

**INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS**

**HUMAN RIGHTS COMMITTEE
SELECTED DECISIONS
under
THE OPTIONAL PROTOCOL**

(Second to sixteenth sessions)



UNITED NATIONS
New York, 1985

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INTRODUCTION

1. The International Covenant on Civil and Political Rights and the Optional Protocol thereto were adopted by the General Assembly on 16 December 1966 and entered into force on 23 March 1976.

2. In accordance with article 28 of the Covenant, the States parties established the Human Rights Committee on 20 September 1976.

3. Under the Optional Protocol, individuals who claim that any of their rights set forth in the Covenant have been violated and who have exhausted all available domestic remedies may submit written communications to the Human Rights Committee for consideration. Of the 80 States which have acceded to or ratified the Covenant 34 have accepted the competence of the Committee to receive and consider individual complaints by ratifying or acceding to the Optional Protocol.* These States are Barbados, Bolivia, Cameroon, Canada, the Central African Republic, Colombia, Congo, Costa Rica, Denmark, the Dominican Republic, Ecuador, Finland, France, Iceland, Italy, Jamaica, Luxembourg, Madagascar, Mauritius, the Netherlands, Nicaragua, Norway, Panama, Peru, Portugal, Saint Vincent and the Grenadines, Senegal, Suriname, Sweden, Trinidad and Tobago, Uruguay, Venezuela, Zaire and Zambia. No communication can be received by the Committee if it concerns a State party to the Covenant which is not also a party to the Optional Protocol.

4. Under the terms of the Optional Protocol, the Committee may consider a communication only if certain conditions of admissibility are satisfied. These conditions are set out in articles 1, 2, 3 and 5 of the Optional Protocol and restated in rule 90 of the Committee's provisional rules of procedure, pursuant to which the Committee shall ascertain:

(a) That the communication is not anonymous and that it emanates from an individual, or individuals, subject to the jurisdiction of a State party to the Protocol;

(b) That the individual claims to be a victim of a violation by that State party of any of the rights set forth in the Covenant. Normally, the communication should be submitted by the individual himself or by his representative; the Committee may, however, accept to consider a communication submitted on behalf of an alleged victim when it appears that he is unable to submit the communication himself;

(c) That the communication is not an abuse of the right to submit a communication under the Protocol;

(d) That the communication is not incompatible with the provisions of the Covenant;

(e) That the same matter is not being examined under another procedure of international investigation or settlement;

(f) That the individual has exhausted all available domestic remedies.

5. From the time when the Committee started its work under the Optional Protocol at its second session in 1977 to its sixteenth session in 1982, inclusive, 124 communications relating to alleged violations by 13 States parties were placed before it for consideration. During that period 249 formal decisions were adopted, as follows:

(a) Decisions at pre-admissibility stages (mainly under rule 91 of the Committee's provisional rules of procedure, requesting additional information or observations on questions relating to admissibility): 112;

(b) Decisions declaring a communication inadmissible, discontinued or suspended (relating to 39 communications): 36;

(c) Decisions declaring a communication admissible: 54;

(d) Further interlocutory decisions after a communication has been declared admissible (requesting additional information or explanations from the parties): 16;

(e) Views under article 5 (4): 31.

6. Although article 5 (3) of the Optional Protocol provides that "the Committee shall hold closed meetings when examining communications under the present Protocol", the Committee decided at its seventh session that the terms of the Protocol did not preclude publication of its "views" adopted after consideration of a communication, that publication was desirable in the interest of the most effective exercise of the Committee's functions under the Protocol, and that publication in full was preferable to publication of a summary only. In the annual reports of the Human Rights Committee, beginning with the 1979 report and up to the 1982 report, 31 final views, one decision on inadmissibility and one decision to discontinue consideration have been published in full.¹

7. At its fifteenth session the Committee decided, in addition, to proceed with the periodical publication of a selection of its decisions under the Optional Protocol in a suitably edited form. The present volume covers decisions taken from the second to the sixteenth sessions, inclusive. It contains all "views" adopted under article

¹ See *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 40 (A/34/40); Thirty-fifth Session, Supplement No. 40 (A/35/40); Thirty-sixth Session, Supplement No. 40 (A/36/40); Thirty-seventh Session, Supplement No. 40 (A/37/40).*

* As at 31 December 1984.

5 (4) of the Optional Protocol (final decisions on the merits) as well as a selection of decisions on admissibility and other decisions adopted in the course of proceedings under the Optional Protocol. In addition to the views, the decisions selected are those which best illustrate, on the procedural level, the Committee's method of work at the different stages of consideration of cases, and on the substantive level, the provisions of the Covenant and of the Optional Protocol.

8. With regard to the publication of decisions relating to communications declared inadmissible or on which action has been discontinued, the names of the author(s), the alleged victim(s) and the State party are, where the Committee considers it desirable, replaced by letters or initials. With respect to decisions of an in-

terlocutory kind, including decisions declaring a communication admissible, the Committee will normally not publish the names of the author(s), the alleged victim(s) and the State party concerned, unless the names have been disclosed in a decision already published.

9. Communications under the Optional Protocol are numbered consecutively, indicating the year of registration (e.g. No. 1/1976).

10. The Human Rights Committee hopes that this publication will be of value to all interested parties, Governments, practitioners, research workers and the general public, and will contribute to its goal of strengthening international observance of the rights enshrined in the International Covenant on Civil and Political Rights.

INTERLOCUTORY DECISIONS PRIOR TO ADMISSIBILITY DECISION

SECOND SESSION

Communication No. 1/1976

Submitted by: A *et al.* in August 1976

Alleged victims: A *et al.*

State party: S

Date of decision: 26 August 1977 (second session)

Transmittal to State party under rule 91—Request to State party for information on admissibility—Request to authors for information on standing

With regard to communication No. 1/1976, dated August 1976, addressed to the Secretary-General for submission to the Human Rights Committee by A *et al.*, the Human Rights Committee decides:

(a) That the communication be transmitted to the State party concerned under rule 91 of the provisional rules of procedure, requesting from the State party information and observations relevant to the question of admissibility of the communication with regard to 14 of the authors of the communication who allege that they are victims of violations of the Covenant;

(b) That, with regard to the other alleged victims named in the communication, the State party be informed that the Committee is taking steps to seek further information from the authors of the communication, with a view to ascertaining certain questions regarding the admissibility of the communication in respect of those other alleged victims, and that the Committee will, in this regard, communicate further with the State party in due course;

(c) That the 18 authors be requested to furnish detailed information on:

(i) The grounds and circumstances justifying their acting on behalf of the alleged victims who are

not signatories to the communication, in particular the authors' reasons for believing that these victims would approve the authors' acting on their behalf and the authors' reasons for believing that they are unable to act on their own behalf,

(ii) The efforts made or steps taken by the victims or on their behalf to exhaust domestic remedies;

(d) That the State party and the authors of the communication be informed that, as a rule, the Committee can only consider an alleged violation of human rights occurring on or after 23 March 1976 (the date of entry into force of the Covenant and the Protocol for S) unless it is an alleged violation which, although occurring before that date, continues or has effects which themselves constitute a violation after that date;

(e) That the State party and the authors be informed that their information or observations should reach the Human Rights Committee, in care of the Division of Human Rights, United Nations Office at Geneva, within six weeks of the date of the request;

(f) That the Secretary-General transmit any information or observations received to the other party as soon as possible to enable the other party to comment thereon if it so wishes. Any such comments should reach the Human Rights Committee, in care of the Division of Human Rights, United Nations Office at Geneva, within four weeks of the date of the transmittal.

Communication No. 4/1977

Submitted by: William Torres Ramírez on 13 February 1977

Alleged victim: The author

State party: Uruguay

Date of decision: 26 August 1977 (second session)

Transmittal to State party under rule 91—Request to State party for information on admissibility—Request to author on exhaustion of domestic remedies

With regard to communication No. 4/1977, dated 13 February 1977, addressed to the Human Rights Com-

mittee by William Torres Ramírez, the Human Rights Committee decides:

(a) That the communication be transmitted to the State party concerned under rule 91 of the provisional rules of procedure requesting from the State party infor-

mation and observations relevant to the question of admissibility of the communication;

(b) That the author be requested to furnish information on his efforts or steps taken to exhaust domestic remedies and to give details of the facts which constitute the alleged violations of articles 18 and 19 of the Covenant;

(c) That the State party and the author of the communication be informed that, as a rule, the Committee can only consider an alleged violation of human rights occurring on or after 23 March 1976 (the date of entry into force of the Covenant and the Protocol for Uruguay), unless it is an alleged violation which, although occurring before that date, continues or has

effects which themselves constitute a violation after that date;

(d) That the State party and the author be informed that their information and observations should reach the Human Rights Committee, in care of the Division of Human Rights, United Nations Office at Geneva, within six weeks of the date of the request;

(e) That the Secretary-General transmit any information or observations received to the other party as soon as possible to enable the other party to comment thereon if it so wishes. Any such comments should reach the Human Rights Committee, in care of the Division of Human Rights, United Nations Office at Geneva, within four weeks of the date of the transmittal.

THIRD SESSION

Communication No. 4/1977

Submitted by: William Torres Ramírez on 13 February 1977

Alleged victim: The author

State party: Uruguay

Date of decision: 26 January 1978 (third session)

Request to author for information on submission of same matter to the Inter-American Commission on Human Rights (IACHR)—Request to State party on remedies available to alleged victim

Article of Optional Protocol: 5 (2) (a) and (b)

The Human Rights Committee decides:

(a) That the author be informed

(i) That the Committee understands that a case concerning him (Case No. 2109, October 1976) has been submitted to and declared admissible by the Inter-American Commission on Human Rights under the special procedure governed by articles 53 to 57 of its Regulations,

(ii) That the Committee is precluded by article 5 (2) (a) of the Optional Protocol from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. If the author maintains that the matter which he has submitted to the Human Rights Committee is not the same matter which is under consideration by the Inter-American Commission on Human Rights, he should inform the Committee of his grounds for so maintaining and furnish the Committee with any other information in his possession relating to the submission of the case to and its examination by the Inter-American Commission on Human Rights. In the absence of any further information pertinent to this question, the Committee may have to conclude that case No. 2109 before the Inter-American Commission on

Human Rights and the communication submitted under the Optional Protocol concern the same matter.

(b) That the State party be informed that, in the absence of more specific information concerning the domestic remedies said to be available to the author, and the effectiveness of those remedies as enforced by the competent authorities in Uruguay, the Committee is unable to accept that he has failed to exhaust such remedies. The communication will therefore not be considered inadmissible in so far as exhaustion of domestic remedies is concerned, unless the State party gives details of the remedies which it submits have been available to the author in the circumstances of his case, together with evidence that there would be a reasonable prospect that such remedies would be effective;

(c) That the State party and the author be informed that any additional information which they may wish to submit in this connection should reach the Human Rights Committee, in care of the Division of Human Rights, United Nations Office at Geneva, within six weeks of the date of the present communication addressed to them;

(d) That the Secretary-General transmit any information or observations received to the other party as soon as possible to enable the other party to comment thereon if it so wishes. Any such comments should reach the Human Rights Committee, in care of the Division of Human Rights, United Nations Office at Geneva, within four weeks of the date of the transmittal;

(e) That the text of this decision be communicated to the State party and the author.

