HUMAN RIGHTS COMMITTEE

Fei v. Colombia

Communication No. 514/1992 **/

4 April 1995

CCPR/C/53/D/514/1992 */

VIEWS

Submitted by: Mrs. Sandra Fei [represented by counsel]

Victim: The author

State party: Colombia

Date of communication: 22 July 1992 (initial submission)

Date of decision on admissibility: 18 March 1994

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

Meeting on 4 April 1995,

Having concluded its consideration of communication No. 514/1992 submitted to the Human Rights Committee by Mrs. Sandra Fei 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, her counsel and the State party,

Adopts its

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

1. The author of the communication is Sandra Fei, of Italian and Colombian citizenship, born in 1957 in Santa Fé de Bogotá and currently residing in Milan, Italy. She claims to be a victim of violations by Colombia of articles 2, paragraphs 2 and 3; 14, paragraphs 1 and 3

(c); 17; 23, paragraph 4; and 24 of the International Covenant on Civil and Political Rights. She is represented by counsel.

The facts as submitted by the author:

2.1 Mrs. Fei married Jaime Ospina Sardi in 1976; in 1977, rifts between the spouses began to emerge, and in 1981 Mrs. Fei left the home; the two children born from the marriage remained with the husband. The author sought to establish a residence in Bogotá but, as she was unable to obtain more than temporary employment, finally moved to Paris as a correspondent for the daily newspaper **24 Horas**.

2.2 A Colombian court order dating from 19 May 1982 established a separation and custody arrangement, but divorce proceedings subsequently were also instituted by the author before a Paris tribunal, with the consent of her exhusband.

2.3 Under the Colombian court order of May 1982, the custody of the children was granted provisionally to the father, with the proviso that custody would go to the mother if the father remarried or cohabited with another woman. It further established joint parental custody and provided for generous visiting rights. Mr. Rodolfo Segovia Salas, a senator of the Republic, brother-in-law of Mr. Ospina Sardi and close family friend, was designated as guarantor of the agreement.

2.4 On 26 September 1985, Mrs. Fei's children, during a visit to her mother, were allegedly kidnapped by the father, with the help of three men said to be employees of the Colombian Embassy in Paris, when the author was leaving her Paris apartment. Between September 1985 and September 1988, the author did not have any contact with her children and knew nothing of their whereabouts, as Mr. Segovia Salas allegedly refused to cooperate. The author obtained the good offices of the French authorities and of the wife of President Mitterrand, but these **démarches** proved unsuccessful. Mrs. Fei then requested the assistance of the Italian Ministry of Foreign Affairs, which in turn asked for information and judicial assistance from the Colombian authorities. The author alleges that the latter either replied in evasive terms or simply denied that the author's rights had been violated. During the summer of 1988, an official of the Italian Foreign Ministry managed to locate the children in Bogotá. In September 1988, accompanied by the Italian Ambassador to Colombia, the author was finally able to see her two children for five minutes, on the third floor of the American School in Bogotá.

2.5 In the meantime, Mr. Ospina Sardi had himself initiated divorce proceedings in Bogotá, in which he requested the suspension of the author's parental authority as well as an order that would prohibit the children from leaving Colombia. On 13 March 1989, the First Circuit Court of Bogotá (Juzgado Primero Civil del Circuito de Bogotá) handed down its judgement; the author contends that in essence, the judgement confirmed the terms of the separation agreement reached several years earlier. Mrs. Fei further argues that the divorce proceedings in Colombia deliberately ignored the proceedings still pending before the Paris tribunal, as well as the children's dual nationality.

