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# International Covenant on Civil and Political Rights

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**Human Rights Committee**

## Communication No. 1641/2007

### Views adopted by the Committee at its 104th session, 12 to 30 March 2012

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| *Submitted by:* | Jaime Calderón Bruges (not represented by counsel) |
| *Alleged victim:* | The author |
| *State party:* | Colombia |
| *Date of communication:* | 22 May 2007 (initial submission) |
| *Document reference:* | Special Rapporteur's rule 97 decision, transmitted to the State party on 6 December 2007 (not issued in document form) |
| *Date of adoption of Views:* | 23 March 2012 |
| *Subject matter:* | Conviction of a person on appeal in cassation |
| *Procedural issues:* | Substantiation of claim |
| *Substantive issues:* | Right to a fair and public hearing by a competent, independent and impartial tribunal; right to be presumed innocent; right to have a conviction and sentence reviewed by a higher tribunal according to law; inviolability of the principle of res judicata; right to equal protection of the law without discrimination |
| *Articles of the Covenant:* | 14, paragraphs 1, 2, 5 and 7; 15; and 26 |
| *Article of the Optional Protocol:* | 2 |

[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 (104th session)

concerning

### Communication No. 1641/2007*

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| *Submitted by:* | Jaime Calderón Bruges (not represented by counsel) |
| *Alleged victim:* | The author |
| *State party:* | Colombia |
| *Date of communication:* | 22 May 2007 (initial submission) |

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

*Meeting* on 23 March 2012,

*Having concluded* its consideration of communication No. 1641/2007, submitted to the Human Rights Committee by Mr. Jaime Calderón Bruges, 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 is Jaime Calderón Bruges, a Colombian national born on 17 March 1941. He claims to be the victim of a violation by Colombia of article 14, paragraphs 1, 2, 5 and 7; article 15; and article 26, read in conjunction with article 2, paragraphs 1 and 3, and article 14, paragraph 1, of the Covenant. The author is not represented by counsel. The Covenant and its Optional Protocol entered into force for Colombia on 23 March 1976.

* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval. 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.

**The facts as submitted by the author**

2.1 In November 1998, the Prosecutor-General's Office (*Fiscalía General de la Nación*) began to investigate the author for his alleged relationship with Miguel Angel Rodríguez Orejuela, a known drug trafficker. He was accused of having borrowed money from Orejuela that the latter had obtained from illegal activities, which would constitute the offence of illegal enrichment. On 7 December 1998, he was placed in pretrial detention and, as a result, he was suspended from his post as National Civil Registrar.

2.2 In a judgement of 18 January 2000, the Bogotá Third Special Circuit Criminal Court found the author not guilty due to a lack of conclusive evidence. The Public Legal Service (*Ministerio Público*) filed an appeal with the Bogotá Judicial District High Court, which, on 15 June 2000, upheld the verdict of the court of first instance, as it had not been proved that the author either knew Mr. Rodríguez Orejuela or was aware of the illegal origin of the funds, which had been borrowed through a third person. In addition, the High Court directed that the order of 30 March 2000 for the provisional release of the author be made definitive and unconditional.

2.3 On 24 August 2000, the prosecution service filed an appeal in cassation with the Supreme Court, citing alleged errors in the evaluation of the evidence by the Bogotá High Court. On 21 July 2004, the Supreme Court found that the Bogotá High Court had erred and quashed its judgement. It sentenced the author to 5 years' imprisonment and a fine and disqualified him from the exercise of public rights and duties for an equal period of time. He was thereupon sent to prison and suspended from the post of notary that he had occupied since his acquittal.

2.4 The author submitted an application for *tutela* (legal protection) to the Disciplinary Chamber of the Cundinamarca Council of the Judiciary against the cassation ruling, alleging, inter alia, violations of his right to life, liberty, equality and due process. He said that the cassation appeal was filed while articles 1 and 6 of Act No. 553/2000, which allowed such appeals against executory (final) judgements issued in the second instance by high courts, were in force. Although those provisions were declared unenforceable (unconstitutional) in that regard by the Constitutional Court in its decision No. C-252 of 28 February 2001, the earlier legislation, which was unfavourable to the author, was applied. The Supreme Court found that it was competent to hear the appeal, given that it had been submitted within the time limits specified under the law then in force[1] and that the declaration of unconstitutionality in 2001 was applicable with prospective effect. In its decision of 18 November 2004, the Council of the Judiciary rejected the application for *tutela*, ruling that *tutela* was not applicable to judicial interpretations and that the Supreme Court had not acted arbitrarily as the proceedings before it had been initiated in accordance with the regulations in force at the time.