Communication No. 20/1977

Submitted by: M. A. in December 1977

Alleged victim: Author's husband

State party: S

Date of decision: 25 January 1978 (third session)

Transmittal to State party under rule 91—Request to State party for information on admissibility, available remedies, whereabouts and state of health of alleged victim

Article of Optional Protocol: 5 (2) (a) and (b)

The Human Rights Committee decides:

(a) That the communication be transmitted to the State party concerned under rule 91 of the provisional rules of procedure requesting from the State party information and observations relevant to the question of admissibility of the communication. If the State party contends that domestic remedies have not been exhausted, it is requested to give details of the effective remedies available to the alleged victim in this case. If the State party objects that the same matter is already being examined under another procedure of international investigation or settlement, it should give details including information on the stage reached in those proceedings;

(b) That the State party be requested to inform the Committee of the alleged victim's whereabouts and his state of health;

(c) That it should be explained to the author that the Committee is precluded under article 5 (2) (a) of the Optional Protocol from considering a communication if the same matter is being examined under another pro-

cedure of international investigation or settlement. In this connection the author should be requested to state whether a case concerning the alleged victim has been submitted by her or, to her knowledge, by any other person to the Inter-American Commission on Human rights. If so, she should give details, including any information in her possession as to the stage reached in the procedure before the Inter-American Commission on Human Rights, so as to assist the Committee in determining whether the same matter is being examined under that procedure;

(d) That the State party and the author be informed that their information and observations should reach the Human Rights Committee, in care of the Division of Human Rights, United Nations Office at Geneva, within six weeks of the date of the request;

(e) That the Secretary-General transmit any information or observations received to the other party as soon as possible to enable the other party to comment thereon if it so wishes. Any such comments should reach the Human Rights Committee, in care of the Division of Human Rights, United Nations Office at Geneva, within four weeks of the date of the transmittal;

(f) That the text of this decision be communicated to the State party and the author.

Communication No. 22/1977

Submitted by: O. E. on 30 December 1977

Alleged victim: Author's son

State party: S

Date of decision: 25 January 1978 (third session)

Transmittal to State party under rule 91—Request for information on admissibility and available remedies—Interim measures—Request that alleged victim not be expelled by State party—Request to author for substantiation, and information on exhaustion of domestic remedies

The Human Rights Committee decides:

(a) That the communication be transmitted to the State party concerned under rule 91 of the provisional rules of procedure requesting from the State party information and observations relevant to the question of admissibility of the communication. If the State party contends that domestic remedies have not been exhausted, it is requested to give details of the effective remedies available to the alleged victim in this case. If the State party objects that the same matter is already being ex-

amined under another procedure of international investigation or settlement, it should give details including information on the stage reached in those proceedings;

(b) That the State party be asked to inform the Committee whether deportation or extradition of the alleged victim to country X is being contemplated;

(c) That the State party be informed, in accordance with rule 86 of the provisional rules of procedure, of the view of the Committee that pending further consideration of the case, the alleged victim, having sought refuge in S, should not be handed over or expelled to country X;

(d) That the author be requested to furnish information

(i) In substantiation of the claim that each of the articles 7, 9, 13, 14 and 15 of the International

Covenant on Civil and Political Rights, referred to by him, has been violated,

(ii) On any steps taken by the alleged victim or on his behalf to exhaust domestic remedies;

(e) That the State party and the author be informed that their information and observations should reach the Human Rights Committee, in care of the Division of Human Rights, United Nations Office at Geneva, within six weeks of the date of the request;

(f) That the Secretary-General transmit any information or observations received to the other party as soon as possible to enable the other party to comment thereon if it so wishes. Any such comments should reach the Human Rights Committee, in care of the Division of Human Rights, United Nations Office at Geneva, within four weeks of the date of the transmittal;

(g) That the text of this decision be communicated to the State party and the author of the communication.

FOURTH SESSION

Communication No. 10/1977

Submitted by: Alice Altesor and Víctor Hugo Altesor on 10 March 1977

Alleged victim: Alberto Altesor (authors' father)

State party: Uruguay

Date of decision: 26 July 1978 (fourth session)

Request to State party for medical report on alleged victim—Notice to authors of Committee's preclusion if same matter before IACHR

Article of Optional Protocol: 5 (2) (a)

The Human Rights Committee decides:

1. That the State party be informed that the Committee has taken note, with appreciation, of the information provided by the State party pursuant to paragraph (c) of the Committee's decision of 26 January 1978, concerning the medical examination and state of health of Alberto Altesor, and that the Committee is looking forward to early receipt of the medical report;

2. That upon receipt, the medical report be transmitted to the authors for their information;

3. That the authors of the communication be informed,

(a) That on the basis of the information before the Committee, and in the absence of more specific information from the authors in support of their contention to the contrary, it appears that case No. 2112 before the Inter-American Commission on Human Rights concerns the same matter as that submitted to the Committee by the authors;

(b) That, accordingly, the Committee may be precluded by article 5 (2) (a) of the Optional Protocol from continuing consideration of the communication, unless the authors furnish more specific information in support of their contention that it is not the same matter;

4. That the text of this decision be communicated to the State party and the authors.

Communication No. 22/1977

Submitted by: O.E. on 30 December 1977

Alleged victim: Author's son

State party: S

Date of decision: 26 July 1978 (fourth session)

Interim measures, request to State party that alleged victim not be expelled—Request to author for information on submission of same matter to IACHR

Article of Optional Protocol: 5 (2) (a)

The Human Rights Committee decides:

1. That the State party be informed that the Committee has taken note, with appreciation of the information provided by the State party pursuant to paragraph

(b) of the Committee's decision of 25 January 1978 and that, pending further consideration of the case, the Committee is still of the view, expressed in paragraph (c) of that decision, that the alleged victim, having sought refuge in S, should not be handed over or expelled to country X.

2. That the author of the communication be reminded of the Committee's request for further information pursuant to paragraph (d) of its decision of 25

January 1978, in particular on any steps taken to exhaust domestic remedies, taking into account the note from the State party dated 14 April 1978;

3. That the author be informed that unless he furnishes the requested information within six weeks of the date of the reminder, the Committee may conclude that he no longer wishes the Committee to continue consideration of the communication;

4. That the attention of the author be drawn to the observation of the State party that the matter referred to in his communication has been investigated under the procedure established by the Inter-American Commission on Human Rights ...;

5. That the author be informed that the Committee is precluded by article 5 (2) (a) of the Optional Protocol from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. If the author maintains that the matter which he has submitted to the Human Rights Committee is not the same matter which has been submitted to the Inter-American Commission

on Human Rights, he should inform the Committee of his grounds for so maintaining and furnish the Committee with any other information in his possession relating to the submission of the case to and its examination by the Inter-American Commission on Human Rights. In the absence of any further information pertinent to this question, the Committee may have to conclude that [the] case ... before the Inter-American Commission on Human Rights and the communication submitted under the Optional Protocol concern the same matter;

6. That it should be explained to the author that this is not a decision on the admissibility of his communication;

7. That the Secretary-General transmit any reply received from the author to the State party as soon as possible to enable the State party to comment thereon if it so wishes, within four weeks of the date of the transmittal;

8. That the text of this decision be communicated to the State party and the author.

ELEVENTH SESSION

Communication No. 73/1980

Submitted by: Ana María Teti Izquierdo on 7 July 1980

Alleged victim: Mario Alberto Teti Izquierdo (author's brother)

State party: Uruguay

Date of decision: 24 October 1980 (eleventh session)

Transmittal to State party under rule 91—Request for information on whereabouts and state of health of alleged victim, copies of court orders or decisions

The Human Rights Committee decides:

1. That the author of the communication is justified in acting on behalf of the alleged victim;

2. That the communication be transmitted, under rule 91 of the provisional rules of procedure, to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication. If the State party contends that domestic remedies have not been exhausted, it is requested to give details of the effective remedies available to the alleged victim in the particular circumstances of his case, and, in particular, to specify which of the alleged violations could be effectively remedied within the purview of the established military judicial process. If the State party objects that the same matter is being examined under another procedure of international investigation or settlement, it should give details including information on the stage reached in those proceedings;

3. That the State party be requested to provide the Committee with copies of any court orders or decisions relevant to this case, including the decision of the Supreme Military Tribunal, referred to in the communication;

4. That the State party and the author of the communication be informed that, as a rule, the Committee can only consider an alleged violation of human rights occurring on or after 23 March 1976 (the date of entry into force of the Covenant and the Protocol for Uruguay) unless it is an alleged violation which, although occurring before that date, continues or has effects which themselves constitute a violation after that date;

5. That the State party be informed that its information and observations pursuant to paragraphs 2 and 3 above should reach the Human Rights Committee, in care of the Division of Human Rights, United Nations Office at Geneva, within two months of the date of the request;

6. That the Secretary-General transmit any information or observations received pursuant to paragraphs 2 and 3 above to the author of the communication as soon as possible to enable her to comment thereon if she so wishes. Any such comments should reach the Human Rights Committee, in care of the Division of Human Rights, United Nations Office at Geneva, within four weeks of the date of the transmittal;

7. That, in view of the telegram received from the author of the communication on 9 October 1980, in-

forming the Committee that her brother had disappeared from the Libertad prison and expressing, in that context, fear for his physical safety, the State party be requested to furnish without delay information concerning the present whereabouts and state of health of Mario Alberto Teti Izquierdo;

8. That the information received pursuant to paragraph 7 above be communicated to the author of the communication without delay, for information;

9. That this decision be communicated to the State party and the author.

DECISIONS DECLARING A COMMUNICATION ADMISSIBLE

SIXTH SESSION

Communication No. 31/1978

Submitted by: Guillermo Waksman on 25 May 1978

Alleged victim: The author

State party: Uruguay

Date of decision on admissibility: 24 April 1979 (sixth session)

Passport renewal—Journalist—Refugee—Freedom of movement—Freedom of expression
Articles of Covenant: 12 and 19

The author of the communication, dated 25 May 1978, is a 33-year-old Uruguayan citizen, journalist and translator, who was residing in Switzerland at the time of submission of the communication. He submits the communication on his own behalf.

The author states that from 1965 to 1972 he was an official in the judicial system in Uruguay, during which time he also worked as a journalist for three Uruguayan periodicals, subsequently banned by the military Government. In 1972, he left Uruguay for Chile, where he worked for a journal that supported the Government of Salvador Allende. He sought asylum in the Embassy of Argentina in September 1973, following the *coup d'état* in Chile, and travelled to Switzerland where he was later (18 April 1978) granted refugee status. On 27 September 1977, the author claims to have submitted an application for renewal of his Uruguayan passport at the Consulate in Geneva, and states that he was subsequently informed that, after consultation with the Uruguayan Government, the Consulate was not authorized to renew his passport. He states in this connection that he was never been declared "wanted", arrested or charged with any offence in Uruguay, and that he has never belonged to a political party.

The author alleges that the State party has refused to renew his passport, in order to punish him for the opinions which he holds and has expressed concerning alleged violations of human rights in Uruguay. He maintains that this constitutes a violation of articles 12 (2) and 19 of the International Covenant on Civil and Political Rights.

The author claims that under article 12 (2) of the Covenant, the Government of Uruguay is obliged to respect not only his right to leave Uruguay, but also his right to leave any country. To that effect, he maintains, Uruguayan authorities are obliged to furnish him with a passport, without which his right to leave and enter a country may become more or less meaningless. The author further claims that by refusing to renew his

passport, Uruguayan authorities have restricted his ability to cross frontiers in the course of seeking, receiving and imparting information and ideas, in violation of article 19 of the Covenant. He states that he has not submitted the matter under any other international procedure.

