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Communication No. 1904/2009

**Decision adopted by the Committee at its 107th session,
11–28 March 2013**

<i>Submitted by:</i>	D.T.T. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Colombia
<i>Date of communication:</i>	18 February 2009 (initial submission)
<i>Document reference:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 5 October 2009 (not issued in document form)
<i>Date of decision:</i>	25 March 2013
<i>Subject matter:</i>	The author's conviction for the offence of illicit enrichment
<i>Procedural issues:</i>	Exhaustion of domestic remedies; substantiation of claims
<i>Substantive issues:</i>	Right to a fair and public hearing by a competent and impartial tribunal; prohibition of retroactive application of criminal law
<i>Articles of the Covenant:</i>	Articles 14 and 15
<i>Articles of the Optional Protocol:</i>	Article 2 and article 5 (para. 2 (b))

[Annex]

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (107th session)

concerning

Communication No. 1904/2009*

Submitted by: D.T.T. (not represented by counsel)
Alleged victim: The author
State party: Colombia
Date of communication: 18 February 2009 (initial submission)

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

Meeting on 25 March 2013,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Mr. D.T.T., a Colombian national born on 6 June 1952. He claims to be the victim of a violation by Colombia of his rights under articles 14 and 15 of the Covenant. The author is a lawyer and is representing himself before the Committee.

Factual background

2.1 The author held several senior posts in the State party. He was a potential candidate for the Presidency of the Republic until 13 March 1994, representing the Liberal Party. On 31 August 1994, he was appointed Comptroller-General of the Republic. Following the presidential election held in that year, information was disclosed indicating that some of the election campaigns had been funded by known drug traffickers, which led to the opening of the legal investigation known as the “*Proceso 8000*”.

2.2 On 5 February 1998, the Attorney General (*Fiscal General de la Nación*) ordered an investigation into the author, on suspicion that he had been the ultimate beneficiary of sums of money derived from drug trafficking, which he had received through the company Export Café Ltd.

* The following members of the Committee participated in the consideration of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

2.3 On 26 February 1998, the Attorney General ordered that the author be taken into custody and on 15 July of that year the author was charged with the offence of illicit personal enrichment¹ before the Supreme Court of Justice, because, in view of his position, this was the court that had jurisdiction to hear the case. The Attorney General's Office maintained that the author could not substantiate the increase in his assets by 43.6 million Colombian pesos; that the transactions he cited to substantiate the increase, such as the sale of a plot of land, could not, in fact, have realized such a sum; and that the money he had received had derived from illicit drug trafficking, paid with a cheque drawn on the account of Export Café Ltd. It was established that this company did not engage in any activity corresponding to its stated purpose but operated as a front organization for the Cali cartel. In framing the indictment, the Attorney General's Office took into consideration the statement made by a witness, Mr. G.A.P.G., while he was in detention in the United States of America in the context of the trial of an uncle of the author's for activities that were also related to the financing of election campaigns with money derived from drug trafficking. This witness testified that Export Café Ltd. was a front for the Cali cartel, that the cartel had financed the campaign of a presidential candidate and various congressmen and that the author was in frequent contact with a drug trafficker, Mr. M.A.R.O. According to the information submitted by the author, the Attorney General's Office considered that the testimony of Mr. G.A.P.G. was valid and that, since he was testifying in the United States under the protected witness scheme, his interrogation must have conformed to the regulations of the State in which the testimony was taken. Moreover, the worth of the evidence could not be questioned merely because the statement had been made in the context of another criminal trial. Furthermore, the statement had been openly transferred to the case file in the author's trial in accordance with the requirements of the law.

2.4 On 19 August 1998, Congress accepted the author's resignation from his post of Comptroller-General of the Republic. Owing to the loss of his special privileges, the Supreme Court transferred the trial on 27 August 1998 to the Bogotá Regional Court, which was made up of "faceless" judges.

2.5 The author asked the Regional Court to declare null and void the proceedings that followed the inquiry by the Attorney General's Office, claiming that he could not be detained unless he had previously been suspended from his post by Congress; that his detention had been unduly prolonged; that the prosecutor who questioned Mr. G.A.P.G. about the author did not have the authority to do so; and that the prosecutor assigned to the Supreme Court who took his statement also lacked such authority. The Regional Court declined to make such a declaration and ordered, among other measures, that a sworn statement should be taken from Mr. G.A.P.G. to clarify his previous statement and that the author should be allowed to cross-examine the witness, as was his right. On 5 March 1999, a letter of request was sent to the competent United States authorities.