2.5 The author challenged this decision, which led to a review by the Jurisdictional Disciplinary Chamber of the High Council of the Judiciary. On 2 February 2005, the High Council ruled in favour of the application for *tutela* and overturned the ruling of the Cundinamarca Council of the Judiciary. It found that, in view of decision No. C-252 of the Constitutional Court, the Supreme Court should not have admitted the cassation appeal against the judgement of the Bogotá High Court, since it was an executory judgement. It therefore concluded that the Supreme Court had disregarded the most-favourable-law principle applicable to criminal cases and had thereby violated the author's right to due process and to liberty. As a result, the High Council ruled that the decision of the Supreme

[1] Article 6 of Act No. 553/2000 states that an appeal in cassation must be submitted in writing within 30 days of the issuance of the executory judgement of the court of second instance and that if no appeal is submitted, the original case file is to be sent to the sentence enforcement judge.

Court was null and void, upheld the ruling of the Bogotá High Court and ordered the immediate release of the author.

2.6 The Constitutional Court subsequently reviewed the judgement of the High Council of the Judiciary and, on 20 June 2005, issued a new ruling on the application for *tutela*. The Constitutional Court found that the Supreme Court's decision to hear the cassation appeal filed in August 2000 did not contravene decision No. C-252 of 2001 and was in compliance with the provisions of the Code of Criminal Procedure in force at the time, that is, prior to the Constitutional Court's declaratory judgement on partial unenforceability. The Constitutional Court's judgement stipulates that there is not necessarily "a single, exclusive and unavoidable interpretation leading to the conclusion that the Supreme Court ... should not have issued any judgement whatsoever on cassation appeals filed against executory judgements that acquitted the accused, as the petitioner claims, since that body took the action that it did on the understanding that, if such appeals were filed before decision No. C-252 of 2001 [was issued], ... it was required to rule on them, without distinction". The Constitutional Court therefore overturned the High Council's ruling and upheld the judgement of the Cundinamarca Council of the Judiciary.

2.7 The author submitted an application for annulment of this ruling, which was rejected by the Constitutional Court in a plenary session on 26 September 2005. When the decision of the High Council of the Judiciary was reversed, the author was once again deprived of his liberty.

**The complaint**

3.1 The author maintains that, pursuant to decision No. C-252 of the Constitutional Court, the Supreme Court was not competent to hear the cassation appeal and that its verdict therefore was in violation of his rights under article 14 of the Covenant.

3.2 More specifically, the author claims to be a victim of a violation of article 14, paragraph 2, of the Covenant. He says that he was tried twice in ordinary courts in which evidence, pleadings and appeals could be submitted and contested and in which challenges could be lodged. He was acquitted in both trials, and the judgements were duly executory. At no time did evidence subsequently emerge to disprove his innocence as established by those judgements. Nevertheless, the Supreme Court undertook cassation proceedings in which he had no opportunity to produce or contest evidence or to appeal, much less challenge the Court's decisions. He alleges that this was not a genuine trial in terms of the due process required under the Covenant.

3.3 The author maintains that his trial came to an end with his definitive acquittal in the court of second instance. The cassation proceedings therefore did not represent an ordinary or extraordinary remedy but rather a separate action that led to a new trial, concerning the same acts, in which there was no opportunity to challenge the conviction. This situation contravenes article 14, paragraphs 1 and 5, which provides for the right of any convicted person to challenge any penalty or conviction.

3.4 The Colombian judiciary violated the principles of res judicata and *non bis in idem* as set forth in article 14, paragraph 7, of the Covenant, by not upholding the definitive acquittal handed down by the court of second instance and by trying the author again for the same offences – offences of which he had been acquitted by two courts in proceedings that were in full accordance with process and that gave him the opportunity to refute and contest the charges against him.

3.5 The author alleges that the Supreme Court disregarded his right to benefit from the most-favourable-law principle and therefore violated article 15 of the Covenant. The Court applied a procedural rule that had previously been rescinded because it violated fundamental rights. The cassation appeal was filed on the basis of Act No. 553/2000, which

made it possible to do so within 30 days of the issuance of an executory judgement by the court of second instance. Under the previous law, which had been repealed by Act No. 553, appeals had to be filed before the court of second instance handed down its final verdict. Decision No. C-252 of the Constitutional Court reinstated the law that had preceded Act No. 553, and that law should have been applied both because it was in force when the cassation appeal was decided and in order to comply with the most-favourable-law principle.