Under rule 91 of the provisional rules of procedure of the Committee, the communication was transmitted to the State party on 28 September 1978, with the request that the State party submit, by 9 November 1978 at the latest, information or observations which it might deem relevant to the question of the admissibility of the communication, in particular as regards the fulfilment of the conditions set out in article 5 (2) (a) and (b) of the Optional Protocol. No reply has been received from the State party in this connection.

The Committee finds, on the basis of the information before it, that it is not precluded by article 5 (2) (a) of the Optional Protocol from considering the communication. The Committee is also unable to conclude that in the circumstances of his case, there are effective domestic remedies available to the alleged victim which he has failed to exhaust. Accordingly, the Committee finds that the communication is not inadmissible under article 5 (2) (b) of the Optional Protocol.

The Human Rights Committee therefore decides:

1. That the communication is admissible;
2. That, in accordance with article 4 (2) of the Protocol, the State party shall be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;
3. That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Protocol must primarily relate to the substance of the matter under consideration, and in particular the specific violations of the Covenant alleged to have occurred;
4. That any explanations or statements received from the State party shall be communicated by the

Secretary-General to the author of the communication under rule 93 (3) of the provisional rules of procedure of the Committee, with the request that any additional observations which he may wish to submit should reach the Human Rights Committee, in care of the Division of

Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

5. That this decision be communicated to the State party and to the author of the communication.

SEVENTH SESSION

Communication No. 24/1977

Submitted by: Sandra Lovelace on 29 December 1977

Alleged victim: The author

State party: Canada

Date of decision on admissibility: 14 August 1979 (seventh session)¹

Minorities—Indian Act—Sex discrimination—Exhaustion of domestic remedies

Articles of Covenant: 3 and 27

Article of Optional Protocol: 5 (2) (b)

The author of the communication dated 29 December 1977 is a Canadian citizen of Indian origin, living in Canada. She stated that she was born and registered as "Maliseet Indian" but that she had lost her rights and status as an Indian in accordance with the relevant section of the Indian Act after having married a non-Indian. She also stated that, in accordance with that same Act, an Indian man who married a non-Indian woman did not lose his Indian status, and claimed therefore that the Act was discriminatory on the ground of sex and contrary to the Covenant. The author submitted "that all domestic remedies have been exhausted in so far as the jurisprudence rests on the decision of the Supreme Court of Canada".

In a further communication, dated 17 April 1978, the author maintained that the judgement of the Supreme Court of Canada in *The Attorney General of Canada v. Jeanette Lavell, Richard Isaac et.al. v. Yvonne Bédard* [1974] S.C.R. 1349, of which she transmitted a copy, was relevant to her claim, and that domestic remedies had already been exhausted in Canada with regard to the subject matter she complained of before the Human Rights Committee. In the judgement in question the Supreme Court decided that the provision of the Indian Act, under which an Indian woman who married a non-Indian lost her Indian status, was valid as it was not rendered inoperative by section 1 (b) of the Canadian Bill of Rights providing for "equality before the law... without discrimination by reason of... sex".

By its decision of 18 July 1978, the Human Rights Committee transmitted the communication, under rule 91 of the provisional rules of procedure, to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication.

At its meeting on 6 April 1979, the Working Group of the Human Rights Committee reiterated its request to the State party for information and observations and decided that consideration of the communication be continued at the seventh session of the Committee and its Working Group.

When considering the question of admissibility of the communication the Committee had not received any information or observations from the State party, the second deadline for submission of such observations having expired on 18 May 1979.

With regard to exhaustion of domestic remedies the Committee finds that article 5 (2) (b) of the Optional Protocol does not impose on the alleged victim the obligation to have recourse to the national courts if the highest court of the State party concerned has already substantially decided the question at issue. Accordingly, the Committee concludes that the communication is not inadmissible under article 5 (2) (b) of the Optional Protocol.

The Human Rights Committee therefore decides:

1. That the communication is admissible;
2. That, in accordance with article 4 (2) of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;
3. That any explanations or statements received from the State party shall be communicated by the Secretary-General to the author, under rule 93 (3) of the provisional rules of procedure of the Committee, with the request that any comments which the author may wish to submit thereon should reach the Human Rights Committee, in care of the Division of Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;
4. That the author shall be requested to submit additional information to the Committee within six weeks of the date of the transmittal of this decision, concerning her age and the date of her marriage;
5. That this decision be communicated to the State party and the author of the communication.

¹ Pursuant to rule 85 of the provisional rules of procedure, Mr. Walter Surma Tarnopolsky did not participate in the consideration of this communication.

DECISIONS DECLARING A COMMUNICATION PARTLY ADMISSIBLE

SEVENTH SESSION

Communication No. 29/1978

Submitted by: E. B. on 7 April 1978

Alleged victims: B, C, D, E

State party: S

Date of decision on admissibility: 14 August 1979 (seventh session)

Author's standing to act for alleged victims—Exhaustion of domestic remedies—Burden of proof—Harassment of counsel

Articles of Optional Protocol: 2 and 5 (2) (b)

The author of the communication dated 7 April 1978 is a Spanish national living in Spain. He submitted the communication on behalf of his brother, B. The author also purported to act on behalf of C, D, and E. All four persons are allegedly imprisoned in S.

The author claimed that on 10 July 1977 his brother and the latter's son had been arrested at their place of work, a photographic studio in city X by members of the military police who had confiscated all the photographic equipment. The author believed that the arrest had occurred because his brother and his brother's son had made photographs showing people being tortured. The author further stated that his brother's son had been released after three days, after having been forced to remain on a chair with his head covered, with a view to persuading his father, who was subjected to severe torture, to confess guilt. The author claimed that his brother had subsequently been detained at an undisclosed place and that the family had only been informed of his whereabouts after threatening to take action against the S Consulate in Madrid.

By its decision of 26 July 1978 the Human Rights Committee:

(a) Decided that the author was justified, by reason of close family connection, in acting on behalf of his brother, B;

(b) Requested the author to furnish detailed information as to the grounds and circumstances justifying his acting on behalf of the other three alleged victims, the efforts made and steps taken by or on behalf of all the alleged victims to exhaust domestic remedies and whether the same matter had been submitted to the Inter-American Commission on Human Rights;

(c) Decided that the communication be transmitted, under rule 91 of the provisional rules of procedure, to the State party concerned requesting information and observations relevant to the question of admissibility in so far as the communication related to B, pointing out,

in particular, that if the State party contended that domestic remedies had not been exhausted, it was requested to give details of the effective remedies available to the alleged victim in the particular circumstances of his case.

The State party, in its response dated 29 December 1978, stated that B had not exercised any domestic remedies and it enclosed in an annex a description of the rights available to accused persons before the military criminal tribunals and the domestic remedies designed to protect and safeguard the rights of the accused under the S judicial system. The State party expressed the opinion that the author of the communication would have to prove that a certain legal remedy has been exercised or that it would be ineffective.

In his reply, dated 7 February 1979, to the Committee's request, the author described the steps taken to exhaust domestic remedies in respect of his brother, B. He claimed that an appeal had been filed and that every kind of legal proceeding had been instituted on behalf of his brother.

He further claimed that his brother's first defence lawyer, L, had been detained because of his efforts to act in the case, that a second defence lawyer had subsequently disappeared and that the third lawyer, engaged by the Spanish Consulate in X, had been imprisoned. The author furnished no information as to the other points raised in the Committee's decision of 26 July 1978.

After having considered all submissions by the author, the Human Rights Committee finds that the information furnished so far by the author does not justify his acting on behalf of C, D, and E.

With regard to the exhaustion of local remedies the Committee is unable to conclude on the basis of the information before it, that there are further remedies available to the author's brother, B which he could or should have pursued. It seems to the Human Rights Committee that an attempt has been made to file an appeal on behalf of the alleged victim and that the three lawyers who have been acting in his defence have either

been imprisoned or disappeared. This statement by the author has so far not been contested by the State party. Accordingly, the Committee finds that the communication is not inadmissible under article 5 (2) (b) of the Optional Protocol. This decision may be reviewed in the light of further explanations which the State party may submit under article 4 (2) of the Optional Protocol, giving details of any domestic remedies which it claims to have been available to the alleged victim, together with evidence that there would be a reasonable prospect that such remedies would be effective.

The Human Rights Committee therefore decides:

1. That the communication is admissible as far as it relates to the author's brother, B;
2. That the consideration of the communication shall be discontinued as far as it relates to C, D and E, because of lack of information;
3. That, in accordance with article 4 (2) of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

4. That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must primarily relate to the substance of the matter under consideration, and in particular the specific violations of the Covenant alleged to have occurred. The State party is requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration;

5. That any explanations or statements received from the State party shall be communicated by the Secretary-General to the author of the communication, under rule 93 (3) of the provisional rules of procedure of the Committee, with the request that any additional observations which he may wish to submit should reach the Human Rights Committee, in care of the Division of Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

6. That this decision be communicated to the State party and to the author of the communication.

NINTH SESSION

Communication No. 27/1978

Submitted by: Larry James Pinkney on 25 November 1977

Alleged victim: The author

State party: Canada

Date of decision on admissibility: 2 April 1980 (ninth session)

Exhaustion of domestic remedies—Compatibility of communication with Covenant—Abuse of right of submission—Alleged mistrial—Procedural delays—Alien—Author's failure to appeal against deportation order—Prison conditions—Control of prisoner's correspondence

Articles of Covenant: 10 (1) and (2), 13, 14 (1), (3) and (5) and 17

Articles of Optional Protocol: 3 and 5 (2) (b)

1. The author of the communication (initial letter dated 25 November 1977 and a further letter dated 7 April 1978) is a citizen of the United States of America who is serving a prison sentence in Canada. He describes himself as a black political activist, having been involved in the activities of several political organizations since 1967 (Black Panther Party (1967-1968), Black National Draft Resistance League (Chairman) (1969-1970), San Francisco Black Caucus (Co-Chairman) (1970-1973), Minister of the Interior for the Republic of New Africa (1970-1972) under the name of Makua Atana and, since 1974, Chairman of the Central Committee of the Black National Independence Party). He entered Canada as a visitor in September 1975. In May 1976 he was arrested by police authorities in Vancouver, British Columbia, on charges under the

Canadian Criminal Code and remanded to the Lower Mainland Regional Correction Centre at Oakalla, British Columbia, pending his trial on certain criminal charges. Because of his arrest, Mr. Pinkney's continued presence in Canada came to the attention of immigration officials and consequently, during the period that he was incarcerated at the Correction Centre, proceedings were taken under the Immigration Act to determine whether he was lawfully in Canada. These proceedings took place during the period between 21 May 1976 and 10 November 1976 when an order of deportation was issued against Mr. Pinkney. Subsequently, he was convicted of the criminal charges against him and sentenced to a term of five years' imprisonment.

2. By its decision of 18 July 1978 the Human Rights Committee transmitted Mr. Pinkney's communication under rule 91 of the provisional rules of procedure to the State party concerned requesting information and observations relevant to the question of admissibility of the communication.

3. The Committee also communicated its decision to Mr. Pinkney.

4. The State party's submissions on the question of admissibility were contained in letters of 18 June 1979 and 10 January 1980 and further comments from

Mr. Pinkney were contained in letters of 11 and 15 July 1979 and 21 and 22 February 1980.