2.6 On 30 June 1999, the regional courts ceased functioning and Act No. 504 of 1999 came into force, establishing special circuit criminal courts within the ordinary system of justice. These courts have jurisdiction to try cases of illicit personal enrichment, among other things. The author's trial was assigned to the Fifth Criminal Court of the Bogotá Special Circuit ("the Fifth Court"). The Court continued to gather evidence and took steps to ensure that a statement could be taken from Mr. G.A.P.G. in the United States.

¹ Article 10, endorsed in Decree No. 1895 of 1989 and enshrined in law by Decree No. 2266 of 1991: "Any person who, directly or through another person, obtains for himself or for another person, an unsubstantiated increase in assets deriving in one way or another from criminal activities shall, by that act alone, be liable to a term of imprisonment of between 5 and 10 years and a fine equivalent to the value of the illicit increase in assets."

2.7 On 29 December 1999, the Fifth Court convicted the author and sentenced him to 70 months' imprisonment, a fine of 43,579,952.70 Colombian pesos and an accessory penalty prohibiting him from exercising his civic rights or public duties during the same period. In its judgement, which has been made available by the author, the Court stated that the offence of illicit personal enrichment should be interpreted in accordance with the 1996 case law of the Constitutional Court, which ruled that it was a separate offence, but that this did not affect the principle of legality and the most-favourable-law principle. With regard to the testimony of Mr. G.A.P.G., it concluded, *inter alia*, that it had been obtained in accordance with the law and that it was only one piece of evidence in the case and that his statements matched the other evidence; the evidence as a whole left no doubt about the author's criminal liability. In the light of all the evidence collected, the judgement also set out the reasons why it was considered unnecessary to order the examination of further evidence, as requested by the author.

2.8 The author appealed to the High Court of the Bogotá Judicial District ("the High Court"), which dismissed his appeal on 14 February 2001. According to the judgement, which has been made available by the author, the High Court confirmed the evidentiary effect of the evidence provided and ruled that the author's applications for annulment had been resolved previously and that his right to be tried by a duly appointed judge (*juez natural*) had not been breached.

2.9 The author lodged an appeal in cassation before the Supreme Court of Justice. On 19 June 2003, the Court decided not to annul the sentence and said, *inter alia*, that the decisions of the courts of first and second instance complied with statutory requirements and fulfilled the conditions for validity in terms of the reasoning behind them and the penalty imposed.

2.10 The author applied for legal protection (*tutela*) to the Cundinamarca Council of the Judiciary, on the grounds that he had been deprived of his fundamental rights to due process — to be tried by an impartial and independent court — to a defence, to effective access to the administration of justice and to his honour and good reputation, as the Attorney General's Office had applied an inappropriate procedure in dealing with his case; that the Regional Court, by applying rules from other kinds of proceedings, had extended the deadline for the submission of evidence, which had enabled the Attorney General's Office to submit evidence that could not otherwise have been brought; that he had been convicted without a proper or reasoned evaluation of the evidence; that material evidence had not been presented; and that officials who had previously made decisions and issued opinions, such as the judges of the Supreme Court, had not disqualified themselves from hearing the case. On 26 April 2004, the Cundinamarca Council of the Judiciary dismissed his application for legal protection.

2.11 The author then lodged an appeal with the Higher Council of the Judiciary. On 2 June 2004, the Higher Council upheld the ruling on the author's application for legal protection by the Cundinamarca Council of the Judiciary, which had dismissed the application. He then applied to the Constitutional Court for judicial review. On 2 February 2006, the Court ruled that parts of his appeal were inadmissible, including the part relating to the impartiality of the Supreme Court judges, given that the author had not objected to those judges hearing his case, although the law allowed him to do so. According to the ruling, a copy of which has been made available by the author, the Court stated that a conviction for the crime of illicit enrichment was not dependent on a previous ruling that the activities from which an increase in assets was derived were illicit; that the transfer of the criminal proceedings from the Supreme Court to the Regional Court and subsequently to the Fifth Court had been conducted in the normal way and in conformity with the law; that the Supreme Court had given all parties to the proceedings due notice of the public hearing; and that, although the Supreme Court Prosecutor's assignment to the trial meant

that the representative of the Attorney General's Office did not appear before the special judges of the Bogotá Circuit, this procedural irregularity was not significant from a constitutional point of view as regards the right to be tried by a predetermined, impartial judge. The Court also concurred with the conclusion of the lower courts regarding the validity of the evidence, the rejection of some of it, and the weight given to it. The author lodged an appeal for annulment on the grounds that his rights to due process and equality had been violated. On 25 July 2006, the Constitutional Court, sitting in plenary, rejected this appeal, since the author was effectively seeking a review of the judgement of the Eighth Review Chamber of the Constitutional Court of 2 February 2006 as though it were an ordinary court.