3.6 According to the author, the Supreme Court treated identical sets of circumstances differently without justification. On the one hand, an individual who was acquitted by an executory judgement and whose case was submitted for cassation before the Constitutional Court had issued its decision in 2001 was obliged to forgo his or her fundamental rights. On the other hand, a person acquitted by an executory judgement issued after the Constitutional Court had handed down its decision in 2001 could not have his or her acquittal overturned. This constitutes a violation of article 26, read in conjunction with article 2, paragraphs 1 and 3, and article 14, paragraph 1, of the Covenant.

**State party's observations on admissibility**

4.1 In a note verbale dated 6 February 2008, the State party maintains that the communication should be declared inadmissible because the Committee is not competent to evaluate the facts and evidence, whereas the author is proposing that the Committee act as an appellate court or court of fourth instance and evaluate facts and situations or interpretations of domestic law which have already been evaluated by the country's legal system, notably by the Constitutional Court. The State party recalls that the opinions of the Committee are not supposed to take the place of the decisions of domestic courts regarding the evaluation of the facts and evidence in a given case. Rather, the Committee's task is to ensure that States provide their citizens with a justice system that is in compliance with the provisions for due process enshrined in the Covenant.

4.2 On 26 June 2008, the State party submitted its observations on the merits. It affirms that the cassation procedure is a special oversight mechanism that allows for a judicial review of judgements that mark the end of proceedings in courts of first and second instance. It verifies the legality of a judge's decisions and offers an opportunity to consider if any errors were made *in judicando* (regarding the merits) or *in procedendo* (relating to procedure). This legal remedy does not provide for a reconsideration of the matters settled by a judgement, but rather for an assessment of whether or not the verdict that concluded the proceedings was handed down in violation of the law. In the case in question, the court made an error *in judicando* because it failed to weigh the evidence properly.

4.3 Under Act No. 553/2000, cassation appeals were admissible against executory judgements, which is why the prosecution service filed such an appeal on 24 August 2000 against the judgement of the Bogotá High Court of 15 June 2000. At the same time, a public action was filed with the Constitutional Court to review the constitutionality of various articles of Act No. 553, including the article admitting cassation appeals against executory judgements. In its decision No. C-252, the Court found that such appeals breached due process.

4.4 Under article 235 of the Constitution, the Supreme Court may act as a court of cassation. The cassation procedure is a special oversight mechanism that allows for a judicial review of judgements that mark the end of proceedings in courts of first and second instance. Under both Act No. 553 and the law that it replaced, cassation appeals were considered admissible, inter alia, when a judgement infringed a rule of substantive law, which could be the result of an error in the assessment of evidence, as in the case in question. This legal remedy does not allow for a re-examination of the matters considered in the courts of first and second instance, but instead allows for an assessment of whether

the verdict that concluded the proceedings was or was not handed down in violation of the law. The cassation procedure is thus not separate from the proceedings in the courts of first and second instance.

4.5 There is no reason why the declaration of unenforceability of certain legal provisions, under which a cassation appeal was admissible at the time, should have affected the processing of that appeal or prevented the Supreme Court from handing down a decision, given that, as is implied in the Constitutional Court's judgement, the decision that the law in question was unconstitutional was applicable prospectively. The State party points out that, as stated by the Committee, the interpretation of domestic law is primarily a matter for the courts and authorities of the State party concerned.

4.6 Leaving aside the fact that the author wants the Committee to act as a court of fourth instance, he has failed to demonstrate either a lack of impartiality on the part of judges of the Criminal Division of the Supreme Court or any procedural irregularities; nor has he given any substantive reasons for believing his conviction to be unfair. There is thus no evidence of a violation of article 14, paragraph 1, of the Covenant.

4.7 With regard to the author's complaint that his right to be presumed innocent was not respected, the State party points out that the presumption of innocence is confined to ordinary criminal proceedings, and does not extend to cassation hearings. In such hearings, the accused is not tried again, but rather the legality of the verdict is examined. Moreover, the author was notified that a cassation appeal had been lodged and he had the opportunity to submit pleadings, which were then duly considered by the Supreme Court. The author was presumed innocent until the submission of the cassation appeal and has failed to establish how the justice system or the actions of judicial officials led to his being treated as guilty before he was convicted.