5. Mr. Pinkney claims (a) that he is the victim of a mistrial in Canada in regard to the criminal charges brought against him, (b) that he has been prevented from appealing against the deportation order, which is due to come into effect upon his release from prison, and (c) that he has been subjected to ill-treatment because of his race. He alleges that, in consequence, the State party has violated articles 10 (1) and (2) (a), 13, 14 (1) and (3) (b), 16 and 17 (1) of the International Covenant on Civil and Political Rights.

(a) *The claims concerning the alleged mistrial*

6. Mr. Pinkney's allegations relating to these claims are as follows:

Prior to his arrest in May 1976, he had spent over three months in Vancouver compiling specific information on alleged smuggling activities of certain East Indian Asian immigrants in Canada, involving smuggling out of Africa into Europe, Canada and the United States, with the complicity of Canadian immigration officials. He maintains that he was doing this work on behalf of the Governing Central Committee of the Black National Independence Party (BNIP) with a view to putting an end to these illegal activities, which he contends were to the detriment of the economy of African countries. The author further indicates that, during the period prior to his arrest, he managed to establish contact with a relative of the persons involved in the smuggling of diamonds and large sums of money from Kenya, Tanzania, Uganda and Zaire into Canada. He states that the relative revealed to him many details about her uncle's smuggling activities, that he recorded this information on tape, that he made copies of the letters showing dates and amounts of transactions, names of people involved and other details and that he placed this material in a brief-case kept in a 24-hour public locker. He asserts that in one of the letters which was copied reference was made to a gift in cash to certain Canadian immigration officials for their assistance and also to the need to pay more money to a BOAC airline pilot for his help. The author maintains that he periodically informed the Central Committee of the BNIP and a security official at the Kenyan Embassy in Washington of his investigation by telephone and that he recorded these conversations and placed the tapes in the briefcase. The author maintains that after he was arrested, in May 1976, the brief-case was discovered and confiscated by the police and that the material necessary for his defence mysteriously disappeared before his trial. He states that these facts were ignored by the trial court, that he was accused of having used the information in his possession with a view to obtaining money from the persons allegedly responsible for the smuggling, and that he was convicted on the basis of evidence which had been tampered with and distorted but which was nevertheless presented by the police and crown attorney.

7. From the information submitted by the parties, the following facts concerning these claims have been established:

Larry James Pinkney was convicted by the trial court on a charge of extortion on 9 December 1976. Sentence of five years' imprisonment was pronounced on 7 January 1977. On 8 February 1977, Mr. Pinkney sought leave to appeal from his conviction and from his sentence to the British Columbia Court of Appeal. His appeal, however, was not heard until 34 months later. This delay, which the government of British Columbia described as "unusual and unsatisfactory", was due to the fact that the trial transcripts were not produced until June 1979 after the application for leave to appeal was made. Mr. Pinkney alleges that the delay in the hearing, due to the lack of the trial transcripts, was a deliberate attempt by the State party to block the exercise of his right of appeal. The State party rejects this allegation and submits that, notwithstanding the efforts of officials of the Ministry of the Attorney-General of British Columbia to hasten the production of the trial transcripts, they were not completed until June 1979, "because of various administrative mishaps in the Official Reporters' Office". On 6 December 1979, that is 34 months after his application for leave to appeal, the British Columbia Court of Appeal heard the application, granted leave to appeal and on that same day, after hearing Mr. Pinkney's legal counsel, (a) dismissed the appeal against conviction, which had been based on the ground that Mr. Pinkney had not been able to defend himself properly, because of the inability of the authorities to produce the missing briefcase and (b) adjourned the appeal against sentence *sine die*, to be heard at a time convenient for Mr. Pinkney's counsel.

8. According to the judgement of the Court of Appeal dismissing the appeal against conviction, Mr. Pinkney, following his arrest, had directed police officers to a locker in a bus depot in Vancouver, from which they took, in his presence, two briefcases containing documents belonging to him. The State party contended that the contents of these two brief-cases were not the subject of the controversy that arose, during the trial, when Mr. Pinkney asserted that a third briefcase has been kept at his residence, containing the documents which he maintained were of relevance to his defence. The authorities, however, disavowed any knowledge of the existence of a third brief-case. The Court of Appeal concluded that Mr. Pinkney's submissions concerning the third brief-case were too vague to support his contention that it had existed.

9. With regard to these claims, the State party has argued that the author of the communication has not exhausted domestic remedies and that his claims in this respect should be declared inadmissible pursuant to article 5 (2) (b) of the Optional Protocol. It is submitted by the State party (a) that, if Mr. Pinkney continues to feel aggrieved by this most recent decision, he can, with leave of that Court, take a further appeal, on any question of law, to the Supreme Court of Canada "within twenty-one days after the judgement appealed from is

pronounced or within such extended times as the Supreme Court or a judge thereof may, for special reasons allow" (Criminal Code, R.S.C. 1970, c. C-34, s.618 (b)) and that, as of the date of the State party's latest submission (of 10 January 1980), Mr. Pinkney had neither sought leave to appeal nor an extension of the time allowed for appeal; and (b) that his appeal against sentence, a procedure of secondary importance in the circumstances of the communication, has been adjourned *sine die* and will be brought on at some time convenient to his counsel.

10. The Human Rights Committee finds that Mr. Pinkney's complaints concerning his trial and conviction and the dismissal of his appeal against conviction (his alleged difficulties in producing evidence to prove his innocence and the delay of more than two years in producing the trial transcripts) appear to raise questions of fact rather than law. The Committee therefore concludes that in respect of these complaints there is no further domestic remedy available to Mr. Pinkney which he should exhaust.

11. The Committee has also to consider whether Mr. Pinkney's complaints referred to above are compatible with the provisions of the Covenant and in particular with article 14 (1) and (3) (b) which have been invoked by him. The Committee observes that allegations that a domestic court has committed errors of fact or law do not in themselves raise questions of violation of the Covenant unless it also appears that some of the requirements of article 14 may not have been complied with. Mr. Pinkney's complaints relating to his alleged difficulties in producing evidence in his defence and also the delay in producing the trial transcripts do appear to raise such issues. In addition to the provisions invoked by Mr. Pinkney, it may be necessary to consider the possible relevance of article 14 (3) (c) and (5).

(b) The claims concerning the deportation order

12. It appears that Mr. Pinkney's continued presence in Canada came to the attention of immigration officials after he was arrested in May 1976. Proceedings against him were initiated under the Immigration Act on 21 May 1976 and, on 10 November 1976, the Special Inquiry Officer, having legal authority under the Act to do so, issued an order of deportation against Mr. Pinkney, having determined that he was present in Canada contrary to the Immigration Act and therefore not "lawfully" in Canada.

13. Mr. Pinkney alleges that the proceedings before the Special Inquiry Officer were not impartial, that he was denied a fair hearing, that the submission that he considered himself a political refugee was not given due consideration and that the Special Inquiry Office failed to inform him of his right to appeal against the deportation order to the Immigration Appeal Board and thus in effect deprived him of the right to have his case reviewed within the time-limit established by law. He alleges that in consequence the State party has violated articles 13 and 14 (1) and (3) (b) of the Covenant.

14. The State party has objected to the admissibility of these claims on the grounds that article 13 of the Covenant is inapplicable because it applies only to "an alien lawfully in the territory of a State Party", that article 14 (3) is not applicable because it applies only to "the determination of any criminal charge" and therefore cannot be invoked in relation to deportation proceedings, and furthermore that Mr. Pinkney failed to exhaust domestic remedies in that he did not appeal against the deportation order to the Immigration Appeal Board within the time-limit established by law and, in so far as his complaints that the Special Inquiry Officer had not been impartial or had failed to give him a fair hearing were concerned, he had not raised these for review by the Federal Court of Canada, which, under the Federal Court Act, would quash a decision or order made by an officer in breach of either of these principles. The State party has pointed out that Mr. Pinkney was at all relevant times represented by legal counsel whose responsibility it was to advise him of his rights of appeal and review.

15. The Committee observes that Mr. Pinkney did not avail himself in time of his right of appeal against the deportation order and the reasons which he gives for his failure to do so did not, in the circumstances of the case, absolve him from exhausting this remedy. Nor has he availed himself of the right to have his case reviewed by the Federal Court of Canada in so far as he complains of partiality and unfairness in the deportation proceedings.

16. These claims must therefore be considered inadmissible under article 5 (2) (b) of the Optional Protocol, because domestic remedies have not been exhausted.

(c) The claims concerning the alleged ill-treatment

17. The author of the communication alleges that he has been subjected to continual racial insults and ill-treatment in prison. He claims, in particular, (a) that prison guards insulted him, humiliated him and physically ill-treated him because of his race, in violation of articles 10 (1) and 17 (1) of the Covenant, and (b) that, during his pre-trial detention, he was not segregated from convicted persons, that his correspondence was arbitrarily interfered with and that his treatment as an unconvicted person was far worse than that given to convicted persons, in violation of articles 10 (1) and (2) (a) and 17 (1) of the Covenant.

18. The State party asserts that the Corrections Branch of the Department of the Attorney-General of British Columbia undertook two separate investigations of the allegations of racial insults and on both occasions found no apparent evidence to support his claims. Moreover, the State party maintains that these allegations of the author appear in the context of sweeping and numerous accusations of wrong doing by various federal and provincial government officials and by the courts in Canada. It therefore submits that these allegations should be considered to be "an abuse of the right of submission" and declared inadmissible under article 3 of the Optional Protocol. In so far as the com-

munication alleges that before conviction Mr. Pinkney was housed in the same wing of the Lower Mainland Regional Correction Centre as convicted persons and that his mail had been interfered with, these allegations were not brought to the attention of the appropriate authority, namely the Corrections Branch of the British Columbia Ministry of the Attorney-General, in writing by or on behalf of Mr. Pinkney (though he made other complaints and therefore was aware of the procedure) until the Branch became aware of his letter to the Human Rights Committee on 7 April 1978. The State party therefore submits that Mr. Pinkney failed in this respect to exhaust all available domestic remedies, before submitting his claims to the Committee. Mr. Pinkney, however, has pointed out that he was informed that an investigation had been made into his complaints by the Attorney-General's Office and that his charges were unsubstantiated.

19. The Human Rights Committee does not accept the State party's argument that the author's complaint concerning alleged racial insults should be declared inadmissible as an abuse of the right of submission. Moreover, his complaints now appear to have been investigated by the appropriate authorities and dismissed, and consequently it cannot be argued that domestic remedies have not been exhausted.

20. The Committee therefore finds that it is not barred, on any of the grounds set out in the Optional Protocol, from considering these complaints on the merits, in so far as they relate to events taking place on or after 19 August 1976 (the date on which the Covenant and the Optional Protocol entered into force for Canada).

