

HUMAN RIGHTS COMMITTEE

Rojas García v. Colombia

Communication No. 687/1996

3 April 2001

CCPR/C/71/D/687/1996

VIEWS

Submitted by: Mr. Rafael Armando Rojas García

Alleged Victim: The author

State party: Colombia

Date of Communication: 30 August 1995 (initial submission)

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

Meeting on 3 April 2001,

Having concluded its consideration of communication No. 687/1996 submitted to the Human Rights Committee by Mr. Rafael Armando Rojas García, 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 Rafael Armando Rojas García, a Colombian citizen, writing on his own behalf and on behalf of his elderly mother, his two children, his brother and two sisters, three nieces and a domestic helper. He claims that they are the victims of violations by Colombia of article 7, article 14, paragraph 3 (a), article 17, paragraphs 1 and 2, article 19, paragraph 3 (a), article 23 and article 24 of the International Covenant on Civil and Political Rights. The facts as submitted seem to raise an issue also under article 9, paragraph 1, of the Covenant.

The facts as submitted by the author

2.1 On 5 January 1993, at 2 a.m., a group of armed men wearing civilian clothes, from the Public Prosecutor's Office (Cuerpo Técnico de Investigación de la Fiscalía), forcibly entered the author's house through the roof. The group carried out a room-by-room search of the premises, terrifying and verbally abusing the members of the author's family, including small children. In the course of the search, one of the officials fired a gunshot. Two more persons then entered the house through the front door; one typed up a statement and forced the only adult male (Alvaro Rojas) in the family to sign it; he did not allow him to read it, or to keep a copy. When Alvaro Rojas asked whether it was necessary to act with such brutality, he was told to talk to the Public Prosecutor, Carlos Fernando Mendoza. It was at this juncture that the family was informed that the house was being searched as part of an investigation into the murder of the mayor of Bochalema, Ciro Alonso Colmenares.

2.2 On the same day, Alvaro Rojas filed a complaint for unlawful entry into the family house with the Provincial Attorney-General's Office in Cúcuta (Procuraduría Provincial de Cúcuta). An inquiry was initiated by the provincial authorities, which was not only not duly completed but was simply shelved on 3 November 1993. The author was not informed about the discontinuation of his complaint. He filed a new complaint with the Administrative Police in Bogotá (Procuraduría General de la Nación, Procuraduría Delegada de la Policía Judicial y Administrativa). The new complaint was also shelved on 24 June 1994, purportedly on the principle of double jeopardy. The author then submitted the case to the Administrative Tribunal in Cúcuta in order to obtain some form of reparation for the raid on his house and the use of a firearm.

The complaint

3.1 The author claims that the violent assaults on the family home resulted in a severe nervous trauma, psychologically affecting the author's sister, Fanny Elena Rojas García, who was an invalid. She subsequently died, on 8 August 1993, the violent search being considered the indirect cause of her death. Similarly, the author's mother, aged 75, never quite recovered from the shock of the search.

3.2 The author states that the authorities, far from conducting a diligent investigation into the matter, have done everything possible to cover up the incident. No attempt was ever made to establish the responsibility either of the authorities that authorized the raid or of those who carried it out, including the officer who fired a gun in a room where there were young children.

3.3 The author contends that the events described constitute violations of article 7, article 14, paragraph 3 (a), article 17, paragraphs 1 and 2, article 19, paragraph 3 (a), article 23 and article 24 of the Covenant.

The State party's observations and the author's reply

4.1 By submission of 12 November 1996, the State party argues that the author failed to exhaust domestic remedies, as an inquiry that may lead to disciplinary action is still under way in respect of the officers who raided the author's house.

4.2 The State party further argues that the entry into the author's house fulfilled all the legal requirements of article 343 of the Code of Criminal Procedure and was therefore within the scope of the law. The search was ordered by an officer of the court, Miguel Angel Villamizar Becerra, and was carried out in the presence of a prosecutor. In this respect, it is stated that all the pertinent documentation regarding the possible responsibility of the officials taking part in the raid was requested by the National Prosecutor (Fiscalía General) from its internal investigation section (Veeduría) in order to establish whether any disciplinary action was necessary. Reference is also made to a disciplinary inquiry carried out by the Investigating Office (Dirección Seccional del Cuerpo Técnico de Investigación) as well as by the Prosecutor for internal affairs in the police (Procuraduría Delegada para la Policía Judicial), both of which were filed.

