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Decision

Communication No. 1616/2007

Submitted by:	Hernando Manzano, Maria Cristina Ocampo de Manzano and Belisario Deyongh Manzano (represented by counsel, Carlos Julio Manzano)
Alleged victims:	The authors
State party:	Colombia
Date of communication:	3 August 2007 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 15 November 2007 (not issued in document form)
Date of decision:	19 March 2010
Subject matter:	Violations of due process in the proceeding that led to the authors' conviction
Procedural issues:	Lack of substantiation of the allegations
Substantive issue:	Right to a hearing before an impartial tribunal
Article of the Covenant:	14, paragraph 1
Article of the Optional Protocol:	2

[Annex]

* Published by decision of the Human Rights Committee.

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (ninety-eighth session)

concerning

Communication No. 1616/2007**

Submitted by:	Hernando Manzano, Maria Cristina Ocampo de Manzano and Belisario Deyongh Manzano (represented by counsel, Carlos Julio Manzano)
Alleged victims:	The authors
State party:	Colombia
Date of communication:	3 August 2007 (initial submission)

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

Meeting on 19 March 2010,

Adopts the following:

Decision on admissibility

1. The authors of the communication, dated 18 July 2007, are Hernando Manzano, Maria Cristina Ocampo de Manzano and Belisario Deyongh Manzano, Colombian citizens, who allege that their rights under article 14, paragraph 1, of the Covenant have been violated by Colombia. The Optional Protocol entered into force for the State party on 23 March 1976. The authors are represented by counsel, Carlos Julio Manzano.

The facts as submitted by the authors

2.1 Mr. Manzano and Mr. Deyongh had had a law office in Barranquilla since 1984. Their clientele included employees of Puertos de Colombia (Colpuertos), a Government enterprise responsible for all port activities in the country and owner of all assets used for those activities. By Act No. 01 (1991) the State decided to sell the enterprise's assets to private-sector buyers, making payment of outstanding debts chargeable to the national budget. Under Decree No. 36 (1992), the Government established the Social Liability Fund

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Mr. Krister Thelin. According to article 90 of the Committee's rules of procedure, Mr. Rafael Rivas Posada, committee member, did not take part in the adoption of this ruling.

for the Liquidation of Puertos de Colombia (Foncolpuertos), which would be responsible for servicing all Colpuertos' outstanding debts. While Act No. 01 of 1991 had envisaged the possibility that the private port corporations created to buy the port assets would help pay those debts, that never materialized.

2.2 Foncolpuertos began operations on 1 January 1993, at which time the authors' law office had approximately 100 clients, all in receipt of a pension from Colpuertos, who had approached the office because delays had begun to occur in the payment of their pensions. After Foncolpuertos assumed liability for the full servicing of debts left by Colpuertos, payments became increasingly delayed, forcing thousands of pensioners to seek the assistance of lawyers. By 1998 Mr. Manzano's law office had some 5,000 clients, who freely and spontaneously granted it authority to represent them before the labour tribunals to obtain payment of the months of pension to which they were legally entitled. By that time payment of Foncolpuertos' debt was being charged entirely to the national budget, with the port corporations contributing nothing, which created a major fiscal problem. Legal claims were heard by the relevant labour courts and tribunals, giving rise to amicable settlements, as appropriate, through the Labour Inspectorates attached to the Ministry of Social Security.

2.3 The authors contend that, faced with the resulting budget deficit, and in order to avoid paying the pensions, the State launched a campaign of indiscriminate persecution against all those who in one way or another were defending the pensioners. At the beginning of 1999, Senator Jaime Vargas, a political opponent of the Manzano family, sent his assistant to the Barranquilla labour courts to study the cases filed by Mr. Manzano. Following that visit, the prosecutor's office, for no reason whatsoever, initiated a preliminary investigation into the authors' business dealings. In August 1999, during an official session of Parliament, Senator Vargas read out a list of individuals seeking payment of overdue monthly pension amounts from Foncolpuertos, a list that included judges, court clerks, inspectors of the Labour Office, directors of the Fund and lawyers, and asked the Attorney General to investigate. Hernando Manzano's name was on that list. On 13 October 1999 the prosecutor's office summoned him to explain alleged irregularities found in the context of the proceeding that had been launched against him on 14 April 1999. Despite his explanations, the prosecutor's office brought criminal charges against him. At the same time a group of his clients lodged complaints against him with the regular criminal court demanding payment of amounts greater than those agreed to when contracting his services. Those complaints were settled in the author's favour.