The Human Rights Committee therefore decides:

1. That the communication is admissible in so far as it relates to Mr. Pinkney's trial and conviction on the charge of extortion;

2. That the communication is inadmissible in so far as it relates to the deportation proceedings and the deportation order issued against Mr. Pinkney;

3. That the communication is admissible in so far as it relates to Mr. Pinkney's treatment at the Lower Mainland Regional Correction Centre on or after 19 August 1976;

4. That, in accordance with 4 (2) of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matters referred to in (a) and (c) above and the remedies, if any, that may have been taken by it. The State party is requested in this connection to include details of any investigations which the Canadian authorities have made into the matters complained of by Mr. Pinkney;

5. That any explanations or statements received from the State party shall be communicated by the Secretary-General to the author of the communication, under rule 93 (3) of the provisional rules of procedure of the Committee, with the request that any comments which the author may wish to submit thereon should reach the Human Rights Committee, in care of the Division of Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

6. That this decision be communicated to the State party and the author of the communication.

DECISIONS DECLARING A COMMUNICATION INADMISSIBLE

SECOND SESSION

Communication No. 13/1977

Submitted by: C. E. on 20 June 1977

Alleged victim: The author

State party: Canada

Date of decision on inadmissibility: 25 August 1977 (second session)

Inadmissibility ratione temporis et materiae—Workman's compensation

Article of Optional Protocol: 3

The facts of the case are as follows:

The author of this communication, dated 20 June 1977, is a 51-year-old, unemployed Canadian citizen residing in Surrey, British Columbia, married and father of six children.

Although not explicitly addressed to the Human Rights Committee, the communication appears to be submitted for consideration by the Committee under the Optional Protocol to the International Covenant on Civil and Political Rights.

The author states that he has for many years been subjected to discrimination by the Workman's Compensation Board, Canada, inasmuch as due compensation and medical care have been denied him in connection with five successive work-related accidents in 1964, 1970 and 1971, and that this discrimination has brought great hardships to himself and his family.

Specifically, the communication deals only with the last accident which happened while the author was working in a school workshop. He claims that he was denied the students' accident insurance with medical coverage. It appears that the author initiated a court case in connection with this accident, claiming damages for injuries suffered in a fall from a faulty ladder. He maintains that he was denied due process by a hand-picked judge and that his efforts to appeal the court decision have been in vain, because of his lack of financial means and because the Legal Aid Society has refused him any assistance.

The author does not specify which provision of the International Covenant on Civil and Political Rights has allegedly been violated.

The main communication and the enclosures reveal that the author brought a court case against the Board of School Trustees of School District No. 39, Vancouver, *et al.*, claiming damages for injury suffered in a fall from a ladder in February 1971, while working in a school workshop. His claim was dismissed by the Supreme Court of British Columbia on 29 May 1975 on the ground that the accident was the author's own responsibility. A notice of appeal was issued on behalf of the author on 18 August 1975. There is no information concerning further developments of the court case, except an indication by the author that he does not have the financial means to pursue the matter before the courts and that he has been denied legal aid by the Legal Aid Society of British Columbia, which the author describes as a denial of the right of appeal.

Before considering any claims contained in a communication, the Human Rights Committee shall, in accordance with rule 87 of its provisional rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

The Human Rights Committee considers:

That as far as any question of a denial of justice might be raised by the communication, such claim would relate to events prior to 19 August 1976, the date of entry into force of the Covenant and the Protocol for Canada; and

That as far as the remaining claims presented in the communication are concerned, they likewise relate to such events and moreover do not concern any of the civil and political rights referred to in the Covenant.

The Committee therefore, in accordance with article 3 of the Protocol, decides:

The communication is inadmissible.

THIRD SESSION

Communication No. 1/1976

Submitted by: A *et al.* in August 1976

Alleged victims: A *et al.*

State party: S

Date of decision on inadmissibility: 26 January 1978 (third session)

Standing of authors to act on behalf of alleged victims—Sufficient link—Actio popularis—Submission to IACHR—Procedure under Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970—Submission to UNESCO procedure—Inadmissibility ratione temporis—Domestic remedies

Articles of Optional Protocol: 1, 2 and 5 (2) (a) and (b)

This is a communication submitted by 18 signatories on behalf of 1,194 alleged victims, including 14 of the signatories, containing a general description of alleged violations of the International Covenant on Civil and Political Rights in S during the past few years, together with a brief description of the violations in respect of each of the alleged victims.

The Committee has studied this communication in order to determine the extent of its admissibility under the Optional Protocol. In general the Committee observes that the communication is primarily a complaint about the situation in S during the past few years. The Protocol was not intended to deal with situations as such, but with individual complaints.

The first question which arises is the standing of the authors of the communication to act on behalf of those alleged victims who are not signatories. The authors have explained that these persons are in S or elsewhere where they are not "at liberty" to act for themselves. The Committee notes however that its competence under the Protocol is to receive communications "from individuals ... who claim to be victims of a violation". There are of course circumstances in which one individual must be regarded as having the necessary standing to act on behalf of another. But with regard to the present communication the Committee cannot accept on the information before it that there is a sufficient link to enable the signatories of the communication to act on behalf of the alleged victims who are not signatories to the communication. The Protocol grants to all the individuals concerned the right to submit communications, but does not, on the other hand, allow for an *actio popularis*.

Another factor which the Committee must take into account in considering the admissibility of a communication is that, as a rule, the Committee can only consider an alleged violation of human rights occurring after the date of the entry into force of the Covenant and the Protocol for the State party concerned, unless the alleged violation is one which, although occurring before that date, continues or has effects which themselves constitute violations after that date. The relevant date for S is 23 March 1976. The Committee

finds that on the basis of the facts before it the communication is inadmissible on this ground in regard to the violations alleged in respect of the following 11 of the authors of the communication: A *et al.*

With regard to the alleged violations in respect of B, C and D, the State party submits that the Human Rights Committee cannot consider the communication as these cases have already been submitted to the Inter-American Commission on Human Rights. The Human Rights Committee has ascertained that with regard to B and C [a] case ... was submitted to the Inter-American Commission on 8 February 1976, and with regard to D [two] cases ... were submitted to the Inter-American Commission on 8 February 1976 and in October 1976 respectively. These cases have been declared admissible by the Inter-American Commission under the special procedure governed by articles 53 to 57 of its Regulations and the Human Rights Committee understands that they are still being examined under that procedure. Since the cases concerning B and C were submitted to the Inter-American Commission on Human Rights before 23 March 1976, the date on which the Covenant and the Optional Protocol entered into force for S, the Committee concludes that they do not concern the same matter which the Committee is competent to consider. It remains for the Human Rights Committee to ascertain in regard to the cases of D whether they concern the same matter as that submitted to the Human Rights Committee.

With regard to the alleged violations in respect of B and C the State party submits that the Human Rights Committee cannot consider the communication as these cases have already been submitted to the United Nations. The Committee finds however that the United Nations has no procedure of international investigation or settlement, as referred to in article 5 (2) (a) of the Protocol, relevant to these cases. In particular, the procedure under resolution 1503 (XLVIII) of 27 May 1970, adopted by the Economic and Social Council of the United Nations, is concerned with the examination of situations which reveal "a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms". In the view of the Committee, this procedure is not concerned with the examination of the same matter, within the meaning of article 5 (2) (a) of the Protocol, as a claim by an individual under the Protocol.

With regard to the alleged violation in respect of D, the State party submits that the Human Rights Committee cannot consider the communication, as this case has already been submitted to the United Nations Edu-

cational, Scientific and Cultural Organization (UNESCO). The Committee finds however that UNESCO has at present no procedure of international investigation or settlement, as referred to in article 5 (2) (a) of the Protocol, relevant to this case.

The State party further submits that in none of the accusations is there any mention of the fact that the individuals in question have ever had recourse to, let alone exhausted, domestic legal remedies or, if such a mention is made, it is made in a manner designed to mislead the members of the Committee. The State party has not however specified the remedies which it claims are or were available to the alleged victims and which they should have exhausted. The authors of the communication on their part deny the existence of effective remedies to which recourse should have been made. In the absence of more specific information concerning the domestic remedies said to be available to the alleged victims, B, C and D, and the effectiveness of those remedies as enforced by the competent authorities in S, the Committee is unable to accept that there are effective domestic remedies which the alleged victims have failed to exhaust.

The Human Rights Committee therefore decides:

1. That the authors of the communication have not established that they have the necessary standing to act on behalf of the alleged victims who are not signatories of the communication and consequently the communication is inadmissible in so far as these alleged victims are concerned;

2. That the claims presented in the communication in respect of ... eleven [of the] authors of the communication relate to events prior to 23 March 1976, the date of the entry into force of the Covenant and the Optional Protocol for S and consequently the communication is inadmissible in so far as these alleged victims are concerned;

3. That before deciding finally on the admissibility of the communication in respect of B, C and D,

(a) The authors be requested:

(i) To furnish further detailed information with regard to the claim in respect of B, including information as to when he ceased to be detained in prison in S,

(ii) To furnish further detailed information with regard to the claims in respect of C and D;

(b) The authors be informed:

(i) That the Committee understands that [two] cases concerning D... (... , 8 February 1976, and ... , October 1976) have been submitted to and declared

admissible by the Inter-American Commission on Human Rights under the special procedure governed by articles 53 to 57 of its Regulations,

(ii) That the Committee is precluded by article 5 (2) (a) of the Optional Protocol from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. If the authors maintain that the matter which they have submitted to the Human Rights Committee in all or any of these cases is not the same matter which is under consideration by the Inter-American Commission on Human Rights, they should inform the Committee of their grounds for so maintaining and furnish the Committee with any other information in their possession relating to the submission of the cases to and their examination by the Inter-American Commission on Human Rights. In the absence of any such further information pertinent to this question, the Committee may have to conclude that they concern the same matter;

(c) The authors be informed that their reply should reach the Human Rights Committee in care of the Division of Human Rights, United Nations Office at Geneva, within six weeks of the date of the letter addressed to them;

4. That the Secretary-General transmit any reply received from the authors to the State party as soon as possible to enable the State party to comment thereon if it so wishes;

5. That at the same time the State party be informed that, in the absence of more specific information concerning the domestic remedies said to be available to the alleged victims, B, C and D, and the effectiveness of those remedies as enforced by the competent authorities in S, the Committee is unable to accept that these alleged victims have failed to exhaust such remedies. The communication will therefore not be considered inadmissible in so far as exhaustion of domestic remedies is concerned, unless the State party gives details of the remedies which it submits have been available to each of the alleged victims in the circumstances of his case, together with evidence that there would be a reasonable prospect that such remedies would be effective;

6. That the State party be informed that any such comments and information should reach the Human Rights Committee in care of the Division of Human Rights, United Nations Office at Geneva, within six weeks of the date of the request;

7. That the text of this decision be communicated to the State party and the authors.

FOURTH SESSION

Communication No. 17/1977

Submitted by: Z. Z. on 15 November 1977

Alleged victim: The author

State party: Canada

Date of decision on inadmissibility: 18 July 1978 (fourth session)

Unsubstantiated allegations—Racial discrimination

Articles of Covenant: 14 (1) and 26

The author of the communication (initial letter dated 15 November 1977 and further information furnished under cover of letters dated 3 January and 3 June 1978) is a 40-year-old Canadian citizen of Yugoslav origin. The author claims to be a victim of systematic discrimination by the courts in Canada, contrary to articles 14 and 26 of the Covenant and purports to support his claim by submitting a dossier of court records pertaining to a civil damage suit brought against him for breach of contract, including the judgement of the County Court of the Judicial District of York, Ontario, rendered in December 1976, and the judgement of the Court of Appeal of the Supreme Court of Ontario. The

decision of the Supreme Court of Canada, dated 19 December 1977, dismissing his application for leave to appeal to the Supreme Court is also enclosed. He calls for a new trial, which would be presided over by an impartial non-anglophone judge, which would treat him equally before the law and which would take into account all evidence tendered and the legal arguments submitted.