5 On 22 January 1997, the author reiterates that the search was illegal since article 343 of the Code of Criminal Procedure does not provide for night-time "commando-like" actions, rooftop entries, firing into the air, etc. He states that the military prosecutor (Fiscal Delegado ante las Fuerzas Armadas) was not present, and that the prosecutor appeared only at the very end of the events and then only to draw up a record, of which no copy was given to the author's brother. The author reiterates the far-reaching repercussions that the house search had on his family, that his family was branded as the murderers of the ex-mayor, that his sister died after the raid, and that his mother and children continue to suffer from trauma. The author notes that the administrative procedures initiated in 1993 have not produced any results to date.

6 On 14 October 1997, the State party informed the Committee of its inquiries into the status of the administrative proceedings in the case. The National Public Prosecutor's Office (Fiscalía General de la Nación) requested information from the investigating office in Cúcuta (Dirección Seccional del Cuerpo Técnico de Investigación) as to whether proceedings had been initiated in respect of officer Gabriel Ruiz Jiménez. By 30 April 1997, no proceedings had been initiated. The request was reiterated in June, July and August 1997, again with negative results. The State party affirms that investigations continue and that, consequently domestic remedies have not been exhausted.

The Committee's decision on admissibility

7.1 At its sixty-second session, the Committee considered the admissibility of the communication and took note of the State party's request that the communication should be declared inadmissible for failure to exhaust domestic remedies. The Committee considered that in the circumstances of the case, it must be concluded that the author had diligently but unsuccessfully pursued remedies aimed at establishing responsibility for the raid on his house. More than five years after the events (at the time the decision on admissibility was taken), those responsible for the incident had not been identified or indicted, let alone tried. The Committee concluded that in the circumstances, domestic remedies had been "unreasonably prolonged" within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

7.2 As to the author's allegations under article 14, paragraph 3 (a), article 19, paragraph 3 (a), article 23 and article 24 of the Covenant, the Committee observed that these remained of a general nature and had not been further substantiated. There was nothing to indicate, for example that criminal charges had been brought against the author of which he had not been promptly informed (art. 14, para. 3 (a)) or that he had been denied freedom of expression (art. 19), and no description was given

of how the State had interfered in his family life or violated the rights of his children (arts. 23 and 24).

7.3 With respect to the remaining allegations, under article 7 and article 17, paragraphs 1 and 2 of the Covenant, the Committee considered that they had been sufficiently substantiated for purposes of admissibility and that they should accordingly be considered on their merits.

The State party's observations and the author's comments

8.1 By submission of 28 December 1999, the State party reiterates its position on the inadmissibility of the complaint and states that, in its view, no violation of any of the articles of the International Covenant on Civil and Political Rights has taken place.

8.2 The State party notes, as did the author, that the investigating office in Cúcuta (Cuerpo Técnico de Investigación de la Fiscalía, Seccional Cúcuta) carried out an administrative inquiry into the incident that occurred on 5 January 1993 during the raid on the Rojas García family house and on 3 November 1993 ordered it to be discontinued as groundless. In addition, following the inquiry into the events, a preliminary investigation was ordered against Gabriel Ruiz Jiménez, the person who fired the shot during the raid. According to the Prosecutor for internal affairs in the police (Procuraduría Delegada), there are no grounds whatsoever for pursuing the preliminary inquiry, since it has been shown that a disciplinary inquiry into the same events was initiated and completed by the Attorney-General's Office, through the Director of the investigating office in Cúcuta (Seccional del Cuerpo Técnico de Investigación de Cúcuta), and was subsequently shelved (see para. 2.2).

8.3 In an official letter dated 10 May 1999, the Attorney-General's Office reiterated that the Director of the investigating office in Cúcuta, who opened the preliminary disciplinary inquiry against Gabriel Ruiz Jiménez, had shelved the case because he considered that the shot fired by Jiménez had been accidental and not the result of negligence or misconduct by the accused, and that there were therefore no grounds for initiating a formal investigation.

8.4 With regard to the psychological traumas caused to the house occupants by the ensuing panic, the State party maintains that it is up to an expert medical witness to determine their existence during the administrative hearing now under way.

8.5 The State party reports that the author has filed suit for reparation for the damages allegedly incurred in connection with these events, with the Administrative Tribunal of Norte de Santander.

8.6 The State party does not share the Committee's view that, more than five years after the events, those responsible for the incident have not been identified or indicted. For the State party, it is clear that a search was carried out by members of the investigating office in Cúcuta (Cuerpo Técnico de Investigación de la Fiscalía, Seccional Cúcuta) in accordance with article 343 of the Code of Criminal Procedure, which stipulates:

"Searches, procedure and requirements. Where there are serious grounds for believing that a person who is the subject of an arrest warrant, or weapons,

instruments or items used in committing an offence or produced by an offence, are to be found in a building, vessel or aircraft, a court official may issue a court order for search and seizure duly stating the reasons. “

"The court order referred to in the preceding paragraph does not require notification."