2.4 The persons on the "Vargas list" were not tried in the ordinary courts; the High Council of the Judiciary, in Decision No. 1799 of 14 May 2003, established a special judicial body solely for criminal proceedings concerning acts related to the liquidation of Colpuertos and Foncolpuertos. That body was made up of two criminal circuit courts and one district high court, all located in Bogotá. The decision states that it is issued pursuant to article 63 of Act No. 270 (1996) on Organization of the Administration of Justice, which deals with measures to reduce backlogs in the judicial system. The authors' case should have been assigned to a criminal court in Barranquilla, given that the alleged events occurred and the accused resided in that city. The case was heard, however, by the first of the courts mentioned above, which on 24 September 2004 found the authors guilty of being accessories in the offence of aggravated fraud and principals in the offences of peculation by appropriation for the benefit of third parties, of perversion of the course of justice, and providing false information in and forging of a public document on the part of an official. They were sentenced to 150 months' imprisonment, deprivation of their rights and public duties for 10 years, and a fine. The authors lodged an appeal, which was heard by the High Court of the Judicial District of Bogotá, Criminal Chamber for the Clearance of Foncolpuertos cases, on 31 May 2005. The Court overturned the guilty verdict for the offence of aggravated fraud. For the charges of perpetrating and being criminally

responsible for the offences of peculation by appropriation for the benefit of third parties, perversion of the course of justice, and providing false information in and forging of a public document on the part of an official, the Court reduced the sentence to eight years and one month's imprisonment, deprivation of rights and public duties for a period equivalent to that of the main penalty, and a fine.

2.5 The authors lodged an appeal in cassation with the Supreme Court, which, by decision dated 27 March 2007, declared the criminal proceedings relating to fraud, perversion of the course of justice and providing false information in and forging of a public document on the part of an official to be time-barred. The Court did not, however, declare the proceeding for peculation to be time-barred. The Court reviewed the authors' arguments for cassation, including the contention that the judicial body's decision was invalid on the grounds that it did not have jurisdiction owing to alleged violation of the principle of the natural judge ("juez natural"), and rejected the appeal by decision dated 9 April 2007. With regard to the judicial body's alleged lack of jurisdiction, the Supreme Court stated inter alia that the appellants had not demonstrated how their guarantees of due process had been restricted in practice or how the rules for their trial had been altered to the detriment of their rights, and confirmed that the establishment of the judicial bodies in question by the Administrative Chamber of the High Council of the Judiciary had its legal basis in articles 25 and 63 of Act No. 270 (1996).

2.6 The authors also filed an application for reconsideration of that decision, requesting that the criminal proceeding for peculation be declared time-barred. The Supreme Court rejected that application by decision dated 20 April 2007.

2.7 The authors maintain that as a result of the trial they received threats from guerrilla groups and were forced to flee the country. In execution of their sentence, all their assets were seized.

The complaint

3. The authors allege that they are the victims of a violation of the right to due process under article 14, paragraph 1, of the Covenant, for the following reasons:

(1) Their case was dealt with by a court created especially in 2003 to try the acts of which they had been accused and therefore showing partiality, since the appointed judges accepted the unfounded charges laid by the prosecution. That is a violation of article 6 of the Code of Criminal Procedure, according to which no one may be tried except by a competent judge or court already existing at the time when the alleged act was committed. Those bodies were established on a temporary basis, for four months, and yet are still functioning. The authors state that they filed a criminal complaint in that regard but that their complaint was never taken up.