A thorough examination by the Committee of the dossier submitted by the author has not revealed any facts in substantiation of his allegations, and the communication is thus found to be manifestly devoid of any facts requiring further consideration.

The Human Rights Committee therefore decides:

The communication is inadmissible.

Communication No. 26/1978

Submitted by: N. S. on 19 January 1978

Alleged victim: The author

State party: Canada

Date of decision on inadmissibility: 28 July 1978 (fourth session)

Non-exhaustion of domestic remedies—Indian—Racial discrimination

Article of Optional Protocol: 5 (2) (b)

The author of the communication (initial letter dated 19 January 1978 with enclosures and further letter dated 25 April 1978) is a 45-year-old Indian citizen residing in Canada, who worked for the Department of Indian Affairs and Northern Development, Government of Canada, from 19 March 1973 until he was dismissed from his post as a teacher in a public school on 10 December 1976. He claims that he was dismissed because of his race and religion and that he failed in his recourse to the Public Service Staff Relations Board because the Adjudicator was biased, ignored evidence and rendered a decision based on preconceived views. After the expiry of the time-limit for appeal the author applied to the Federal Court of Appeal for an extension of the time to appeal. Extension of time to appeal was not granted and his application was dismissed on 14 November 1977. The author concludes that, accordingly, he has exhausted domestic remedies.

The author calls for assistance to obtain justice and his reinstatement. He alleges that he is a victim of violations of articles 2, 7, 14, 17 and 26 of the Covenant.

Before considering a communication from an individual who claims to be a victim of a violation of the Covenant, the Committee shall ascertain, under article 5 (2) (b) of the Optional Protocol that he has exhausted all available domestic remedies.

In the present case the author failed to avail himself in time of the remedy of appeal. Further, the communication does not disclose the existence of any special circumstances which might have absolved the author, according to the generally recognized rules of international law, from exhausting the domestic remedies at his disposal. He cannot, therefore, be considered to have exhausted the remedies available to him under Canadian law.

The Human Rights Committee therefore decides:

The communication is inadmissible.

SIXTH SESSION

Communication No. 15/1977

Submitted by: D. B. on 8 August 1977

Alleged victim: The author

State party: Canada

Date of decision on inadmissibility: 24 April 1979 (sixth session)

Unsubstantiated allegations

The communication, comprising the initial letter dated 8 August 1977 and subsequent letters dated 21 March and 25 December 1978, is submitted by D. B., a Canadian citizen who appears also to hold British and French nationality. From the material submitted by the author, it appears that he had, prior to the entry into force of the International Covenant on Civil and Political Rights for Canada, accumulated a number of fines, imposed for breaches of parking regulations, which he refused to pay. As a consequence, it appears, the author was repeatedly arrested, from 1975 to 1977, under warrants of arrest issued by the Municipal Court of Montreal, which meted out several sentences of payment of fines or imprisonment in lieu of payment of fines or for contempt of court. It further appears from the material submitted by the author that he has also been sentenced to imprisonment for refusal to pay alimony to his ex-wife.

The author claims that the Municipal Court of Montreal did not have competence to act in his case, that the

entire judicial system of Canada is corrupt and that the judges, the members of the legal profession and the municipal authorities of Montreal have consistently flouted his rights under the law, in violation of several articles of the Covenant.

Before considering a communication on the merits, the Committee must ascertain whether it fulfils the basic conditions relating to its admissibility under the Optional Protocol. In this connection, the Committee has endeavoured to elicit from the author clarifications regarding questions of admissibility of the communication and the facts complained of.

A thorough examination by the Committee of all the material submitted by the author, including his last submission, dated 25 December 1978, in response to the Committee's request for clarifications, has not revealed any precise allegations of fact in substantiation of the claim that he is a victim of violations by the State party of any of the rights set forth in the Covenant.

The Human Rights Committee therefore decides:

The communication is inadmissible.

Communication No. 20/1977

Submitted by: M. A. in December 1977

Alleged victim: Author's husband

State party: S

Date of decision on inadmissibility: 24 April 1979 (sixth session)

Same matter under examination by IACHR—Author's failure to respond to Committee

Article of Optional Protocol: 5 (2) (a)

The author of the communication states that her husband was arrested in S in September 1977, where he has allegedly been detained incommunicado, in spite of several attempts to remedy the situation, including the recourse of *habeas corpus*. The author claims that her husband is a victim of the prevailing situation in S, which allegedly reveals total disregard for the rights of persons arrested for political reasons. In this connection, the author lists several articles of the International Covenant on Civil and Political Rights which have allegedly been violated in respect of her husband.

In its observations concerning the admissibility of the communication the State party observes, *inter alia*, that the alleged victim is a "wanted person", who has been sought by the S authorities since 18 January 1975, and further, that the same matter has been submitted to the Inter-American Commission on Human Rights. ... In this connection the author of the communication has

acknowledged that she has submitted her husband's case to the Inter-American Commission on Human Rights.

The author was informed, in accordance with the Committee's decision of 26 July 1978, that the Human Rights Committee is precluded, under article 5 (2) (a) of the Optional Protocol, from considering a communication if the same matter is being examined by the Inter-American Commission on Human Rights. No response has been received from the author to the Committee's request that she clarify whether it is her intention to withdraw [the] case ... from the Inter-American Commission on Human Rights.

On the basis of the information before it, the Committee concludes that the same matter is under examination by the Inter-American Commission on Human Rights and that, therefore, the communication is inadmissible pursuant to rule 90 of the Committee's provisional rules of procedure.

The Human Rights Committee therefore decides:

The communication is inadmissible.

SEVENTH SESSION

Communication No. 2/1976

Submitted by: L. P. on 25 November 1976

Alleged victim: The author

State party: Canada

Date of decision on admissibility: 14 August 1979 (seventh session)

Extradition—Ill-treatment while in custody—Facilities for preparation of defence—Inadmissibility ratione temporis, personae et materiae—Exhaustion of domestic remedies

Articles of Optional Protocol: 3 and 5 (2) (b)

The author of the communication (initial telegram dated 25 November 1976, letters dated 4 December 1977 and 20 March 1978 and further submissions dated 14 July and 23 August 1978) is a North American native Indian, social worker, member of the American Indian Movement for National Liberation, formerly domiciled at the Pine Ridge Reservation, South Dakota, United States of America. He claims to have been unlawfully extradited from Canada to the United States on the basis of false evidence, fabricated either by the United States law enforcement agents in collaboration with Canadian Government officials, or by a Canadian Government official who, in accordance with an administrative arrangement between the Governments of Canada and the United States of America, assisted the latter Government during the extradition proceedings. He also alleges that his extradition was unlawful, inasmuch as he claims that the Government of Canada should have rejected the extradition request of the United States of America, since the alleged acts on which it was based had taken place on the territory of the independent Lakota nation, whose sovereignty Canada has failed to recognize. He further alleges that during his detention in Canada from 6 February 1976 until he was extradited 11 months later (on 18 December 1976), he was subjected to ill-treatment and denied the opportunity to prepare his case for the extradition hearings properly.

The decision ordering the author's extradition was rendered by the extradition judge on 18 June 1976 and upheld on appeal by the Federal Court of Appeal on 27 October 1976. The author thereupon addressed himself to the Minister of Justice, asking him to determine that the offences for which his extradition was sought were of a political character and to order, under the power granted him by law, that he should not be extradited to the United States of America. The Minister of Justice came to the conclusion that the author's extradition was not sought for political offences.

The author claims that his appeal to the Minister of Justice exempted him from availing himself of the opportunity to appeal the decision of the Federal Court of Appeal to the Supreme Court of Canada. He thus claims to have exhausted domestic remedies, as far as his extradition was concerned. In respect of the allega-

tions of ill-treatment while in custody in Canada, he claims to have exhausted domestic remedies by filing a civil action on 6 August 1976 against the prison authorities concerned and the Government of the Province of British Columbia. He states that this action was "terminated as moot", when the Minister of Justice let the extradition order stand.

The author alleges that the facts complained of constitute breaches by the State party of the following articles of the International Covenant on Civil and Political Rights: articles 1 (1) and (3); 2 (1) and (3) (a); 3; 7; 9 (1); 10; 13; 14 (3) (b); 18 (1); 19 (1) and 26. The Committee observes that the author's reference to some of these articles seems to be secondary to the main complaints, deriving from the same facts.

The Covenant entered into force for Canada on 19 August 1976.

By its submissions, dated 29 May 1978 and 7 March 1979, respectively, furnished in response to the Committee's request for information and observations relevant to the question of admissibility of the communication, the State party rejects the allegations put forward by the author.

In respect of the extradition proceedings, it denies any responsibility for the alleged false evidence introduced at the extradition hearings and observes that any evidence adduced was submitted by or on behalf of the requesting State, the United States of America. It further rejects the contention that the Canadian civil servant, who, for the purpose of the extradition hearings acted on behalf of the United States of America in accordance with the terms of a bilateral treaty between Canada and the United States of America, had any part in the alleged fabrication of false evidence, or any reason to believe that the evidence adduced was fabricated. The State party further observes that L. P.'s extradition was sought on five different counts and that four of these were regarded by the extradition judge as warranting committal. The alleged false evidence, consisting of two affidavits, purportedly made and signed by an eyewitness, pertained to two of the five counts, on the basis of which extradition was sought. These affidavits were introduced at the extradition hearings as evidence of murder of two agents of the United States Federal Bureau of Investigation, near Oglala, South Dakota, on 26 June 1975. Subsequent to the extradition hearing, a third affidavit, made by the same person, and preceding in time the two adduced at the hearings, came to light. This affidavit, which, for one reason or another was not tendered at the extradition hearings, although

in the possession of United States authorities at that time, was thoroughly inconsistent with the other two. The State party submits that the decision to commit L. P. for extradition was taken, and reviewed, by competent, independent and impartial tribunals and that this fact has not been challenged by him. The State party further argues that L. P. failed to seek leave to appeal to the Supreme Court of Canada and that he also failed to apply for a writ of *habeas corpus* to have the legality of his committal adjudicated. Thus, the State party contends, L. P. failed to exhaust all available domestic remedies, as far as his extradition was concerned.

In respect of L. P.'s claim that he was subjected to ill-treatment while in custody in Canada, which claim concerns his confinement in an isolation cell, physical restraint by mechanical means (the use of leg irons) lack of physical exercise and lack of hygienic facilities, the State party submits that two of his three complaints before the appropriate Canadian authorities, filed prior to the entry into force of the Covenant for Canada, namely on 19 February and 15 April 1976, were examined by these authorities and remedied as far as they were found justified. His third complaint, a court action against the Province of British Columbia, instituted on 6 August 1976, i.e., also before the entry into force of the Covenant for Canada, was never adjudicated, the State party submits, because of failure by L. P. to pursue the action.

In respect of the claim that L. P. was denied the possibility of preparing the case regarding his extradition properly, the State party rejects the claim as unsubstantiated and observes that L. P. was afforded privileges going beyond those normally enjoyed by persons detained in prison and that he had numerous visits from his lawyers (including 72 visits from the time the Covenant entered into force, until he was extradited); moreover, it observes that he never made that complaint before the Canadian authorities.

