HUMAN RIGHTS COMMITTEE

Rodríguez Orejuela v. Colombia

Communication No. 848/1999

23 July 2002

CCPR/C/75/D/848/1999

VIEWS

Submitted by: Mr. Miguel Ángel Rodríguez Orejuela (represented by counsel, Mr. Pedro Pablo Camargo)

Alleged victim: Mr. Miguel Ángel Rodríguez Orejuela

State party: Colombia

Date of communication: 16 September 1997 (initial submission)

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

Meeting on 23 July 2002,

Having concluded its consideration of communication No. 848/1999, submitted by Mr. Miguel Ángel Rodríguez Orejuela 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 Mr. Miguel Ángel Rodríguez Orejuela, a Colombian citizen currently being held at La Picota General Penitentiary in Colombia for the offence of drug trafficking. He claims to be a victim of the violation by Colombia of article 14 of the International Covenant on Civil and Political Rights. The author is represented by counsel.

The facts as submitted by the author

2.1 Mr. Miguel Ángel Rodríguez Orejuela was charged with, among other activities, the offence of engaging in drug trafficking on 13 May 1990. The Bogotá Prosecution Commission, which was established by resolution of the Office of the Public Prosecutor, adopted in accordance with article 250 of the 1991 Constitution of Colombia,1/ was given responsibility for conducting the proceedings as from 1993 and bringing the charge against him.

2.2 In a judgement handed down by the Bogotá Regional Court on 21 February 1997, the author was sentenced to 23 years' imprisonment and a fine. He appealed against the sentence before the National Court, which, in a judgement of 4 July 1997, upheld the conviction at first instance but reduced the sentence to 21 years' imprisonment and a lower fine. An appeal was lodged on 20 October 1997 before the Colombian Supreme Court of Justice, which upheld the conviction on 18 January 2001.

2.3 Both the Bogotá Regional Court and the National Court were established by Emergency Government Decree No. 2790 of 20 November 1990 (Defence of Justice Statute), and were incorporated in the new Code of Criminal Procedure enacted by Decree No. 2700 of 30 November 1991, which entered into force on 1 July 1992, and which was repealed by Law No. 600 of 2000 which is currently in force. Article 457 on the confidentiality of proceedings held in closed court was repealed by Law No. 504 of 1999. Article 9 of Decree No. 2790 established the public order judges and granted them competence to hear offences provided for in the "Drugs Statute".2/ This article was given permanent legal character by means of Decree No. 2271 of 1991. The above-mentioned Decree No. 2790 withdrew competence to try offences provided for in the "Drugs Statute" from "district criminal courts and district courts exercising mixed jurisdiction" as specialized jurisdictions and established the "public order, faceless or emergency jurisdiction", which was converted into secret "regional justice" after its entry into force on 1 July 1992.

The complaint

3.1 The author claims to be a victim of a violation of the Covenant because Decrees No. 2790 of 20 November 1990 and No. 2700 of 30 November 1991 were applied ex post facto against him. In particular, he claims a violation of article 14, paragraph 1, of the Covenant because neither the Bogotá Prosecution Commission, which conducted the investigation and brought the charges against the author, nor the Bogotá Regional Court, which handed down the judgement against the author, nor the National Court existed at the time the offences were committed, i.e. on 13 May 1990. The author maintains that the Prosecution Commission began the investigation in 1993 and brought charges against him before the Bogotá Regional Court for an offence allegedly committed on 13 May 1990. He states that the court is therefore an unlawful ad hoc body or special commission.

3.2 The author maintains that the court competent to try this case would have been the Cali Circuit Court of Criminal and Mixed Jurisdiction as a specialized court, since it was courts in that category that were competent in drug-trafficking matters at the time the offence was committed. However, since this court was abolished on 15 July 1991, the competent court would have been the Cali Circuit Criminal Court, which is a court of ordinary jurisdiction. The competent court at second instance, at the appeal stage, would have been the Cali Higher Judicial District Court. The author states that the

guarantee of a competent, independent and impartial judge or court has been ignored as he was tried by members of an institution established subsequent to the commission of the offence. He likewise claims that the right to be tried in conformity with laws that predated the act of which he was accused and the guarantee enshrined in article 14 of the Covenant that all persons shall be equal before the courts has been breached, as he has been tried under the restrictive emergency provisions introduced subsequent to the offence.

3.3 The author further states that he was deprived of the right to a public trial, with a public hearing and obligatory attendance by defence counsel and a representative of the public prosecutor's office, as provided for in the Code of Criminal Procedure which entered into force on 1 July 1992. He recalls the decision of the Human Rights Committee in the *Elsa Cubas v. Uruguay* and *Alberta Altesor v. Uruguay* cases,3/ where it found that in both cases there had been a violation of article 14, paragraph 1, of the Covenant because the trial had been conducted in camera, in the absence of the defendant, and the judgement had not been rendered in public.