4.8 With regard to the alleged violation of article 14, paragraph 7, of the Covenant, the State party notes that, while the law in force when the cassation appeal was filed allowed cassation appeals against executory judgements, the word "executory" did not indicate that such judgements could not be challenged or overturned. A cassation appeal against this judgement, even though it was executory, was admissible under Act No. 553/2000, which allowed a petition to be filed against a verdict within 30 days of the issuance of an executory judgement by the court of second instance. Given that the law established that cassation appeals against executory judgements were admissible, such judgements were not immutable. Indeed, in Colombia the executory effect of a decision can be lifted as a result of other actions, such as petitions for review or *tutela*, which, in the same way as cassation appeals at the time, are intended to avert unfair trials or executory judgements that run counter to the Constitution or the law. The cassation process was therefore clearly an oversight mechanism designed to ensure legality and could be legally applied to the verdict delivered by the criminal court of second instance. There was therefore no violation of article 14, paragraph 7, of the Covenant.

4.9 With regard to the alleged violation of article 15 of the Covenant, the State party argues that the author was convicted for having committed acts that, at the time of the events, constituted an offence. The author was not given a heavier penalty, despite the fact that a new law (Act No. 599/2000) which imposed a heavier penalty had come into effect by the time the cassation judgement was handed down. The law applied was the one in force at the time of the events, as it was more lenient in terms of sentencing. The State party has therefore complied with the provisions of article 15 of the Covenant.

4.10 With regard to the alleged violation of article 26 of the Covenant, the State party denies that the author has been subjected to discriminatory treatment. It consistently applied the law in force at the time, which provided for cassation appeals against executory judgements. Once decision No. C-252 had been issued, the State party was also consistent

in not applying the special remedy of cassation to executory judgements. Therefore, there has been no violation of article 26 of the Covenant.

**Author's comments on the State party's observations on admissibility and the merits**

5.1 On 4 September 2008, the author submitted comments on the State party's observations.

5.2 The author reiterates the arguments he put forward at the outset. He contends that his analysis of the judicial decisions and procedures in question is intended to demonstrate how the relevant articles of the Covenant were violated and that he is in no way seeking to invoke another, or higher, court than the national courts.

5.3 According to the author, the State party's argument that the writ of execution of a final judgement may be set aside in cassation is illogical. Neither the Covenant, nor domestic legislation, nor international or domestic jurisprudence characterize the remedy of cassation as having this operative feature. There are only two actions that can overturn an executory judgement: judicial review and *tutela* or *amparo*. These actions are aimed at establishing the material truth in the administration of justice and upholding the fundamental rights of the individual.

5.4 With regard to article 14, paragraph 2, the author maintains that his presumed innocence was converted into a proven fact by virtue of an ordinary trial that culminated in his acquittal by executory judgement.

5.5 With regard to article 14, paragraph 1, the author claims that the State party is confusing the cassation appeal with the appeal against the cassation ruling. The first was lodged on 24 August 2000, in accordance with Act No. 553/2000, which authorized the submission of cassation appeals against an executory judgement. The cassation ruling was issued on 21 July 2005, years after the Constitutional Court had eliminated cassation of executory judgements from the legal system on the grounds that it violated fundamental rights and, thus, the Covenant. He reiterates that when the Criminal Appellate Division of the Supreme Court ruled on the cassation appeal, it was not competent to do so, since it was applying unenforceable legal provisions and thereby violating an entire range of the fundamental rights provided for in the Covenant. Generally, the finding that a law is unconstitutional has prospective effect, unless the judgement specifies otherwise or the principle of the retroactive effect of the less severe criminal statute is applicable.

5.6 Concerning article 14, paragraph 7, the author restates his view that an executory judgement cannot be overturned in cassation and that procedural rules of a substantive nature are applicable immediately. The author cites an excerpt from decision No. C-252, which states: "Cassation is a special kind of judicial challenge used to give effect to material law, to restore the fundamental rights of participants in the proceedings and to redress grievances. It therefore becomes the most fitting and effective remedy for those purposes, provided that it is carried out made before the decision of the court of second instance becomes final, since this remedy is a means of confirming the decision's legal validity and this is only possible within the same criminal proceedings."