2.6 Mrs. Fei contends that, since September 1985, she has received, and continues to receive, threats. As a result, she claims, she cannot travel to Colombia alone or without protection. In March 1989, therefore, the Italian Foreign Ministry organized a trip to Bogotá for her; after negotiations, she was able to see her children for exactly two hours, "as an exceptional favour". The meeting took place in a small room in Mr. Segovia Salas' home, in the presence of a psychologist who allegedly had sought to obstruct the meeting until the very last moment. Thereafter, the author was only allowed to communicate with her children by telephone or mail; she contends that her letters were frequently tampered with and that it was almost impossible to reach the girls by telephone.

2.7 In May 1989, Mr. Ospina Sardi broke off the negotiations with the author without providing an explanation; only in November 1989 were the Italian authorities informed, upon request, of the "final divorce judgement" of 13 March 1989. Mr. Ospina Sardi refused to comply with the terms of the judgement. On 21 June 1991, Mr. Ospina Sardi filed a request for the revision of the divorce judgement and of the visiting rights granted to the author, on the ground that circumstances had changed and that visiting rights as generous as those agreed upon in 1985 were no longer justifiable in the circumstances; the author contends that she was only informed of those proceedings in early 1992. Mr. Ospina Sardi also requested that the author be refused permission to see the children in Colombia, and that the children should not be allowed to visit their mother in Italy.

2.8 The Italian Foreign Ministry was in turn informed that the matter had been passed on to the office of the Prosecutor-General of Colombia, whose task under article 277 of the Constitution it is, **inter alia**, to review compliance with judgements handed down by Colombian courts. The Prosecutor-General initially ignored the case and did not investigate it; nor did he initiate criminal proceedings against Mr. Ospina Sardi for contempt of court and non-compliance with an executory judgement. Several months later, he asked for his disqualification in the case, on the grounds that he had "strong bonds of friendship" with Mr. Ospina Sardi; the file was transferred to another magistrate. The Italian authorities have since addressed several complaints to the President of Colombia and to the Colombian Ministries of Foreign Affairs and International Trade, the latter having offered, on an unspecified earlier date, to find a way out of the impasse. No satisfactory reply has been provided by the Colombian authorities.

2.9 The author notes that, during her trips to Colombia in May and June 1992, she could only see her children very briefly and under conditions deemed unacceptable, and never for more than one hour at a time. On the occasion of her last visit to Colombia in March 1993, the conditions under which the visits took place allegedly had become worse, and the authorities attempted to prevent Mrs. Fei from leaving Colombia. Mrs. Fei has now herself instituted criminal proceedings against Mr. Ospina Sardi, for non-compliance with the divorce judgement.

2.10 In 1992 and 1993, the Colombian courts took further action in respect of Mr. Ospina Sardi's request for a revision of parental custody and visiting rights, as well as in respect of complaints filed on behalf of the author in the Supreme Court of Colombia. On 24 November 1992, the Family Law Division (Sala de Familia) of the Superior Court of Bogotá

(Tribunal Superior del Distrito Judicial) modified the visiting rights regime in the sense that all contacts between the children and the author outside Colombia were suspended; at the same time, the entire visiting rights regime was pending for review before Family Court No. 19 of Bogotá.

2.11 Mrs. Fei's counsel initiated proceedings in the Supreme Court of Colombia, directed against the Family Court No. 19 of Bogotá, against the office of the Procurator-General and against the judgement of 24 November 1992, for nonobservance of the author's constitutional rights. On 9 February 1993, the Civil Chamber of the Supreme Court (Sala de Casación Civil) set aside operative paragraph 1 of the judgement of 24 November 1992 concerning the suspension of contacts between the author and her children outside Colombia, while confirming the rest of said judgement. At the same time, the Supreme Court transmitted its judgement to Family Judge No. 19, with the request that its observations be taken into account in the proceedings filed by Mr. Ospina Sardi, and to the Constitutional Court.

2.12 On 14 April 1993, Family Court No. 19 of Bogotá handed down its judgement concerning the request for modification of visiting rights. This judgement placed certain conditions on the modalities of the author's visits to her children, especially outside Colombia, inasmuch as the Government of Colombia had to take the measures necessary to guarantee the exit and the re-entry of the children.