The Human Rights Committee notes that the information and observations furnished by the State party deal both with issues concerning the merits of L. P.'s claims, inasmuch as alleged breaches of the Covenant are concerned, as well as issues of direct relevance to the question of admissibility of his communication under the Optional Protocol. The State party contends that L. P.'s communication should be declared inadmissible under the Optional Protocol because it is:

(a) Partly incompatible with the Covenant (i.e. *ratione materiae*) as concerning matters not covered by it, and partly *abusive* (on particular grounds referred to by the State party);

(b) Partly not directed against Canada (i.e. incompatible *ratione personae*) but in fact against the United States of America;

(c) Partly concerned with events prior to the date of entry into force of the Covenant for Canada (i.e. incompatible *ratione temporis*);

(d) Lacking in respect of the requirement set out in article 5 (2) (b) of the Optional Protocol, to the effect that the alleged victim of a violation must, before submitting a claim for consideration by the Committee, have exhausted all available domestic remedies.

On the basis of the information before it the Human Rights Committee concludes:

1. In so far as L. P. complains about his extradition and alleges violations of articles 13 and 1 (3) of the Covenant, it is not necessary to decide whether any of these provisions might be applicable or whether the facts could be seen to raise issues in that regard, this part of his complaint being inadmissible because the author, by not seeking leave to appeal before the Supreme Court of Canada, failed to exhaust domestic remedies as required by article 5 (2) (b) of the Optional Protocol;

2. In so far as the author complains that he was subjected to various forms of mistreatment in violation of articles 7 and 10 of the Covenant, it is again not necessary to decide whether the alleged facts could raise any issue under these provisions, this part of his complaint being inadmissible *ratione temporis* as far as events alleged to have taken place prior to 19 August 1976 are concerned, and, for any later events, being inadmissible for failure to exhaust domestic remedies, since he did not pursue the civil action introduced by him, his subsequent extradition from Canada not being a sufficient reason for this failure;

3. In so far as the author also appears to complain that he was arbitrarily arrested and detained, and refers in this respect to article 9 (1), again this part of his complaint is inadmissible *ratione temporis* as far as his arrest and his detention prior to 19 August 1976 are concerned, and with respect to his detention after that date, inadmissible for failure to exhaust domestic remedies, e.g. by way of *habeas corpus* proceedings;

4. In so far as the author complains under article 14 (3) (b) of an alleged denial of access to counsel and insufficient time and facilities to prepare his defence, and even assuming that the said provision, or article 13, or any other provision of the Covenant might be applicable to extradition proceedings, this complaint is in any event partly inadmissible as being out of time (for the period prior to 19 August 1976) and otherwise for failure to exhaust domestic remedies, as it has not been shown that this complaint was ever raised before the competent Canadian authorities.

The Human Rights Committee therefore decides:
The communication is inadmissible.

Communication No. 19/1977

Submitted by: C. J. on 24 February 1977

Alleged victim: The author

State party: Canada

Date of decision on inadmissibility: 13 August 1979 (seventh session)

Public employee—Racial discrimination—Non-exhaustion of domestic remedies—Unsubstantiated allegations

Articles of Covenant: 2 (3) (c) and 25 (c)

Article of Optional Protocol: 5 (2) (b)

The communication (initial letter dated 24 February 1977 and further letters dated 30 November 1977 and 29 March 1978) is submitted by a black Canadian citizen, who claims to be a victim of racial discrimination in Canada in violation of articles 2 (3) (c) and 25 (c) of the International Covenant on Civil and Political Rights. Information and observations on questions of admissibility of the communication were submitted by the State party on 9 May 1979, in accordance with rule 91 of the provisional rules of procedure of the Human Rights Committee. Comments thereon, dated 15 June 1979, were received from the author.

On 19 November 1975, the author received a one-year temporary appointment as a personnel officer, level II, step 4, with the Quebec Minimum Wage Commission. He claims to have been a public employee for five years at that time, and that at the expiry of his temporary contract he would have been entitled to a permanent appointment and promotion to level II, step 5. On 18 October 1976 he was informed that his employment would terminate on 18 November 1976, and hence that he would not be recommended for a permanent appointment.

Maintaining that his employer's decision was based on racial discrimination, he complained to the Quebec Human Rights Commission, which, on 13 December 1976, recommended to the Minimum Wage Commission that the author should be reinstated with retroactive effect as from 19 November 1976. The recommendation was based on the opinion of the Quebec Human Rights Commission that, although he had not been subjected to racial discrimination, the termination of his employment was due to an accusation found to be unjust. The recommendation was supported by the Public Protector of Quebec Province on 3 February 1977. The Minimum Wage Commission, not being bound by such recommendations, chose, it appears, to ignore them.

On 4 July 1977, the author was reinstated in the civil service by a temporary appointment with the Office of the High Commissioner for Recreation and Sports of

the Ministry of Education. His employment status, level II, step 4, was based on an eligibility list issued on 13 May 1977 by the Public Service Commission. In May 1978, he reached the level II, step 5, and on 4 July 1978 he was given a permanent appointment.

As the communication now stands the author's claims appear to be that, as a result of the decision of the Minimum Wage Commission to terminate his employment on 18 November 1976, allegedly because of racial discrimination, he has suffered the following injustices which have not been remedied:

(a) Loss of pay for the period from 19 November 1976 to 3 July 1977, during which time he was unemployed;

(b) Loss of remuneration resulting from a delay in a step increase in salary from level II, step 4, to level II, step 5;

(c) Delay in obtaining a permanent appointment.

In its observations on questions of admissibility, the State party rejects the contention of the author that he is a victim of racial discrimination in violation of article 25 (c) of the Covenant. It submits that, inasmuch as the author may claim that he has suffered injustices not yet corrected, he has failed to exhaust domestic remedies, as required under article 5 (2) (b) of the Optional Protocol. It explains which remedies would be available to the author, including the remedy of filing an action for damages before the High Court, in respect of his claim for retroactive payment of salary.

In his comments on the State party's submission, the author maintains that (a) he does not have the financial means to file a suit for damages before the High Court, (b) nor is there, according to his legal counsel, any reason to believe that such action would be successful, taking into account the law of Quebec.

The Human Rights Committee, after careful examination of the written information before it, considers that there does not appear to be evidence in substantiation of the author's claim to be a victim of racial discrimination. However, it finds that the communication is inadmissible, because the author has not yet exhausted domestic remedies.

The Human Rights Committee therefore decides:

The communication is inadmissible.

Communication No. 53/1979

Submitted by: K. B. on 16 June 1979

Alleged victim: The author

State party: Norway

Date of decision on inadmissibility: 14 August 1979 (seventh session)

Property rights—Inadmissibility ratione materiae

The author of the communication, dated 16 June 1979, is a Norwegian citizen living in Norway, who inherited a flat in Oslo in 1964, close to her home. She was separated from her husband in 1975 after 26 years of marriage. In December 1976, he sought by proceedings before the Oslo Town Court to obtain the right, against the author's will, to move into her flat, as a tenant. The flat had been rented to unrelated persons since it came into the ownership of the author. In a judgement delivered in December 1977, the Oslo Town Court rejected his claim.

The marriage was dissolved by divorce in February 1978, and by way of an administrative settlement by the special court for matrimonial estates, the flat inherited by the author was assigned to her as her property.

The ex-husband appealed against the judgement of the Oslo Town Court to the Court of Appeals, which in November 1978 granted him the right to move into the flat and, for that purpose, to deal directly with the present tenants. The author's application to appeal to

the Supreme Court was rejected by the Judicial Select Appeals Committee on 20 March 1979. A petition for a review of the decision of the Judicial Select Appeals Committee was dismissed.

The author alleges that the decision of the Court of Appeals, having the effect of depriving her of the right to dispose of her property, constitutes a breach of articles 2 (1), 3 and 26 of the International Covenant on Civil and Political Rights.

The Human Rights Committee observes that the right to dispose of property, as such, is not protected by any provision of the International Covenant on Civil and Political Rights.

A thorough examination of the communication has not revealed any facts in substantiation of the author's claim that she is a victim of a breach by the State party of articles 2 (1), 3 or 26 of the Covenant or of any other rights protected by the Covenant.

The Human Rights Committee therefore decides:

The communication is inadmissible.

NINTH SESSION

Communication No. 59/1979

Submitted by: K. L. on 27 November 1978

Alleged victim: The author

State party: Denmark

Date of decision on inadmissibility: 26 March 1980 (ninth session)

Discrimination—Taxation—Unsubstantiated allegations

The author of the communication (consisting of numerous complaints dated between 27 November 1978 and 14 February 1980), K. L., is a Danish citizen of Swedish descent, born on 28 November 1945. He directs his complaints against various public officials, municipal and State authorities from several branches of Government in Denmark on the ground, *inter alia*, that they have persistently subjected him to discrimination, because of his ethnic, religious and national background and for political reasons, the Danish authorities being allegedly permeated with radical leftist political ideology and consequently holding persons like the author, who do not claim to hold left wing political convictions, in disfavour. As evidence of the conspiracy against him, the author mentions, among many other alleged facts, that Danish authorities have for years

sought to brand him as a mentally disturbed person and thereby to ruin his social standing, in particular to the detriment of his opportunities to further his studies and to be gainfully employed. He also claims that the fact that his name has repeatedly been misspelled by Danish authorities is yet another manifestation of the discriminatory treatment he has been subjected to.

One of the author's complaints is that, at the request of his sister and with the aid of the police, he was unlawfully brought to a hospital and kept there against his will for seven days (25 February to 4 March 1977), during which period he was subjected to a medical examination on account of an alleged mental illness. He sought unsuccessfully to obtain compensation for the enforced and involuntary detention and alleges that the failure to grant him compensation constitutes violations by the State party of articles 9 (1), 9 (5), 10 (1), 14 (1), 17 (1) and 26 of the International Covenant on Civil and

Political Rights. It appears that the reason given for his removal to the hospital was that his mental illness had made it impossible to cope with him in his home, where he lived with his mother, whom he allegedly suspected of having killed his father. The examination which he underwent at the hospital confirmed that he was suffering from paranoid psychosis, but it was concluded that the prospects for improvement or cure through enforced medical treatment were not good enough to justify involuntary detention and consequently he was released. His claim for compensation was rejected by the district court and on appeal, by the Östre Landsret, since it was found that, in the circumstances that existed, those involved had not acted in a reproachable manner such as to give rise to liability. His request for leave to appeal to the Supreme Court was also rejected on the ground that the conditions to grant leave to appeal were not fulfilled.