5.7 With regard to article 15, the author maintains that the State party's claims are improper and illogical, and he refers to the arguments submitted in his initial communication. With regard to article 26, he affirms that, irrespective of the outcome of the proceedings, equality lies in the application without discrimination of the most-favourable-law principle. In the case of a conviction upheld by a court of second instance, the cassation proceedings should be carried out on the basis of that principle. For the same reasons, when a defendant is acquitted by that court, the court should refuse to hear it.

**Issues and proceedings before the Committee**

*Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 The Committee takes note of the State party's observation that the communication should be considered inadmissible because the Committee may not assess facts already examined and determined by the domestic courts. However, the Committee finds that the objectives of the author's complaints are not to have the Committee reassess the facts and evidence already examined by the domestic courts; they simply question the compatibility of certain procedural matters with the Covenant, as set out below.

6.4 With regard to the alleged violations of article 14, paragraphs 1 and 2, article 15 and article 2, paragraphs 1 and 3, the Committee notes that the author invokes these articles in a general way, without providing sufficient reasons to substantiate his claim that the alleged facts constitute specific violations of them. The Committee therefore considers that this part of the communication is inadmissible under article 2 of the Optional Protocol on the ground of insufficient substantiation. With regard to the complaint of a violation of article 26, to the effect that the principle of equality was not upheld during proceedings, the Committee finds no evidence in the information submitted by the author of discrimination in respect of the criteria set forth in that article. The Committee therefore considers that this complaint has not been substantiated for the purposes of admissibility and decides that it, too, is inadmissible under article 2 of the Optional Protocol.

6.5 The author claims to be a victim of a violation of article 14, paragraph 7, of the Covenant because he was, through the cassation proceedings, tried again for the same offences of which he had been acquitted in first and second instance. The Committee considers, in the light of the information contained in the case file, that the cassation appeal did not constitute a new trial, but rather a further stage in the proceedings against the author that began in 1998. That appeal was filed in 2000 in accordance with the requirements of the law in force at the time. Accordingly, the Committee considers that the author has failed to substantiate his claim sufficiently and declares it inadmissible under article 2 of the Optional Protocol.

6.6 With regard to the author's claim of a violation of article 14, paragraph 5, the Committee considers that it has been sufficiently substantiated, that the State party did not challenge the assertion that domestic remedies had been exhausted, and that the other requirements for admissibility have also been met. The Committee therefore considers this claim admissible and proceeds to consider it on its merits.

*Consideration of the merits*

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

7.2 The author contends that his conviction by the Supreme Court in a cassation judgement, after having been acquitted in the court of first instance and the appeals court, gave rise to a violation of article 14, paragraph 5, of the Covenant. The Committee notes that the author filed a number of applications for *tutela*, including with the Constitutional

Court, in which he challenged the competence of the Supreme Court to institute cassation proceedings in his case. However, the Committee considers that, for the purpose of the application of article 14, paragraph 5, these proceedings were irrelevant, as their purpose was not the determination of criminal charges against the author.

7.3 The Committee recalls its jurisprudence to the effect that article 14, paragraph 5, guarantees the right to have a conviction reviewed.[2] In its general comment No. 32, the Committee has pointed out that: "article 14, paragraph 5, is violated not only if the decision by the court of first instance is final, but also where a conviction imposed by an appeal court or a court of final instance, following acquittal by a lower court, according to domestic law, cannot be reviewed by a higher court".[3] The Committee notes that, in the case in question, the author was tried and acquitted by the Bogotá Third Special Circuit Criminal Court. This judgement was appealed by the Public Prosecutor before the Bogotá Judicial District High Court, which upheld the verdict of the court of first instance. Subsequently, the Prosecutor filed an appeal in cassation with the Supreme Court, citing alleged errors in the evaluation of the evidence by the High Court. The Supreme Court quashed the judgement of the High Court and sentenced the author to, inter alia, 5 years' imprisonment. Since this conviction was not reviewed by a higher court, the Committee concludes that article 14, paragraph 5, of the Covenant has been violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses a violation by the State party of article 14, paragraph 5, of the Covenant.

9. In accordance with article 2, subparagraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which includes the review of his conviction and adequate compensation. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a 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 or 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 the Committee's Views. The State party is also requested to publish the present Views.

[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.]

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[2] Communication No. 1095/2002, *B.G.V. v. Spain*, Views of 22 July 2005, para. 7.1.

[3] See general comment No. 32: Article 14: right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32), para. 47.