The complaint

3.1 The author claims to have been the victim of a violation of articles 14 and 15 of the Covenant.

3.2 With regard to article 14 of the Covenant, the author claims that there were serious irregularities in the criminal proceedings brought against him, to the detriment of his rights to a defence, to effective access to justice, to a trial by an impartial and independent court and to the presumption of innocence.

3.3 The author's right to a defence was violated in that he had no opportunity to refute the evidence. His conviction was based essentially on the testimony of Mr. G.A.P.G. The author, however, was unable to challenge this evidence, despite his requests to question the witness. Moreover, the testimony had been taken in an irregular manner from another criminal trial in which he had not been involved. Also, in his own trial, evidence had been admitted that had not been produced in the course of the proceedings, while other evidence that was crucial to determining his criminal liability, and which he had asked to have admitted, had not been heard, in breach of the Covenant. Furthermore, according to the author, the Regional Court was composed of faceless judges and when it was in charge of the supplementary investigations the identity of the judge ordering, accepting or rejecting evidence was not known to the author, which restricted his right to a defence.

3.4 The author maintains that he was not tried by a competent, independent and impartial court. The Fifth Court and the High Court did not have the territorial jurisdiction to hear the case against him, which should have been brought before a court in the circuit where the cheque and the unconditional payment order that were under investigation were issued, that is, the Cali Criminal Circuit Court. He claims that, in a criminal trial similar to his own, the Supreme Court had ruled the entire proceedings null and void and ordered that the case be transferred to the Cali courts; his right to equal treatment by the courts had therefore been violated.

3.5 The courts had applied procedural rules from different proceedings rather than restricting themselves to complying with the compulsory requirements, in violation of his right to due process. For example, when his trial was transferred to the Regional Court, the latter had continued to apply the deadline for taking the case to trial set out in the Supreme Court rules, whereas it ought to have adhered to the procedural rules governing regional courts. This had enabled the Attorney General's Office to submit evidence against the author.

3.6 With regard to article 15 of the Covenant, the author claims that, in order to convict him, the court retroactively applied the interpretation issued by the Constitutional Court on 18 July 1996, establishing the offence of illicit enrichment as a separate offence.² The

² The communication refers to Constitutional Court Judgement No. C-319 of 1996.

events for which he was on trial, however, dated back to 1 May 1994, when the Constitutional Court's ruling on the meaning of the article defining the offence was that it was connected with or derived from other offences and was therefore subject to a judicial ruling on the illegality of the activities in which the enrichment had originated.³ Moreover, in considering a petition for a review of the constitutionality of the article on 19 October 1995, the Constitutional Court had ruled that the matter was *res judicata*. Thus, at the time that the cheque was issued, the author had no means of knowing that he was committing an offence. The prohibition against making criminal law valid retroactively could not therefore be interpreted strictly, but should be extended to courts' interpretations of the definitions of offences that were detrimental to the accused.

3.7 The author asks the Committee to find that his rights under articles 14 and 15 of the Covenant have been violated, and requests the State party to provide an effective remedy and financial compensation for the economic and moral damages suffered by himself and his family.

State party's observations on admissibility

4.1 On 12 February 2009, the State party submitted its observations on the admissibility of the communication and asked the Committee to declare it inadmissible owing to its lack of competence to consider a communication whose purpose was to bring about an evaluation of facts and evidence previously submitted to the national authorities and also because of the author's failure to exhaust domestic remedies, under articles 3 and 5, paragraph 2 (b), of the Optional Protocol.