2.13 On 28 July 1993, finally, the Constitutional Court partially confirmed and partially modified the judgement of the Supreme Court of 9 February 1993. The judgement is critical of the author's attitude **vis-à-vis** her children between 1985 and 1989, as it assumes that the author deliberately neglected contact with them between those dates. It denies the author any possibility of a transfer of custody, and appears to hold that the judgement of Family Court No. 19 is final ("no vacila ... en oponer como cosa juzgada la sentencia ... dictada el 14 de abril de 1993"). This, according to counsel, means that the author must start all over again if she endeavours to obtain custody ofthe children. Finally, the judgement admonishes the author to assume her duties with more responsibility in the future ("Previénese a la demandante ... sobre la necesidad de asumir con mayor responsabilidad los deberes que le corresponden como madre de la niñas").

2.14 In December 1993, the author's children, after presumed pressure from their father, filed proceedings pursuant to article 86 of the Colombian Constitution (**acción de tutela**; see para. 4.5 below) against their mother. The case was placed before the Superior Tribunal in Bogotá (Tribunal Superior del Distrito Judicial de Santa Fé de Bogotá). Mrs. Fei claims that she was never officially notified of this action. It appears that the Court gave her until 10 January 1994 to present her defence, reserving judgement for 14 January. For an unexplained reason, the hearing was then advanced to the morning of 16 December 1993, with the judgement delivered on the afternoon of the same day. The judgement orders Mrs. Fei to stop publishing her book about her and her children's story (**Perdute, Perdidas**) in Colombia.

2.15 The author submits that her lawyer was prevented from attending the hearing of 16 December 1993 and from presenting his client's defence. Counsel thereupon filed a

complaint based on violations of fundamental rights of the defence with the Supreme Court. On 24 February 1994, the Supreme Court (Sala de Casación Penal) declared, on procedural grounds, that it was not competent to hear the complaint.

2.16 Mrs. Fei notes that apart from the divorce and custody proceedings, her ex-husband has filed complaints for defamation and for perjury/deliberately false testimony against her. She observes that she won the defamation complaint in all instances; furthermore, she has won, on first instance, the perjury complaint against her. This action is pending on appeal. The author submits that these suits were malicious and designed to provide a pretext enabling the authorities to prevent her from leaving Colombia the next time she visits her children.

The complaint:

3.1 The author alleges a violation of article 14, paragraph 1, of the Covenant, in that she was denied equality before the Colombian tribunals. She further contends that the courts have not been impartial in their approach of the case. In this context, it is submitted that just prior to the release of the judgement of the Constitutional Court, press articles carried excerpts of a judgement and statements of a judge on the Court that implied that the Constitutional Court would rule in her favour; inexplicably, the judgement released shortly thereafter went, at least partially, against her.

3.2 The author further alleges that the proceedings have been deliberately delayed by the Colombian authorities and courts, thereby denying her due process. She suspects that the tacitly agreed strategy is simply to prolong proceedings until the date when the children become of age.

3.3 According to the author, the facts as stated above amount to a violation of article 17, on account of the arbitrary and unlawful interferences in her private life or the interference in her correspondence with the children.

3.4 The author complains that Colombia has violated her and her children's rights under article 23, paragraph 4, of the Covenant. In particular, no provision of the protection of the children was made, as required under article 23, paragraph 4 **in fine**. In this context, the author concedes that her children have suffered through the high exposure that the case has had in the media, both in Colombia and in Italy. As a result, they have become withdrawn. A report and the testimony of a psychologist used during the proceedings before Family Court No. 19 concluded that the children's relationshipsdeteriorated abruptly because of the "publicity campaign" waged against their father; the author observes that this psychologist was hired by her ex-husband after the children returned to Colombia in 1985, that she received instructions as to which treatment was appropriate for the children and that she literally "brainwashed" them.