(2) The alleged acts do not constitute the offence of peculation for which they were convicted. Peculation (*peculado*) is defined in the Criminal Code of Colombia as an offence committed by a "public official who appropriates for his own profit or that of a third party assets belonging to the State or to enterprises or institutions in which the State maintains an interest, or parafiscal assets or funds, or assets belonging to individuals the administration or custody of which have been entrusted to the official concerned by virtue of his functions". According to the authors, two fundamental elements in that offence did not exist in their case: the status of public official and profit. The authors were not public officials but merely practising lawyers, who had in fact filed suit against the State. Their judicial function was limited to demanding payment on behalf of a group of retirees of work-related debts owed but not paid by the State. As for the element of "profit", throughout the trial both the prosecution and the judges acknowledged that the fees charged

by the author were completely legal and in accordance with his clients, so that there is no basis for the charge of profiting.[1]

(3) Owing to unjustified delays in court proceedings attributable to the legal officials responsible for the case, the time limit for the criminal proceedings expired on 22 April 2006. Nevertheless the Supreme Court, in rejecting the appeal in cassation by decision dated 20 April 2007, stated only that the time limit had expired for part of the appeal, without addressing the prescription period for the offence of peculation.

(4) There were numerous errors in the appreciation of evidence. In particular, the prosecution accused the authors of having received sums of money owed by the State on behalf of clients who allegedly had not granted them authority to do so. The authors maintain that they had copies of some but not all of those powers of attorney because they were removed by the prosecution following the search of the authors' law office. In order to prove that they did have their clients' proxies, the authors requested a judicial audit of the clients' records in Foncolpuertos. However, due to negligence on the part of the investigating judges, that piece of evidence was replaced by a request to Foncolpuertos to certify that they existed. The requested certification was never provided in the event by Foncolpuertos and the judge did not seek the evidence requested by the authors. Given the lack of that evidence, the judgement was based on the false assumption that the powers of attorney did not exist, which led to a denial of justice. The few clients whom the judges agreed to question, at the insistence of the authors, confirmed that they had indeed given proxies to the authors.

State party's observations on admissibility and merits

4.1 On 16 January 2008, the State party submitted a note verbale containing observations on the admissibility of the communication, arguing that it should be declared inadmissible.

4.2 The State party points out that the communication was submitted by Carlos Julio Manzano on behalf of his brother, pursuant to the authority granted to him in the latter's general power of attorney, as well as on behalf of his mother, Maria Cristina Ocampo de Manzano, and his cousin Belisario Deyongh Manzano. He has not, however, produced any power of attorney from the latter two, supposedly because their whereabouts are unknown. The State party argues that the communication should be declared inadmissible under article 1 of the Optional Protocol on the grounds that Carlos Julio Manzano is not authorized to act on behalf of those two persons and does not submit any proof of why the alleged victims are unable to file a complaint in their own name.

4.3 The State party argues that the reason why bodies are established to relieve backlogs in the courts is to ensure prompt, effective and efficient justice. They are temporary because they are created to resolve the problem of backlogs in judicial proceedings and thereby guarantee the efficient administration of justice. Backlog courts ("juzgados de descongestión") have a legal basis under article 63 of the Act on Organization of the Administration of Justice (1996), which grants the Administrative Chamber of the High Council of the Judiciary the power to appoint, on a temporary basis, special substantiating

[1] The authors provided the Committee with copies of the guilty verdicts. The cassation judgement of 9 April 2007 refers (p. 142) to the issue of whether the facts met the definition of the crime of peculation. The Supreme Court did not agree with the authors' contention that an individual who is not a public official may not be punished for perpetrating the offence of peculation. The Court ruled that article 30 of the Criminal Code on participants in a crime was applicable and recalled that according to the last paragraph of that article, participants who do not meet the criteria for a specific crime have their sentence reduced by one quarter.

or trial judges or magistrates. Furthermore, article 257, subparagraph 2, of the Constitution provides that the High Council of the Judiciary is empowered to create, abolish, merge or transfer responsibilities within the justice system.

4.4 In the current case, the aforementioned backlog courts were set up to address the paralysis in proceedings before the circuit criminal courts across the country arising out of offences committed by Foncolpuertos, and also in view of the importance of the case, involving millions of State funds, which had given rise to the investigations, and of the need to ensure that justice was served properly and promptly. The First Chamber of the Council of State, in a decision dated 20 May 2004, when dealing with the petition for annulment of the rulings of the Administrative Chamber establishing the backlog courts ("juzgados de descongestión"), found that those courts were established in response to the need to relieve the backlog in the labour tribunals of the Barranquilla, Cartagena, Santa Marta, Buenaventura, Tumaco and Bogotá Judicial Circuits, as well as the Labour Chamber of the Barranquilla Judicial District. In the opinion of the First Chamber, it was the law with the higher ranking (article 63 of the 1966 Act), and not the challenged rulings, that provided the legal basis for modifying the rules of jurisdiction for the purpose of reducing the backlog in the court system. The constitutionality of that provision was submitted to review and was declared valid by decision C-037 of 1996.