4.2 The author's communication sets out his disagreement with the judgements of the Fifth Court, the High Court and the Supreme Court, of 29 December 1999, 14 February 2001 and 19 June 2003, respectively, in which he was convicted for the offence of illicit personal enrichment, and seeks to persuade the Committee to act as an appeal court. The State party notes that it is not for the Committee to replace the decisions of domestic courts on the evaluation of the facts or the evidence in a particular case with its own opinions. There is no evidence to suggest that the action of the courts in the author's trial was arbitrary or constituted a denial of justice. The issues raised by the author were evaluated and decided in accordance with the law. The author had access to various legal remedies and obtained substantive decisions in accordance with the law. The State party therefore asked the Committee to declare the communication inadmissible under article 3 of the Optional Protocol.

4.3 As regards the author's claim under article 14, paragraph 1, of the Covenant, that the courts lacked impartiality, the State party requested that the claim be declared inadmissible owing to the author's failure to exhaust domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol. If the author considers that some of the Supreme Court judges who heard the appeal for cassation were lacking in impartiality, he should have applied for their disqualification, as permitted by law, at the appropriate time. His failure to do so explained why that part of his application for legal protection had been ruled inadmissible.

State party's observations on the merits

5.1 On 6 April 2010, the State party submitted its observations on the merits of the communication to the Committee.

³ The communication refers to Constitutional Court Judgement No. C-127 of 1993.

5.2 The State party submitted a detailed account of every stage of the criminal proceedings, the appeals lodged, the body of evidence obtained and examined by the authorities, and the application for legal protection. It states that the principal and accessory penalties imposed on the author were declared to have been extinguished on 20 May 2004 and he was set free.

5.3 The State party says that the criminal proceedings against the author did not breach article 14 of the Covenant and that the evidence submitted during the trial showed beyond any reasonable doubt that he was guilty of the offence. His conviction and sentence therefore cannot be considered arbitrary or a denial of justice. Even if the author considers that the courts' decisions were unjust, the State party reiterates its view that the Committee cannot act as a court of appeal to consider alleged errors of law or fact.

5.4 The State party denies that rules of procedure that were applicable in other cases were used to the author's detriment or breached the mandatory rules that guarantee due process. The deadline of 20 working days set by the Regional Court for supplying or requesting evidence when the case was transferred from the Supreme Court did not affect the author's right to due process. On the contrary, the Regional Court applied the deadline that was in force when the case was being heard by the Supreme Court, since that was more favourable to the author. If the procedure applicable to regional courts had been applied strictly, the author would have had only 10 additional calendar days. As it was, during the open period for evidence, the author's representative submitted 6 pieces of evidence and requested that 24 more be examined. Moreover, the deadline applied to all the parties, without prejudice to any of them.

5.5 The transfer of the trial to the Fifth Court, once the regional courts had ceased to exist, did not affect his right to be tried by a duly appointed judge. Judges specialized in criminal law, like the judge presiding over the Fifth Court, are judicial officials who form part of the ordinary system of justice. The fact that they are assigned to certain cases because of their speciality or the nature of the case does not mean that they are special judges. Moreover, the author was not tried by faceless judges. Although at the trial stage the Regional Court conducted the first examination of the accused and extended it without disclosing the identity of the judges, it was not the Regional Court that weighed up the evidence obtained or presided over the author's trial. Furthermore, at the examination and indictment stage, the author knew that the Attorney General was in charge of the investigation, examination and indictment in his case. Also, once the case had been transferred from the Regional Court to the Fifth Court, the order was given to hold the hearing in public and the authorities, the author and his representative participated in the hearing, in accordance with the rules set out in the Code of Criminal Procedure. The author thus knew the identity of the judge who heard his case and convicted him in the court of first instance and also the identity of the officials in the higher courts.

5.6 With regard to the claims that his right to a defence was violated, the State party points out that, at the request of the Regional Court, a letter of request was sent to the authorities in the United States, where the witness, Mr. G.A.P.G., was being held, with a view to questioning him for the author's defence. The Fifth Court subsequently took various steps with a view to obtaining a statement. However, there was no reply to the letter of request and the State party had no means of insisting on a reply, since it is the prerogative of the requested State to grant or refuse a request for legal assistance. The State party claims it was not in a position to question the evidentiary value of the statement made previously by G.A.P.G. in another case simply on the grounds that the author had been unable to question him, particularly since, in the author's trial, the statement had been considered to be documentary evidence carried over to his trial, and not simply as testimony. Moreover, the statement was treated merely as one piece of evidence among many that demonstrated the author's criminal liability. Furthermore, at the trial at which the

statement was made, procedures were followed in accordance with the guidelines set out in the Criminal Code and the Code of Criminal Procedure. It was not the purpose of the proceedings to obtain information against the author; rather, such information arose spontaneously during the questioning. There was thus no violation of the special privileges that the author enjoyed at that time as Comptroller-General.