3.5 The author alleges a violation of article 24, in relation to the children's presumed right to acquire Italian nationality, and their right to equal access to both parents.

3.6 Finally, counsel argues that the Committee should take into account that Colombia also

violated articles 9 and 10 of the Convention on the Rights of the Child, which relate to contact between parents and their children. In this context, he notes that the Convention on the Rights of the Child was incorporated into Colombian law by Law No. 12 of 1991, and submits that the courts, in particular Family Court No. 19, failed to apply articles 9 and 10 of the Convention.

3.7 The author submits that whereas some form of domestic remedies may still be available, the pursuit of domestic remedies has already been unduly prolonged within the meaning of article 5, paragraph 2(b), especially if the very nature of the dispute, custody of and access to minor children, is taken into consideration.

The State party's submission on admissibility:

4.1 The State party argues that the communication is inadmissible on the ground of non-exhaustion of domestic remedies. It explains the proceedings before Family Court No. 19, which were, at the time of the submission, still pending.

4.2 The State party further observes that if the author had wanted to complain about the non-execution of the separation agreement of 19 May 1982, she could have initiated proceedings under what was then article 335 of the Code of Civil Procedure. It is noted that between 1986 and 13 March 1989, the author did not avail herself of this procedure.

4.3 With regard to the author's attitude between 13 March 1989 and 21 June 1991, the State party appears to endorse the contention of Mr. Ospina Sardi that, during this period, the author did not visit her children in Colombia and only maintained telephone or postal contacts with them. Furthermore, Mrs. Fei did not avail herself of the possibility of an action under article 336 of the Code of Civil Procedure, namely, to request enforcement of the decision of the First Circuit Court of Bogotá. Accordingly, the State party submits, the non-exhaustion of local remedies has two aspects: (a) judicial proceedings remain pending before a family court; and (b) Mrs. Fei did not avail herself of the available procedures under the Code of Civil Procedure.

4.4 Additionally, the State party affirms that it cannot possibly be argued that the author was the victim of a denial of justice since:

(a) The judicial authorities acted diligently and impartially, as demonstrated by the separation agreement of 19 May 1982, the divorce judgement of 13 March 1989 and the proceedings before Family Court No. 19;

(b) The State party's judicial authorities were unaware of the noncompliance with the decisions of May 1982 and March 1989 before 21 June 1991, for the reason that, in civil matters, the courts do not initiate proceedings **ex officio** but only upon the request of the party or the parties concerned;

(c) No omission or failure to act in the case can be attributed to the judicial authorities of Colombia, notwithstanding the complaints filed by the author's representative against, for

example, the office of the Procurator-General.

4.5 The State party points to the availability of a special procedure (**Acción de tutela**), which is governed by article 86 of the Colombian Constitution of 1991, under which every individual may request the protection of his or her fundamental rights. [Article 86 of the Constitution stipulates: "Toda persona tendr á acci ó n de tutela para reclamar ante los jueces, en todo momento y lugar, mediante un procedimiento preferente y sumario, por s í misma o por quien actue en su nombre, la protecci ó n inmediata de sus derechos constitucionales fundamentales ..." The proceedings leading to the judgement of 28 July 1993 of the Constitutional Court were instituted under article 86 of the Constitution.]

4.6 Finally, the State party reiterates that no impediments exist that prevent Mrs. Fei from entering Colombian territory and from initiating the pertinent judicial proceedings in order to vindicate her rights.

The Committee's decision on admissibility:

5.1 In March 1994, the Committee considered the admissibility of the communication. It noted the parties' observations relating to the question of exhaustion of domestic remedies, in particular that proceedings in the case had been initiated in 1982 and that two actions which according to the State party remained available to the author had in the meantime been filed and concluded, without providing the relief sought. The Committee also observed that after more than 11 years of proceedings, judicial disputes about custody of and access to the author's children continued, and concluded that these delays were excessive. It remarked that in custodial disputes and in disputes over access to children upon dissolution of a marriage, judicial remedies should operate swiftly.

