 14 (1) and (3) (c), of the Covenant.

9. Under article 2 (3) (a) of the Covenant, the State party has the obligation to provide an effective remedy, including compensation, to Mr. José Luis Gutiérrez Vivanco. In addition, the State party has the obligation to ensure that similar violations do not occur in the future.

10. Bearing in mind that, in acceding to the Optional Protocol, the State party has recognized the Committee's competence to determine whether there has been a violation of the Covenant and that, under 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 and to provide an effective and applicable remedy in the event that a violation has been found to have been committed, the Committee wishes to receive information from the State party within 90 days on the measures it has adopted to give effect to the Committee's decision. It also requests the State party to publish the Committee's decision.

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

Notes

[1] Decree-Law No. 25,475 of 6 May 1992 relating to the offence of terrorism provides in article 12 that the Peruvian National Police shall be responsible for investigating terrorist offences through the DINCOTE. This Directorate is empowered to decide whether the evidence it gathers is sufficient to bring charges. Thus, in accordance with this article, the police are empowered to detain suspects for 15 days and are only obliged to notify the judge and the public prosecutor's office within 24 hours of the arrest. Article 12 (d) stipulates that during this period the police may order detainees to be held completely incommunicado.

[2] Article 16 of the above-mentioned Decree provides that the trial shall be held in the prison establishment concerned so that the judges, members of the Public Prosecutor's Office and judicial officials may not be identified visually or orally by the defendants or defence lawyers.

[3] Under article 13 (d) of the Decree, senior government prosecutors have an obligation to bring charges, and consequently cannot express an opinion on the innocence of the defendants, even if there is no evidence against them.

[4] Article 18 of the Decree-Law.

[5] It should be pointed out that at the time when the author submitted his communication to the Human Rights Committee no decision had yet been taken on the application for review.

[6] Communication No. 577/1994, Views of 6 November 1997.

Individual opinion of Committee member Mr. Ivan Shearer (…)

I have joined the Views of the Committee in this case. However, I think it desirable to make clear that the Committee has not condemned the practice of "faceless justice" in itself, and in all circumstances. The practice of masking, or otherwise concealing, the identity of judges in special cases, practised in some countries by reason of serious threats to their security caused by terrorism or other forms of organized crime, may become a necessity for the protection of judges and of the administration of justice. When States parties to the Covenant are faced with this extraordinary situation they should take the steps set out in article 4 of the Covenant to derogate from their obligations, in particular those arising from article 14, but only to the extent strictly required by the exigencies of the situation. These statements of derogation should be communicated to the Secretary-General of the United Nations in the manner provided in that article. In formulating any necessary statements the States parties should have regard to General Comment No. 29 (States of Emergency) adopted by the Committee on 24 July 2001. In the present case the State party presented no observations on the claims of the author based on any situation of emergency. Nor had the State party made any declarations of derogation under article 4 of the Covenant. Hence those possible aspects of the case did not arise for determination.

(Signed) Ivan Shearer

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