5.7 The author was able to conduct his defence properly and challenge every piece of evidence put forward. The evidence that had been ordered and examined was produced in accordance with the law and with the author's knowledge. Among those involved in this process were the representatives of the Attorney General's Office, the prosecuting attorney assigned by the Public Legal Service (*Ministerio Público*) and the author's representative. At every point, the author had access to the evidence against him; he was provided with a copy of every document used in the investigation and his representative was able to participate in the questioning. All the evidence was comprehensively evaluated. The judicial authorities responded to applications from everyone involved in the proceedings and ordered that any evidence that might provide certainty and clarity on the case before the court should be examined. The author was able to request and submit evidence at every stage of the proceedings. However, following a review of the evidence as a whole, pieces of evidence that were of no use, that related to blatantly irrelevant facts or that were manifestly superfluous were rejected.

5.8 With regard to the author's claim that he was tried by judges who did not have territorial jurisdiction, in violation of article 14, paragraph 1, of the Covenant, the State party asserts that the courts with the jurisdiction to hear the author's case were those in Bogotá, not in Cali, since what was relevant in determining the jurisdiction in which the criminal trial should be held was not the place where the cheque was issued but the destination of the money concerned in the criminal act. In this case, the cheque was undoubtedly issued in Cali, but the increase in the author's assets occurred in Bogotá.

5.9 With regard to the claims concerning article 15 of the Covenant, the State party says that no criminal law was applied to the author retroactively. The previous interpretations by the Constitutional Court concerning the criminal offence of illicit enrichment could not be construed as establishing a law or a rule of law. For that reason, the Fifth Court deemed inadmissible the defence proposal to consider the actions attributed to the author in accordance with the interpretative parameters established in Constitutional Court Judgement No. C-127 of 1993, without taking into account the points made in Judgement No. C-319 of 1996, in application of the principles of legality and the most favourable law. Under the State party's Constitution, only the law can define criminal offences. In the author's case, the courts applied the definition of the offence that was in force at the time that the acts for which he was on trial were committed. The interpretations of the Constitutional Court did not change the definition of the offence. The application of the criteria established by the Constitutional Court in 1996 did not, therefore, constitute a violation of article 15 of the Covenant. The offence of illicit personal enrichment is deemed a separate offence, that is, it is not dependent on a previous conviction for the illicit activity that gave rise to the illicit enrichment.

Author's comments on the State party's submission

6.1 On 24 September 2010, the author submitted his comments on the State party's observations.

6.2 The author reiterates the arguments submitted in his communication and maintains that the purpose of his communication is not that the Committee should act as a "fourth level of jurisdiction" and assess the evaluation of the facts or the evidence in the domestic proceedings. He asserts that he exhausted all the available domestic remedies, lodging

every possible appeal in the course of the criminal proceedings against him and applying for legal protection.

6.3 In the testimony given by Mr. G.A.P.G. at another trial, his identity was not clearly indicated, since it was accompanied only by a photocopy of a photograph. When the testimony was used in the author's own trial, not even a copy of the photograph in question was attached. He reiterates that the judgement against him was based essentially on that testimony and that the judicial authorities did not carry out any investigation to determine the origin of the money in the accounts of Export Café Ltd.

6.4 He reiterates that the right enshrined in article 15 of the Covenant was violated, since the alleged illicit conduct attributed to him was committed on 1 May 1994. Notwithstanding that, the Court retroactively applied the less favourable interpretation of the offence of illicit personal enrichment set out in Constitutional Court Judgement No. C-319 of 18 July 1996.

6.5 The supplementary investigation carried out by the Bogotá Regional Court was conducted before faceless judges. It was in that context that some evidence was admitted and other evidence rejected. Because of these irregularities, the whole investigative stage of the proceedings should have been declared null and void.

6.6 The author claims that the judgement handed down in the criminal trial of his brother, Mr. J.F.T., was used against him in his own trial, even though it had not been transferred to the case file or brought to his attention. This had affected his right to mount a defence and to challenge the evidence.

6.7 During his trial, the procedures adopted were those governing two different criminal proceedings, to the detriment of his right to due process. The author maintains that it was not relevant to determine which procedure was the more favourable in order to apply a more advantageous rule, since in principle all procedures provided equal safeguards. The author was thus not tried in accordance with the criminal procedure explicitly laid down by Colombian law.