8.7 The State party therefore considers that responsibility for any irregularities in the performance of its duties must be determined by inquiries carried out by the competent State bodies. With regard to the alleged responsibility of Mr. Gabriel Ruiz Jiménez, the Attorney-General's Office has established that it was the result of an accident.

8.8 In respect of the Committee's reference to unreasonably prolonged domestic remedies, within the meaning of article 5, paragraph 2 (b), of the Optional Protocol the State party wishes to make the following comments:

(1) Since the date of the incident, the brother of the author of the complaint has availed himself of the remedies provided in domestic law before the Attorney-General's Office, which, acting through the Administrative Police in Bogotá, issued an order on 24 June 1994 to shelve the investigation on the grounds that the National Public Prosecutor's Office, through the investigating officer in Cúcuta (Cuerpo Técnico de Investigación de Cúcuta), had initiated and completed a disciplinary inquiry into the same events. The State party points out that the mere fact that a domestic remedy does not find in favour of the complainant does not in itself mean that effective domestic remedies do not exist or have been exhausted. Clearly, in a case such as this, if a remedy is not appropriate, then it should not be exhausted but another, more appropriate procedure should be used.

(2) Mr. Rojas García brought a further complaint against the State before the Administrative Tribunal of Norte de Santander, thereby availing himself of another remedy; at the time of writing a decision by the Tribunal is imminent. These remedies have not therefore been unreasonably prolonged, as the Committee maintains, since, in the circumstances of the case, they have been used in the most appropriate and effective way. The appropriateness of a remedy means its suitability within the domestic legal system to protect the legal situation that has been violated. The remedy is designed to produce a result and cannot be interpreted as not having produced a result or as having produced a result that is clearly absurd or irrational. There was no intention on the part of the competent authorities to prolong the inquiries, but any lack of thoroughness would certainly have led to absurd and illogical decisions.

8.9 The State party reiterates that Mr. Rojas García had not exhausted internal remedies at the time he submitted his case for the Committee's consideration and the communication should thus be inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

9.1 The observations of the State party on the merits of the case were transmitted to the author, who,

by submission of 14 March 2000, refutes a number of the State's arguments. He repeats, for example, that a family with no previous dealings whatsoever with the justice system was the victim of a raid and its members ill-treated. He states that the raid was carried out on the assumption that criminals were to be found on the premises and, when children and old people were found, instead of correcting the mistake, all that has been done to date is compound it.

9.2 According to the author, article 343 of the Code of Criminal Procedure could not be applied in a case involving the home of an innocent family, without first complying with the most basic legal provisions covering such cases. Forcible entry through the roof at 2 a.m. and the firing of a gunshot constituted violations of the right to life, family life and other rights and freedoms guaranteed by the Constitution of Colombia.

9.3 The author rejects the Government's argument to the effect that the longer an inquiry takes, the less absurd and illogical the decisions will be. The author reiterates that more than seven years have passed since the events occurred and the case has still not been resolved.

9.4 The author adds that arbitrary cases arising out of the excessive use of force should automatically be given special treatment and examined and adjudicated by international bodies of inquiry in order to reserve impartiality and due process.

9.5 By submission of 10 July 2000, the author reports that, in respect of his suit against the State for reparation for the raid on his house, in the Administrative Tribunal of Norte de Santander, the Tribunal denied his petition, on the grounds of lack of evidence and on a strict interpretation of article 343 of the Code of Criminal Procedure. He reports that an appeal has been lodged with the Council of State in Bogotá.

9.6 He also reiterates that, according to eyewitnesses, the search party was making for house No. 2-36 and not 2-44 (the Rojas García house). He also points out that the widow of Ciro Alonso Colmenares (Mayor of Bochalema, whose murder gave rise to the investigation and the subsequent raid on the Rojas family's house), assured him that she never made any allegations against them. As for the gunshot fired by Gabriel Ruiz Jiménez, he alleges that it was not accidental but occurred inside the house in order to compel the occupants to find the keys to the door to the street. He also states that, when they realized that an official of the Pamplona public prosecutor's office, Cecilia Rojas García, lived in the house, the assailants' attitude changed and some of them apologized and said there had been a mistake.

9.7 With regard to his sister's death some months after the raid, the author claims that the authorities did not make the necessary effort to show a causal link between the raid and her death.

Examination of the merits

10.1 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.

10.2 The Committee has noted the State party's claim that the author had not exhausted domestic remedies at the time the communication was submitted to the Committee and that the communication should therefore not have been admitted. It also notes that, according to the State party, it was not the intention of the competent authorities to prolong the investigations, but any lack of thoroughness would have led to absurd and illogical decisions. The Committee refers to what was stated in its decision on admissibility in this connection.