5.2 In respect of the claim under article 24, the Committee observed that this violation would have had to be claimed on behalf of the author's children, in whose name the communication had not been submitted. The Committee concluded that this allegation had not been substantiated, for purposes of admissibility.

5.3 As to the claim under article 14, paragraph 3(c), the Committee recalled that the right to be tried without undue delay relates to the determination of criminal charges. As these were not at issue in the author's case, with the exception of those mentioned in paragraph 2.16 above in respect of which delay had not been claimed, the Committee held this claim to be inadmissible **ratione materiae**, as incompatible with the provisions of the Covenant.

5.4 The Committee considered the remaining allegations under article 14, paragraph 1; 17; and 23, paragraph 4, to be adequately substantiated, for purposes of admissibility. On 18 March 1994, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 14, paragraph 1; 17; and 23, paragraph 4, of the Covenant.

The State party's observations on the merits and the author's comments thereon:

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 28

September 1994, the State party denies that the author's rights under the Covenant have been violated. As to the claim under article 14, paragraph 1, it submits that articles 113, 116, 228 and 229 of the Colombian Constitution guarantee the independence of the Colombian judiciary. Article 230 guarantees the impartiality of the judges, by stipulating that they are only bound to respect the laws of the country.

6.2 As to the "excessive delays" of the proceedings referred to by the Committee in its admissibility decision, the State party submits that the sole fact that proceedings have lasted for over 12 years does not in itself justify the conclusion that they have been unduly prolonged. It refers to the judgements of the different courts of Bogotá of 1982, 1989, 1992 and 1993 and proceedings initiated by the author's daughters and her ex-husband in December 1993 and June 1994, and contends that in all these proceedings, the principle of equality of arms has been observed, as both parties were equally entitled to file claims and counterclaims and to submit their defence arguments ("... han tenido las mismas oportunidades para iniciar y contestar las acciones ..."). In short, the author is said to have benefited from all available constitutional guarantees and in particular the guarantee of due process, laid down in article 29 of the Constitution.

6.3 The State party observes that if one of the parties does not comply with a judgement or court order in family disputes, the law lays down the procedure to follow to obtain the judgement's or order's enforcement, as well as the penalties for non-compliance with these obligations. In this context, the procedure governed by article 86 of the Constitution becomes relevant, since it enables anyone to seek immediate judicial protection of his/her fundamental rights. The author initiated proceedings under article 86 before the Supreme Court of Colombia, and by judgement of 9 February 1993, the Court reinstated the author's right of access to her daughters.

6.4 To the State party, the above indicates that the Colombian courts treated the author's case on the basis of equality and with the requisite impartiality, that they did so without unnecessary delays and, accordingly, in compliance with their obligations under article 14, paragraph 1, of the Covenant.

6.5 The State party rejects as unfounded the author's claim that Colombian authorities interfered arbitrarily and unlawfully with the author's right to privacy, by making contacts between herself and her children unnecessarily difficult. This claim, according to the State party, has not been sufficiently substantiated. In this context, the State party contends that it always gave the author the guarantees and assurances requested by the intermediary of the Italian Embassy, so as to facilitate her travel to Colombia. This is said to have included protection, if so requested. The State party recalls that no impediments exist, or have ever existed, that would prevent the author from entering Colombian territory to visit her children, or with a view to initiating such judicial proceedings she considers opportune to defend her rights.

6.6 Concerning the allegation under article 23, paragraph 4, the State party submits that the author has failed to substantiate how this provision was violated in her case. It recalls that the parents jointly agreed, in 1982, that custody of and care for the children should remain

with Mr. Ospina Sardi; this agreement has been challenged on numerous subsequent occasions before the domestic courts.