6.8 His right to a defence was affected by the fact that he had no opportunity to question Mr. G.A.P.G., owing to the negative reply from the Government of the United States. That fact undermined the principle of equality of arms, whereby he should have been able to question a crucial witness on an equal footing with a view to determining the origin of the money in the accounts of Export Café Ltd.

6.9 The author reiterates that the cheque in question was endorsed with the name of another person. That person has not, however, been investigated. Moreover, no account was taken of the fact that, when the cheque was cashed, the bank account of Export Café Ltd. was overdrawn, which meant that the cash payment was made with the bank's money and not out of the company's account. The author further states that, although he did not have title *stricto sensu* to the plot of land he had transferred to his uncle, Mr. A.F.T.S., a number of people had testified that he and Mr. A.C. had been the owners since 1986. He also asserts that, even though an order had been issued to take the testimony of Mr. J.B. and Mr. F.M., who had acted as witnesses to the option to buy signed by the author's wife and Mr. A.F.T.S., that had not been done. Furthermore, important expert appraisals and evidence requested by the defence had not been ordered.

6.10 The author maintains that, although he has been released, he is still suffering from the effects of his sentence, since constitutional rules mean that he cannot run for any elected office.

7. On 8 October 2010, the author submitted additional information to the Committee. He maintains that, since the State party could not demand a response from the United States to the letter of request sent by the judicial authorities to ask for the testimony of Mr.

G.A.P.G. to be taken, the witness's statements incriminating the author in the context of another trial could not be used. He asserts that, apart from that statement, the criminal investigation police had no means of determining whether the assets of Export Café Ltd. derived from criminal activity; without such confirmation, the criminal definition of the offence illicit enrichment could not be applied.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 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.

8.2 As required under article 5, paragraph 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.

8.3 With regard to the requirement that domestic remedies must have been exhausted, the Committee notes the statement by the State party that the author did not challenge the impartiality of the court in a timely manner, since he at no time sought the disqualification of the Supreme Court judges who heard his application for judicial review or any of the other authorities who took part in the previous stages of the proceedings against him, although he was permitted to take such action by law. The Committee observes that the impartiality of the courts involved in the criminal trial was challenged only during the action for legal protection brought by the author and that this part of his request was not admitted because he had not challenged these authorities in a timely manner during the criminal proceedings. In the absence of any explanation by the author of the reasons that might have prevented him from challenging the judges in his trial, the Committee considers that this part of his communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8.4 The Committee notes the author's claims that he was not tried by a competent court established by law; that the criminal trial should have been held in the Cali courts; that the initial trial was held in the Supreme Court, the Bogotá Regional Court and the Fifth Court, and that the Fifth Court finally heard the case; and that, when the trial was transferred to Bogotá Regional Court, the latter decided to keep the deadline for submission of evidence previously set by the Supreme Court rather than apply the procedural rules governing proceedings before the Regional Court. The Committee observes that both the Supreme Court and the Constitutional Court ruled that, under the law of the State party, the Bogotá courts were competent to conduct the criminal proceedings for the offence of illicit personal enrichment, since the offence was allegedly committed in the city of Bogotá. The Committee also observes that the criminal trial was transferred from the Supreme Court to the Regional Court as a consequence of the author's resignation from the post of Comptroller-General and the loss of his special privileges, and finally transferred to the Fifth Court when the regional courts ceased functioning, and that it was the criminal judges from the special circuit assigned to ordinary courts who had the jurisdiction to try the offence with which the author was charged. The Committee also notes the comments by the State party that the rules governing trials before the Supreme Court were temporarily applied by the Regional Court only at the time that the trial was transferred; that the same deadline was applied to all the parties to the proceedings; and that, if the rules applying to regional courts had been applied immediately, the deadline for the submission of evidence would have been shorter. As the author has not disproved these arguments, the Committee considers that the claims under article 14, paragraph 1, of the Covenant have not been

sufficiently substantiated for the purposes of admissibility and concludes that they are inadmissible under article 2 of the Optional Protocol.