10.3 The Committee must first determine whether the specific circumstances of the raid on the Rojas García family's house (hooded men entering through the roof at 2 a.m.) constitute a violation of article 17 of the Covenant. By submission of 28 December 1999, the State party reiterates that the raid on the Rojas García family's house was carried out according to the letter of the law, in accordance with article 343 of the Code of Criminal Procedure. The Committee does not enter into the question of the legality of the raid; however, it considers that, under article 17 of the Covenant, it is necessary for any interference in the home not only to be lawful, but also not to be arbitrary. The Committee considers, in accordance with its General Comment No. 16 (HRI/GEN/1/Rev.4 of 7 February 2000) that the concept of arbitrariness in article 17 is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. It further considers that the State party's arguments fail to justify the conduct described. Consequently, the Committee concludes that there has been a violation of article 17, paragraph 1, insofar as there was arbitrary interference in the home of the Rojas García family.

10.4 In view of the fact that the Committee has found a violation of article 17 in respect of the arbitrariness of the raid on the author's house, it does not consider it necessary to decide whether the raid constituted an attack on the family's honour and reputation.

10.5 With regard to the alleged violation of article 7 of the Covenant, the Committee notes that the treatment received by the Rojas García family at the hands of the police, as described in paragraph 2.1 above, has not been refuted by the State party. The Committee therefore decides that there has been a violation of article 7 of the Covenant in this case.

11. 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 it disclose a violation by the State party of article 7 and article 17, paragraph 1, of the International Covenant on Civil and Political Rights in respect of the Rojas García family.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Rafael A. Rojas García and his family with an effective remedy, which must include reparation. The State party is also under an obligation to take steps to prevent similar violations occurring in the future.

13. 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 and to provide an effective remedy when 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. In addition, it requests the State party to publish the Committee's Views.

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

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfic Khalil, Mr. Patrick Vella, Mr. Maxwell Yalden.

** Under rule 85 of the Committee's rules of procedure, Mr. Rafael Rivas Posada did not participate in the examination of the case.

*** The text of an individual opinion by Committee members Nisuke Ando and Ivan A. Shearer is appended to the present document.

Individual opinion of Committee members Nisuke Ando and Ivan A. Shearer

We share the Committee's conclusion that there has been a violation of article 17, paragraph 1, in so far as there was arbitrary interference in the home of the Rojas García family. However, we are unable to share its conclusion that there has been a violation of article 7 in the present case (paras. 10.3 and 10.5).

According to the Committee (majority views), the treatment received by the Rojas García family at the hands of the police as described in paragraph 2.1, which has not been refuted by the State party, constitutes a violation of article 7. Paragraph 2.1 states that on 5 January 1993 at 2 a.m. a group of armed men, wearing civilian clothes, from the Public Prosecutor's office, forcibly entered the author's house through the roof; that the group carried out a room-by-room search of the premises, terrifying and verbally abusing the members of the author's family, including small children; and that one of the officials fired a gunshot in the course of the search.

As the author himself states, the search party apparently hit the wrong house (No. 2-44 instead of No. 2-36) and when they realized that an official of the local prosecutor's office lived in the house, some of the party's members apologized and said that there had been a mistake (para. 9.6). The author also states that the raid was carried out on the assumption that criminals were to be found on the premises but that, after the incident, the prosecutor's office failed to correct the mistake, thus compounding the case (para. 9.1).

To our mind, the search party must have expected strong resistance, even by firearms, from the house because they had assumed that the murderer or murderers of the mayor were hiding in it. This would explain what is described in paragraph 2.1: the forcible entry into the house through the roof in the middle of the night; the subsequent room-by-room search of the premises with probably harsh words by the searchers; and an accidental gunshot by one of them. Certainly, there was a mistake on the part of the prosecutor's office, but it is doubtful if the search party's conduct based on that mistake could be characterized as a violation of article 7.

In our view, the search party had been acting in good faith until they realized that they had hit a wrong target. The State party maintains that the raid of the author's house was in compliance with the law. The State party also asserts that the director of the local investigating office opened a preliminary inquiry into the gunshot and considered it not as misconduct but as an accident (para. 8.3). Under the circumstances we conclude that the search party had not intent to terrify the author's family.

Ordinarily article 7 requires an intent on the part of an actor as to possible effects of his/her act, and the lack of such intent works to eliminate or extenuate unlawfulness of the act. This holds true for police investigations such as the one in the present case. Therefore, in our view, there has been no violation of article 7 in this case.

[Signed] Nisuke Ando

[Signed] Ivan A. Shearer

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