4.5 The State party also argues that the communication should be declared inadmissible under article 2 of the Optional Protocol, on the grounds that the authors want the Committee to act as a fourth instance and review facts and evidence already considered by the domestic courts, in order to prevent execution of the criminal conviction and payment of the fine through the sale of their property.

4.6 With regard to the merits, the State party, in a letter dated 20 May 2008, referred moreover to the authors' allegations concerning the partiality of the judges. According to the State party, the authors adduce no evidence in support of their contentions, nor did they ever raise the matter before the domestic courts. The proceedings were fully in conformity with judicial guarantees and even resulted in recognition that the criminal charges relating to aggravated fraud, perversion of the course of justice and providing false information in and forging of a public document on the part of an official were time-barred.

4.7 According to the authors there was a violation of article 14 because unjustified delays in the proceedings led to prescription of the offences but the Supreme Court only declared time-barred the charges of forgery and perversion of the course of justice, not that of peculation. The State party argues that the guarantee enshrined in article 14 is complemented by the guarantee in article 9 relating to a detainee's right either to be tried within a reasonable time or released. Mr. Manzano and Mr. Deyongh were never detained and are even fugitives from Colombian justice, so that they cannot allege that they were affected by any undue delay in delivery of the criminal sentence, especially since the criminal charges relating to aggravated fraud, prevention of the course of justice and providing false information in and forging of a public document on the part of an official were declared to be time-barred, in order to clarify the legal situation of the accused and absolve them of those charges. In conclusion, the State party affirms that the authors' arguments are without merit and that there was no violation of the Covenant.

Authors' comments on the observations of the State party

5.1 In their comments dated 21 October 2008, the authors maintain that the communication should be deemed admissible. With respect to the issue of counsel's lack of authority to represent Maria Cristina Ocampo de Manzano and Belisario Deyongh Manzano, counsel submitted to the Committee documents signed by each of those persons empowering him to represent them before the Committee and expressing approval of steps already undertaken.

5.2 With regard to the legality of the judicial bodies created to deal with the Foncolpuertos-related cases, the authors argue that the Act on Organization of the Administration of Justice under which they were established violates the competent judge principle and is therefore contrary to article 14 of the Covenant. Furthermore, article 11 of the Code of Criminal Procedure, in establishing the natural judge ("juez natural") principle, states that "no one may be tried except by the competent judge or tribunal already existing at the time when the alleged act was committed". They also note that the press, which did great damage to the interests of justice, was not excluded from all the proceedings. The media labelled the accused guilty in advance, and as a result an effort was made to find judges who would accept the prosecution's charges. Since none were found, a special court was created that would heed the calls for guilty verdicts from some political circles and from the press.

5.3 The authors resided in the city of Barranquilla and the facts under investigation occurred there. It would therefore have been natural for the case to be tried by the Barranquilla circuit courts in first instance and the High Court in the event of appeal. Despite that, the cases were heard by judicial bodies located in Bogotá, some 1,000 km distant from Barranquilla. That was a violation of articles 85 to 88 of the Code of Criminal Procedure, which lay down rules with respect to any change of venue in criminal proceedings.

5.4 According to the authors, article 63 of Act No. 270 does not allow the Administrative Chamber of the High Council of the Judiciary to transfer proceedings from one city to another, in disregard of the principle of territorial jurisdiction. Nor does it permit the Chamber to appoint judges and create tribunals after the facts under investigation have occurred. The Council may only appoint judges, not create tribunals, and only on a temporary basis and within the territory of jurisdiction of the natural judge ("juez natural"). They argue that the aim of Chamber of Representatives Bill No. 286 (2007) and Senate Bill No. 23 (2006), amending Act No. 270 (1996) on Organization of the Administration of Justice, had been to modify the Code of Criminal Procedure and the Criminal Code so as to establish new rules of competence with regard to the venue for proceedings, which would henceforth be the responsibility of the High Council of the Judiciary and the Sectional Councils of the Judiciary, instead of the Supreme Court and the Judicial District High Courts. The authors see this as proof that, prior to those bills, the High Council of the Judiciary had no such competence. They point out that, in a ruling dated 15 July 2008, the Constitutional Court declared the proposed amendment unconstitutional.