6.7 The State party rejects as unfounded the author's claim that it did nothing or not enough to protect the "interests of the children", within the meaning of article 23, paragraph 4. In this context, it refers to articles 30 and 31 of the Minors' Code (Codigo del Minor), which governs the protection of children. Article 31, in particular, stipulates that the State will guarantee the protection of children, on a subsidiary basis, if the parents or legal guardians do not fulfil their role. As no circumstances that would have warranted the application of articles 30 and 31 were ever brought to the attention of the competent Colombian authorities, the State party deduces that the author's daughters never were in a situation in which they would have required the State's intervention.

6.8 Still in the context of article 23, paragraph 4, the State party notes that Colombian legislation stipulates that the rights of children shall prevail over the rights of others. Article 44 of the Constitution lays down a number of fundamental rights that are enjoyed by children. A special jurisdiction for minors is safeguarding those rights.

6.9 The State party recalls that the author's daughters themselves filed proceedings against their mother under article 86 of the Constitution, with a view to enforcing their rights under articles 15, 16, 21, 42 and 44 of the Constitution, **inter alia**, on the grounds that their mother's highly publicized attempts to re-establish contacts with them, as well as the publication of a book about her tribulations, interfered with their privacy and had caused them serious moral prejudice. By judgement of 16 December 1993, a court in Bogotá (Sala Penal del Tribunal Superior del Distrito Judicial de Santa Fé de Bogotá) ordered the author to refrain from publishing her book (**Perdute, Perdidas**) in Colombia, as well as from any other activity encroaching upon her daughters' rights. This judgement was confirmed by the Constitutional Court (Corte Constitucional, Sala Quinta de Revisión) on 27 June 1994.

7.1 In her comments, the author reiterates that she did not benefit from equality of arms before the Colombian tribunals. Thus, the procedures initiated by her took exceedingly long to examine and to resolve, whereas the procedures initiated by her ex-husband, either directly or indirectly, were processed immediately and sometimes resolved before the date of the audience initially communicated to the author.

7.2 As an example, the author refers to the proceedings filed by her daughters late in 1993. She insists that she was only notified at the end of January 1994, whereas the delay for the submission of her defence had been set for 10 January 1994, and the audience scheduled for 14 January 1994. Moreover, these dates were wrong, as the audience in fact took place in the morning of 16 December 1993, and judgement was given on the afternoon of the same day.

7.3 The author also refers to the new custody and visiting rights regime decided by the courts in 1992 and 1993, and detailed in paragraphs 2.10 to 2.13 above. Some of these decisions went against her husband, but the author submits that the judicial authorities did not react to his refusal to execute/accept said decisions. For this reason, the author requested the

Colombian authorities to guarantee the enforcement of the decisions of Colombian courts, and a magistrate was charged with an investigation into the matter. Months passed before this magistrate asked for his own discharge because of his friendship with Mr. Ospina Sardi, and before another judge was entrusted with the inquiry. The author recalls that the issue has been under inquiry since mid-1992, without any sign of a decision having been taken.

7.4 As to the violation of article 17, the author notes that while she was free to travel to Colombia, she had to arrange herself for her personal protection. The Colombian authorities never assisted her in enforcing her visiting rights. Numerous **démarches** undertaken to this effect by the Italian Embassy in Bogotá either were left without answer or received dilatory replies. The author submits that by so doing, or by remaining inactive, the State party is guilty of passive interference with her right to privacy.

7.5 Still in the context of article 17, the author contends that on two occasions, the State party arbitrarily interfered with her right to privacy. The first occurred in 1992, on the occasion of one of her visits to Colombia. The author submits that she was not personally notified of proceedings instituted by her ex-husband, and that it required the personal intervention of the Italian Ambassador before the magistrate in charge of the case finally accepted to take her deposition, a few hours before her departure for Italy. The second occurred in 1993 when the Colombian police allegedly tried to prevent her from leaving Colombian territory; again, it took the intervention of the Italian Ambassador before the plane carrying the author was allowed to take off.