3.4 According to the author, the Regional Court judgement of 21 February 1997 shows that he was convicted on the basis of in camera proceedings conducted in his absence, exclusively in writing and without a public hearing which would have enabled him to confront prosecution witnesses and challenge evidence against him. He never attended the Regional Court or had any personal contact with the judges who convicted him, nor did he meet the faceless National Court judges who rendered judgement at second instance. He maintains that he was denied the guarantee of an independent and impartial trial because he was presumed to be the head of the "Cali cartel", an alleged criminal organization.

Information and observations from the State party with regard to admissibility and the merits

4.1 In its observations of 8 April 1999, 2 May 2000, 28 June 2001 and 26 February 2002, the State party refers to the admissibility requirements for the communication and argues that Miguel Angel Rodriguez Orejuela has not exhausted domestic remedies, since the remedy of judicial review is still pending,4/ and there are other remedies available, such as the application for review of the facts before the Supreme Court of Justice, which is an autonomous remedy that is exercised outside the criminal process or, in extreme cases, the application for protection (*amparo*), which has been granted by the Constitutional Court exceptionally in the face of irremediable injury when there is no other means of judicial defence.

4.2 As regards the question of the exhaustion of domestic remedies, the State party considers that the procedural time limits set in Colombian legislation for a criminal proceeding are not, prima facie, unreasonable or arbitrary and do not nullify the right to be heard within a reasonable period.

4.3 As to the merits, the State party argues that Law No. 2 was enacted in 1984 in view of the urgent need to incorporate into the justice system appropriate provisions for addressing new forms of crime, including offences related to drug trafficking. The Law conferred on the specialized judges jurisdiction over cases of this kind. Subsequently, Decree No. 2790 of 1990, issued under the Constitution of 1886, assigned jurisdiction to the courts of public order. However, pursuant to the constitutional reform and to the new Constitution of 1991, a special commission was established to

review existing legislation. On finding that the legislation was in conformity with the new constitutional order, the commission decided to incorporate it permanently into the criminal legislation through Decree No. 2266 of 1991. This Decree assigned to the regional courts, known as "faceless" courts, jurisdiction for drug-trafficking offences, which included the offence committed by the author.

4.4 The State party notes that article 250 of the Constitution established the Office of the Public Prosecutor and invested it with power to investigate punishable acts committed in Colombia. The purpose of these provisions, insofar as criminal activities such as drug trafficking were concerned, was to ensure the proper administration of justice, which at that time was seriously threatened by practices such as corruption and intimidation of officials. The State party likewise maintains that these provisions have been adapted to the Colombian constitutional order from the legislation of other countries, which have used it in extreme situations such as those they have experienced in recent times. This does not imply a limitation of the principles and procedural rights mentioned below.

4.5 The State party argues that, consequently, claims concerning a violation of principles such as due process or legality are not valid, since throughout the proceedings against the author judicial officials have observed all applicable substantive and procedural norms, in particular those relating to defence rights and the adversarial and public nature of the proceedings. The author was at all times represented by his counsel, was shown all the evidence, and was given the opportunity to challenge the evidence and the judgements rendered.

4.6 Concerning the author's argument that the most favourable criminal law in Colombia's procedural law was not applied, the State party considers that this argument falls outside the scope of the Covenant and is therefore inadmissible.

The author's comments relating to admissibility and the merits

5.1 In his comments of 13 December 1999, 21 August 2001, and 23 April 2002, the author responds to the State party on the question of admissibility and the merits, and states that with the decision on the application for judicial review of 18 January 2001, the problem of the exhaustion of domestic remedies has been resolved, but presses the point that the Supreme Court took 39 months to reach a decision on the application and that there had thus been unwarranted delay in the remedies available domestically. On the application for review, the author maintains that this is not admissible since it is an autonomous action and not a remedy that is in conformity with article 5, paragraph 2 (b) of the Optional Protocol. He argues that in criminal law, "Action is not the same as remedy: the *actio* is an abstract right to take procedural action of a public nature in order to trigger jurisdictional activity, while the remedy is the means of challenging a decision in an ongoing trial. In this case, the ordinary remedies and the special remedy of appeal, provided for during the trial and the criminal proceedings under Colombian criminal law, have been exhausted, so that no other remedy remains to be exhausted."

5.2 The author likewise maintains that the application for protection or *amparo* laid down in article 86 of the Constitution was also inadmissible since the Constitutional Court had declared unconstitutional, in a decision of 1 October 1992, the articles that allowed this action against

judgements and other judicial decisions in criminal matters. Moreover, the application for protection would only be admissible if the person concerned had no other means of judicial defence, such as the remedy of judicial review.