5.5 With regard to the merits, the authors refer, inter alia, to the decision of the First Chamber of the Council of State of 20 May 2004 referred to by the State party, according to which the establishment of the courts in question was based on the need to relieve the backlog in the labour tribunals of the Barranquilla, Cartagena, Santa Marta, Buenaventura, Tumaco and Bogotá Judicial Circuits, as well as the Labour Chamber of the Barranquilla Judicial District. According to the authors, that decision applies only to the backlog in those labour tribunals and cannot legitimize the appointment of backlog criminal courts ("juzgados de descongestión") in Bogotá and the related District High Court.

5.6 The authors argue that in its observations the State party does not respond to the allegations in their submission to the Committee regarding violations of the right to due process arising from irregularities in the use of evidence.

5.7 The authors reject the State party's assertion that they were never detained. They point out that Hernando Manzano was detained from 13 October 1999 to 24 July 2001, while Belisario Deyongh was detained from February 2000 to July 2001. Maria Cristina Ocampo was not detained on account of her age (74 at the time).

Decision on admissibility

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

6.2 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.

6.3 The Committee takes note of the State party's observation that the authors' counsel did not produce any power of attorney for two of them and that the communication should therefore be considered inadmissible under article 1 of the Optional Protocol. The Committee observes that while those powers of attorney were not submitted initially, they were made available to the Committee subsequently. It therefore finds that the ground for inadmissibility put forward by the State party is not relevant.

6.4 The authors allege that they were victims of violations of their right to due process on the grounds that the judicial bodies that tried them: committed irregularities in the appreciation of evidence; convicted them of the offence of peculation, when the definition given in the Criminal Code did not correspond to the acts of which they were accused; and erred in calculating the prescription period for that offence. The Committee observes that these allegations relate to the evaluation of facts and evidence by the courts of the State party. The Committee recalls its jurisprudence according to which it is incumbent on the courts of State parties to evaluate the facts and 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.[2] The Committee has studied the materials submitted by the parties, including the guilty verdict of the court of first instance and the decisions on the remedies of appeal and cassation exercised by the authors, which deal with the complaints now lodged with the Committee by the authors. The Committee is of the opinion that the materials submitted do not indicate that those proceedings were flawed as alleged. The Committee therefore finds that the authors have not sufficiently substantiated their complaints of a violation of article 14, paragraph 1, and that the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.5 The authors further allege that they were tried by a court and a tribunal that did not meet the requirement of impartiality, because they were established in an ad hoc manner and in violation of the natural judge ("juez natural") principle. The Committee is of the opinion that article 14 does not necessarily prohibit the creation of criminal courts with special jurisdiction if that is permitted under domestic legislation and those courts operate in conformity with the guarantees laid down in article 14.[3] With respect to the first of these requirements, the Committee observes that the Supreme Court, after hearing the authors' appeal in cassation, concluded that the creation of those bodies had its legal basis in the Act on Organization of the Administration of Justice. The Committee is of the opinion that its role is not to evaluate the interpretation of domestic legislation by national courts.[4] Regarding the second requirement, the Committee considers the fact that the judicial bodies were created specifically for proceedings relating to Foncolpuertos does not mean that they operated with partiality. Other elements are necessary to prove partiality, the existence of

[2] See general comment No. 32 on article 14: Right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32, para. 26). See also communication No. 541/1993, *Errol Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, para. 6.2.

[3] General comment No. 32, para. 22.

[4] Communication No. 1528/2006, *Fernández Murcia v. Spain*, decision of inadmissibility adopted on 1 April 2008, para. 4.3.

which cannot be deduced from the materials available to the Committee. The Committee therefore finds that the authors have not sufficiently substantiated their allegation in that regard and that that part of the communication is also inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision should be transmitted to the State party, to the authors and to counsel.

[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.]