7.6 Finally, the author contends that the violation of article 23, paragraph 4, in her case is flagrant. She describes the precarious conditions under which the visits of their daughters took place, out of their home, in the presence of a psychologist hired by Mr. Ospina Sardi, and for extremely short periods of time. The testimonies of Ms. Susanna Agnelli, who accompanied the author during these visits, are said to demonstrate clearly the violation of this provision.

7.7 The author further submits that article 23, paragraph 4, was violated because her daughters were forced to testify against her on several occasions in judicial proceedings initiated by Mr. Ospina Sardi, testimonies that allegedly constituted a serious threat to their mental equilibrium. Furthermore, the procedure filed by the children against the author under article 86 of the Constitution is said to have been prompted by pressure from Mr. Ospina Sardi. This, it is submitted, clearly transpires from the text of the initial deposition: according to the author, it could only have been prepared by a lawyer, but not by a child.

7.8 In a letter dated 5 October 1994, the author's former lawyer draws attention to the judgement of the Constitutional Court of 27 June 1994, which prohibits the publication and circulation of the author's book in Colombia. He contends that this judgement is in clear violation of the Colombian Constitution, which prohibits censorship, and argues that the Court had no jurisdiction to examine the contents of a book that had not been either published or circulated in Colombia at the time of the hearing.

Examination of the merits:

8.1 The Human Rights Committee has examined the communication in the light of all the information, material and court documents provided by the parties. It bases its findings on the considerations set out below.

8.2 The Committee has taken note of the State party's argument that the Colombian judicial authorities acted independently and impartially in the author's case, free from external pressure, that the principle of equality of arms was respected, and that there were no undue delays in the proceedings concerning custody of the author's daughters and visiting rights. The author has refuted these contentions.

8.3 On the basis of the material before it, the Committee has no reason to conclude that the Colombian judicial authorities failed to observe their obligation of independence and impartiality. There is no indication of executive pressure on the different tribunals seized of the case, and one of the magistrates charged with an inquiry into the author's claims indeed requested to be discharged, on account of his close acquaintance with the author's exhusband.

8.4 The concept of a "fair trial" within the meaning of article 14, paragraph 1, however, also includes other elements. Among these, as the Committee has had the opportunity to point out, [Views on communications Nos. 203/1986 (Mu ñ oz v. Peru), para. 11.3; and 207/1986 (Morael v. France), para. 9.3.] are the respect for the principles of equality of arms, of adversary proceedings and of expeditious proceedings. In the present case, the Committee is not satisfied that the requirement of equality of arms and of expeditious procedure have been met. It is noteworthy that every court action instituted by the author took several years to adjudicate - and difficulties in communication with the author, who does not reside in the State party's territory, cannot account for such delays, as she had secured legal representation in Colombia. The State party has failed to explain these delays. On the other hand, actions instituted by the author's ex-husband and by or on behalf of her children were heard and determined considerably more expeditiously. As the Committee has noted in its admissibility decision, the very nature of custody proceedings or proceedings concerning access of a divorced parent to his children requires that the issues complained of be adjudicated expeditiously. In the Committee's opinion, given the delays in the determination of the author's actions, this has not been the case.

8.5 The Committee has further noted that the State party's authorities have failed to secure the author's ex-husband's compliance with court orders granting the author access to her children, such as the court order of May 1982 or the judgement of the First Circuit Court of Bogotá of 13 March 1989. Complaints from the author about the non-enforcement of such orders apparently continue to be investigated, more than 30 months after they were filed, or remain in abeyance; this is another element indicating that the requirement of equality of arms and of expeditious procedure has not been met.