8.5 The Committee notes the author's claims that proceedings in the Bogotá Regional Court were conducted before faceless judges. The Committee also notes the State party's arguments that the prosecutor assigned to the Supreme Court, the prosecuting attorney representing the Public Legal Service and the author's representative all participated in the first examination of the accused and in the proceedings before the Regional Court; that it was not the Regional Court that assessed the evidence or convicted the author; that at every other stage of the proceedings the author's right to a public hearing and to know the identity of the persons hearing his case was assured; and that, with these guarantees the author had the opportunity to have his conviction and sentence reviewed by a higher court and, ultimately, in cassation. The Committee recalls that in order to satisfy the requirements of the right to a defence enshrined in article 14, paragraph 3, of the Covenant, and particularly in subparagraphs (d) and (e), all criminal proceedings must allow a person charged with a criminal offence an oral hearing, at which he or she may appear in person or be represented by counsel and may present evidence and examine witnesses.⁴ In this case, the Committee notes that the first examination of the accused before the Regional Court was conducted by a faceless judge. However, the trial was subsequently transferred to the Fifth Court, and it was this court that finally assessed the evidence, convicted the author and imposed a punishment; both in this court and in the appeal and cassation courts, the author had the opportunity to be heard in public, to submit or challenge the evidence submitted in the course of the trial and to conduct his defence. The author also knew the identity of the authorities in charge of the previous stages of the proceedings at the Attorney General's Office and the Supreme Court. Moreover, the Committee considers that the information before it does not demonstrate that the actions of the Regional Court were a determining factor in the author's conviction or that any possible irregularities that might have occurred owing to the nature of the regional courts were not subsequently rectified during the course of the trial. In these circumstances, the Committee is of the view that the author's claims have not been sufficiently substantiated for the purposes of admissibility and concludes that they are inadmissible under article 2 of the Optional Protocol.

8.6 The Committee notes the author's claims that he was unable to conduct a proper defence, since he was unable to challenge material evidence, such as the statement by Mr. G.A.P.G.; that the judicial authorities refused to take the evidence requested by him, which he believed was of crucial importance, and did not give due weight to the evidence submitted by the defence; and that he was effectively convicted in the absence of conclusive proof of guilt, and that this, when taken together with other violations of due process, was clearly arbitrary and a denial of justice. The Committee notes that these claims refer to the evaluation of the facts and the evidence by the courts of the State party. The Committee recalls its jurisprudence, according to which it is incumbent on the courts of States parties to evaluate the facts and the evidence in each case, or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.⁵ The Committee has examined the materials submitted by the author, including the judgement of the Fifth Court and the judgements on the remedies of appeal and cassation. The Committee considers that these materials do not show that the criminal proceedings against the author suffered from such

⁴ Committee's general comment No. 32 on the right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32), para. 23.

⁵ See communication No. 1616/2007, *Manzano et al. v. Colombia*, decision adopted on 19 March 2010, para. 6.4, and communication No. 1622/2007, *L.D.L.P. v. Spain*, decision adopted on 26 July 2011, para. 6.3.

defects. Accordingly, the Committee considers that the author has failed to provide sufficient substantiation of his claim of a violation of his right to a defence as enshrined in article 14 of the Covenant and that the communication is therefore inadmissible under article 2 of the Optional Protocol.

8.7 The Committee notes the author's claim under article 15, paragraph 1, of the Covenant that, in convicting him of the offence of illicit personal enrichment, the courts retroactively applied the interpretation issued by the Constitutional Court on 18 July 1996, ruling that it was a separate offence, whereas the events in question occurred on 1 May 1994 and at that time the Constitutional Court had ruled that the offence was of a related or derivative nature. The Committee notes that the creation of the offence of illicit personal enrichment was endorsed in Decree No. 1895 of 1989 and enshrined in law by Decree No. 2266 of 1991. The Committee also notes that the interpretation issued by the Constitutional Court in 1996 did not change the definition of the offence, was limited to an interpretation of the aforementioned Decree and of previous case law relating to the constituent elements of the offence, and established that application of the Decree was not dependent on a previous conviction for the illicit activity that gave rise to the enrichment; it was sufficient that the evidence put forward persuaded the judge of an unjustified increase in assets and their origin. The Committee thus considers that the claims under article 15, paragraph 1, of the Covenant have not been sufficiently substantiated for the purposes of admissibility and concludes that they are inadmissible under article 2 of the Optional Protocol.

9. Therefore, the Human Rights Committee decides:

- (a) That the communication is inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol;
- (b) That this decision shall be transmitted to the State party and to the author.

[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.]