5.3 The author refers to the decision of 26 April 2001 of the Supreme Council of the Judiciary, which found that the application for protection "is inadmissible when the applicant has other means of judicial defence. The application for protection is not, therefore, an alternative, additional or complementary means to achieve the proposed end. Neither can it be claimed that it is the last resort available to the actor, because by its very nature, according to the Constitution, it is the only means of protection specifically incorporated into the Constitution to fill the lacunae that could arise in the legal system so as to provide full protection of individuals' rights. Consequently, it is understood that when an ordinary judicial remedy has been applicable, no claim can be made to supplement the proceedings with an application for protection, given that under article 86 of the Constitution, such a mechanism is inadmissible as long as there is another legal option for protection".

5.4 As regards the merits, the author argues that the State party's explanations concerning "faceless" justice, established "to ensure the proper administration of justice despite the devastating effects of organized crime", and also the conversion of the transitional emergency criminal legislation into permanent legislation, simply confirm the fact that the Colombian State has violated article 14, paragraph 1, of the Covenant relating to trial by a competent, independent and impartial tribunal, due criminal guarantees and the guarantee of equality for all persons before the courts.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 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, 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.

6.3 As regards the requirement of the exhaustion of domestic remedies, the Committee notes that the State party is contesting the communication on the ground of failure to exhaust those remedies, further stating that, in addition to the remedy of judicial review (*casación*), there are other available remedies such as the application for review (*revisión*) and protection. The Committee further notes the State party's explanations that the application for protection is a subsidiary procedure that has been allowed only in exceptional circumstances and that its protection is only temporary until the judge hands down his decision. In this connection, bearing in mind that in the present case there has been a decision of the Supreme Court of Justice against which there is no remedy, the Committee considers that the State party has not demonstrated that other effective domestic remedies exist in the case of Mr. Rodríguez Orejuela.

6.4 Consequently, the Committee has determined, in accordance with article 5, paragraph 2 (b), of the Optional Protocol, that there is nothing to prevent the communication being declared admissible,

and proceeds to examine the merits of the case.

Examination 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 provided for in article 5, paragraph 1, of the Optional Protocol.

7.2 The author claims a violation of article 14, paragraph 1, of the Covenant because he was deprived of his right to be tried by the court that would have been competent at the time that the alleged offence was committed, and was charged in, and tried at first and second instance by, courts whose jurisdiction was established subsequent to the events in question. In this respect, the Committee notes the State party's explanations to the effect that the law in question was established in order to ensure the proper administration of justice, which was under threat at the time. The Committee considers that the author has not demonstrated how the entry into force of new procedural rules and the fact that these are applicable from the time of their entry into force constitute in themselves a violation of the principle of a competent court and the principle of the equality of all persons before the courts, as established in article 14, paragraph 1.

7.3 The author maintains that the proceedings against him were conducted only in writing, excluding any hearing, either oral or public. The Committee notes that the State party has not refuted these allegations but has merely indicated that the decisions were made public. The Committee observes that in order to guarantee the rights of the defence enshrined in article 14, paragraph 3, of the Covenant, in particular those contained in subparagraphs (d) and (e), all criminal proceedings must provide the person charged with the criminal offence 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 the witnesses. Taking into account the fact that the author did not have such a hearing during the proceedings that culminated in his conviction and sentencing, the Committee finds that there was a violation of the right of the author to a fair trial in accordance with article 14 of the Covenant.

7.4 In view of its conclusion that the right of the author to a fair trial in accordance with article 14 of the Covenant was violated for the reasons set out in paragraph 7.3, the Committee is of the opinion that it is not necessary to consider other arguments relating to violations of his right to a fair trial.

8. The Human Rights Committee, acting under article 5, paragraph 2 of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr Miguel Angel Rodríguez Orejuela with an effective remedy.

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 or not there has been a violation of the Covenant 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, and to provide an effective remedy if it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party should also publish these Views.

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* The following members of the Committee participated in the examination of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, 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. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

Notes

1/ Adopted by Decree No. 2700 of 30 November 1991, which entered into force on 1 July 1992.

2/ This article stipulates that the competence of the public order courts responsible for hearing cases shall include ongoing actions and proceedings for punishable acts assigned to them under the article, regardless of the time when they were perpetrated, and related offences. It further stipulates that in every case favourable substantive law or procedural law having substantive effects of the same character shall have primacy over unfavourable law.

3/ Ref. *Elsa Cubas v. Uruguay*, View No. 70/1980 of 1 April 1982, and *Alberto Altesor v. Uruguay*, View No. 10/1977 of 23 March 1982.

4/ When the State party sent its observations of 8 April 1999 and 2 May 2000, no decision had yet been handed down on the remedy of judicial review.