8.6 Finally, it is noteworthy that in the proceedings under article 86 of the Colombian Constitution instituted on behalf of the author's daughters in December 1993, the hearing took place, and judgement was given, on 16 December 1993, that is, before the expiration of the deadline for the submission of the author's defence statement. The State party has

failed to address this point, and the author's version is thus uncontested. In the Committee's opinion, the impossibility for Mrs. Fei to present her arguments before judgement was given was incompatible with the principle of adversary proceedings, and thus contrary to article 14, paragraph 1, of the Covenant.

8.7 The Committee has noted and accepts the State party's argument that in proceedings which are initiated by the children of a divorced parent, the interests and the welfare of the children are given priority. The Committee does not wish to assert that it is in a better position than the domestic courts to assess these interests. The Committee recalls, however, that when such matters are before a local court that is assessing these matters, the court must respect all the guarantees of fair trial.

8.8 The author has claimed arbitrary and unlawful interferences with her right to privacy. The Committee notes that the author's claim about harassment and threats on the occasions of her visits to Colombia have remained generalized, and the transcript of the court proceedings made available to the Committee do not reveal that this matter was addressed before the courts. Nor has the claim that correspondence with her children was frequently tampered with been further documented. As to the difficulties the author experienced in following the court proceedings before different judicial instances, the Committee notes that even serious inconvenience caused by judicial proceedings to which the author of a communication is a party cannot be qualified as "arbitrary" or "unlawful" interference with that individual's privacy. Finally, there is no indication that the author's honour was unlawfully attacked by virtue of the court proceedings themselves. The Committee concludes that these circumstances do not constitute a violation of article 17.8.9 As to the alleged violation of article 23, paragraph 4, the Committee recalls that this provision grants, barring exceptional circumstances, a right to regular contact between children and both of their parents upon dissolution of a marriage. The unilateral opposition of one parent generally does not constitute such an exceptional circumstance. [Views on case No. 201/1985 (Hendriks v. The Netherlands), adopted on 27 July 1988, para. 10.4.]

8.10 In the present case, it was the author's ex-husband who sought to prevent the author from maintaining regular contact with her daughters, in spite of court decisions granting the author such access. On the basis of the material made available to the Committee, the father's refusal apparently was justified as being "in the best interest" of the children. The Committee cannot share this assessment. No special circumstances have been adduced that would have justified the restrictions on the author's contacts with her children. Rather, it appears that the author's ex-husband sought to stifle, by all means at his disposal, the author's access to the girls, or to alienate them from her. The severe restrictions imposed by Mrs. Fei's ex-husband on Mrs. Fei's rare meetings with her daughters support this conclusion. Her attempts to initiate criminal proceedings against her ex-husband for non-compliance with the court order granting her visiting rights were frustrated by delay and inaction on the part of the prosecutor's office. In the circumstances, it was not reasonable to expect her to pursue any remedy that may have been available under the Code of Civil Procedure. In the Committee's opinion, in the absence of special circumstances, none of which are discernible in the present case, it cannot be deemed to be in the "best interest" of children virtually to eliminate one parent's access to them. That Mrs. Fei has, since 1992-1993, reduced her attempts to

vindicate her right of access cannot, in the Committee's opinion, be held against her. In all the circumstances of the case, the Committee concludes that there has been a violation of article 23, paragraph 4. Furthermore, the failure of the prosecutor's office to ensure the right to permanent contact between the author and her daughters also has entailed a violation of article 17, paragraph 1, of the Covenant.

9. 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 facts before the Committee reveal violations by Colombia of articles 14, paragraph 1, and 23, paragraph 4, in conjunction with article 17, paragraph 1, of the Covenant.

10. 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 remedy. In the Committee's opinion, this entails guaranteeing the author's regular access to her daughters, and that the State party ensure that the terms of the judgements in the author's favour are complied with. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. 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 and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English 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.]

Footnotes

*/ Made public by decision of the Human Rights Committee.

**/ Pursuant to rule 85 of the Committee's rules of procedure, Mr. Fausto Pocar did not participate in the adoption of the Committee's Views.