The author's other complaints relate to numerous alleged violations in connection with (a) the failure of the courts to take his views into account before deciding that his mother should retain the undivided estate after her husband's death; (b) the persistent failure of the appropriate administrative authorities and the courts to agree to exempt the author from court costs in a number of law suits which he intended to initiate against various authorities and public officials; (c) refusals to grant the author financial support and free transportation in connection with his studies; (d) the fact that his late father was cremated instead of being given "a Christian burial"; (e) refusal by the authorities to give him access to a document relating to the admission of his father to a rest-home for old people in 1973; (f) persistent failure of the authorities to grant him employment; (g) the fact that he has been obliged to pay taxes although not gainfully employed (this relates to taxation for the year 1976, for which the author did not file a tax return—his taxes were therefore estimated by the tax authorities); (h) being obliged to pay taxes to the State Church although he belonged to another church denomination, the Swedish Church of Gustaf (this also appears to relate to the year for which the author did not file a tax return); (i) refusal of the courts to appoint a lawyer to assist the author in preparing a private criminal law suit against his sister and against the policemen who brought him to the hospital against his will on 25 February 1977; (j) the failure of the authorities, including the Supreme Court, to grant leave to the author to appeal to the Supreme Court in connection with his efforts to obtain compensation for time spent in custody on remand in June/July 1976 (this relates to the investigation of alleged criminal offences which led to court decisions

finding the author guilty of theft and fraud—no penalty was however exacted and the author appears to understand that fact as a vindication of his complaints); (k) the failure of the authorities to initiate, at his request, criminal proceedings against the Supreme Court judges who had rendered decisions in his cases before the court; (l) the failure of the appropriate authorities to take seriously his claim that a social worker had failed in his duty by offering to assist the author in securing a disability pension, instead of offering him assistance in obtaining employment; (m) the failure of the State Tax Court to observe impartiality in a decision concerning him rendered on 15 February 1979; (n) the failure of the Parliamentary Ombudsman to render appropriate assistance to him in connection with his endeavours to find suitable employment and to obtain education grants, thus joining other authorities, who allegedly for political reasons have conspired not to grant him financial assistance and (o) the Ombudsman's failure to find that several examinations which the author had taken at the University of Copenhagen should be declared null and void, on the ground that these examinations had not been conducted in a manner prescribed by law.

The author claims that the facts described above, which relate to events taking place after 23 March 1976, the date on which the Optional Protocol and the International Covenant on Civil and Political Rights entered into force for Denmark, constitute violations by the State party of various provisions of the International Covenant on Civil and Political Rights, as well as the provisions of a number of other international instruments. In substantiation of his complaints he has furnished a voluminous dossier consisting mainly of court transcripts (including the judgements complained of) and correspondence from various public authorities and officials, relating to the matters complained of.

In accordance with article 1 of the Optional Protocol, the Human Rights Committee has only examined the author's claims insofar as they are alleged to reveal breaches by the State party of the provisions of the International Covenant on Civil and Political Rights. The Committee has no competence to examine alleged violations of other international instruments.

The Committee has carefully considered the material submitted by the author, but is unable to find that there are grounds substantiating his allegations of violations of the Covenant.

The Human Rights Committee therefore decides:

1. That the communication is inadmissible.
2. That the decision be communicated to the author.

Communication No. 60/1979

Submitted by: J. J. on 14 July 1979

Alleged victim: The author

State party: Denmark

Date of decision on inadmissibility: 26 March 1980 (ninth session)

Inadmissibility ratione materiae

The author of the communication (dated 14 July 1979) is a Danish citizen residing in Denmark. He states that on 1 November 1970 he contracted to buy an eleven-year-old car for Dkr 500. He subsequently sought to invalidate the purchase and applied for leave to file a civil suit free of costs. His application was refused by the district authority and the Ministry of Justice also rejected an application to reverse the decision of the district authority. He then submitted the matter to the Parliamentary Ombudsman. The latter found no circumstances meriting censure of the deci-

sions of the Danish authorities concerned in the case. The author's complaint is directed against the refusal of the Ombudsman to censure the decision of the Ministry of Justice.

The Human Rights Committee, after careful examination of the communication, is of the opinion that the communication does not reveal any evidence of violation of the Covenant by the Danish authorities.

The Human Rights Committee therefore decides:

The communication is inadmissible.

TENTH SESSION

Communication No. 72/1980

Submitted by: K. L. on 4 April 1980

Alleged victim: The author

State party: Denmark

Decision on inadmissibility: 31 July 1980 (tenth session)

Renewed application by author (see communication No. 59/1979)—Taxation—Unsubstantiated allegations—Abuse of right of submission—Exhaustion of domestic remedies

Articles of Optional Protocol: 3 and 5 (2) (b)

The author of the communication, dated 4 April 1980, K. L., Denmark, complains that a decision concerning him, rendered by the Danish State Tax Court on 3 March 1980, runs counter to articles 14 (1) and 26 of the International Covenant on Civil and Political Rights. The complaint has its origin in the assessment by the Danish tax authorities of the author's taxable income for the year 1974, for which he had not filed a tax return. He was informed of the assessment on 12 January 1976.

The author filed a complaint with the State Tax Court on 17 May 1979, which, on 3 March 1980, dismissed the claim as out of time, on the ground that the time limit for filing such complaint under Danish law is four weeks.

The author also claims that he had complained about the assessment of his taxable income for the year 1975, without the court pronouncing itself on that issue. In a further letter, dated 29 April 1980, he specifically mentions that he intends to pursue further domestic remedies in the matter complained of in the present communication.

The Committee notes that the matters complained of had their origin in the assessment of the author's taxes for the years 1974 and 1975, that is, prior to the entry into force of the Covenant and the Optional Protocol for Denmark on 23 March 1976. This, in itself, does not bar the Committee from examining the claim that the decision of the Danish State Tax Court, rendered on 3 March 1980, constituted a breach of articles 14 (1) and 26 of the Covenant.

However, before considering any claim on the merits, the Committee must decide whether the conditions for admissibility, as laid down in articles 3 and 5 of the Optional Protocol, have been fulfilled, including the condition that domestic remedies have been exhausted.

In this connection the Committee takes into account:

(a) That a similar complaint from the author, regarding alleged violations of the Covenant in connection with the assessment of his taxable income for the year 1976, and subsequent adjudication of his complaints relating thereto, has previously been declared inadmissible under the Optional Protocol as devoid of any substantiation;¹

(b) That the present complaint is similarly devoid of any substantiation of facts or law; and

¹ See the decision concerning communication No. 59/1979, p. 24. above.

(c) That the author has himself indicated that he still intends to pursue further domestic remedies.

The Committee concludes that, in these circumstances, the submission of the communication must

be regarded as an abuse of the right of submission under article 3 of the Optional Protocol.

The Human Rights Committee therefore decides:
The communication is inadmissible.

TWELFTH SESSION

Communication No. 68/1980

Submitted by: A. S. on 23 May 1980

Alleged victims: The author, her daughter and grandson

State party: Canada

Date of decision on inadmissibility: 31 March 1981 (twelfth session)

Immigration—Protection of the family—Equal protection of the law—Compatibility of communication with Covenant—Inadmissibility ratione materiae—Jurisdiction of State party over victim

Articles of Covenant: 12, 17, 23 and 26

Article of Optional Protocol: 1 and 3

1. The author of the communication (letter dated 23 May 1980) is a Canadian citizen of Polish origin, at present residing in Ontario, Canada. She submitted the communication on her own behalf and on behalf of her daughter and grandson, alleging that all her efforts to obtain permission from the Canadian authorities for her daughter and grandson to enter Canada in order to join her have been in vain. Without specifying a breach of any particular article of the International Covenant on Civil and Political Rights, she seeks the Committee's assistance in the matter and describes the relevant facts as follows:

2. The author, who was born in Poland, is a Canadian citizen, living in Ontario, Canada. Her daughter, B, born in 1946, and her daughter's son, C, born in 1964, live at Torun, Poland. They are both Polish nationals.

3. In the spring of 1977, the author filed an application on behalf of her daughter and grandson at the appropriate Canadian Immigration Office, requesting permission for them to enter Canada in order to join the author as permanent residents. Six months later, her daughter was informed by the Canadian Consul in Warsaw, Poland, that she was not eligible for entry into Canada, because she did not have a profession and that, before the Canadian authorities could proceed further, an employment guarantee would have to be procured for her. An employment guarantee was thereupon obtained in the author's home town, Windsor, Ontario, but the Windsor Department of Manpower concluded, upon inquiry, that there were already people available for the job in question (the job of a sales person in a pet store). The author informed the immigration authorities in 1979 that she was willing and able to buy a small business in Windsor (a confectionery store) in order to

create an employment opportunity for her daughter and/or grandson. The author was then told to go ahead and to purchase the business in question, but since she is fully employed herself and would need the assistance of her daughter and grandson to run the business, she felt she would not be in a position to purchase, without any assurances that they would be permitted to enter Canada. The immigration authorities then requested, and were furnished with, relevant information concerning the author's income and assets, showing that she is able fully to support her daughter and grandson, being the owner of four housing units in Windsor, all without encumbrance, and having also a steady full-time job, as well as funds in a bank account. This information was furnished to the immigration authorities in June 1979. In spite of repeated inquiries, the author has been unable to obtain any further information about the matter. She feels that her daughter and grandson are unjustly being kept away from her and points out that, in the absence of an entry permit, her daughter and grandson are unable to make the necessary application for permission to leave Poland. She states that there are no domestic remedies that could be further pursued.

4. By its decision of 21 July 1980, the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication, and drawing the State party's attention in particular to the provisions of articles 12, 17, 23 and 26 of the International Covenant on Civil and Political Rights.

5.1 In its reply dated 2 December 1980, the State party objected to the admissibility of the communication on the ground that the facts of the case did not reveal any breach of the rights protected under articles 12, 17, 23 and 26 of the Covenant on Civil and Political Rights, and that furthermore the communication did not meet the requirements of article 1 of the Optional Protocol (which stipulates that the Committee has competence to receive and consider communications from individuals subject to a State party's jurisdiction), since

B and her son are not subject to Canadian jurisdiction. In substantiation of its refutation of breaches of articles 12, 17, 23 and 26 of the Covenant, the State party submits the following: that no breach of article 12 exists since B is neither a Canadian citizen nor a permanent resident of that country and therefore was not "arbitrarily deprived of the right to enter [her] own country". As regards article 17, which prohibits arbitrary or unlawful interference with the family by the State, it is argued that this article should be interpreted primarily as negative and therefore could not refer to an obligation by the State positively to re-establish conditions of family life already impaired. As regards article 23, which provides for the entitlement of the family to protection by the State, it is claimed that such protection requires *a priori* that an effective family life between the members of the family must have existed; it could not be concluded that B and her son had shared an effective family life with A. S., since B, after being adopted by A. S. in 1959, lived with her in Canada for two years only, whereafter she left the country in 1961 to return to Poland, where she married and had a son. The fact that A. S. and B have been living apart for 17 years clearly demonstrates that a prolonged family life does not exist and that therefore no breach of article 23 could be claimed by the author. A. S.'s allegation that her daughter was refused an immigration visa because she did not have a profession and that this constituted a violation of article 26 of the Covenant, which provides equal protection of the law without any discrimination, is refuted on the ground that the Canadian immigration regulations do not contain any such discrimination.

5.2 The State party further refers to A. S.'s purported willingness to purchase a confectionery store and to offer employment to her daughter and argues that if such employment had existed, and had not only been intended, the Canadian immigration authorities could have examined the existing employment and, if it met the conditions laid down in the Immigration Regulations, 1978, could have certified it as "arranged" employment. In this case A. S.'s daughter would have been granted an immigrant visa. Willingness to create employment could not be substituted for existing employment.

6. No comments on the submission of the State party have been received from the author.

7. In order to substantiate her claim under the Covenant and the Optional Protocol, the author must show that one of the provisions of the Covenant has been violated in her case. The only articles of the Covenant which, in the Committee's view, might be relevant to the consideration of her complaint are articles 12, 17, 23 and 26.

8.1 After careful examination of all the material before it, the Human Rights Committee is unable to conclude that articles 12, 17, 23 and 26 of the International Covenant on Civil and Political Rights are applicable in the case.

8.2 The Human Rights Committee bases its conclusions on the following facts:

(a) Article 12 states that no one shall be arbitrarily deprived of the right to enter his own country; B and her son are Polish nationals; the provisions of article 12 therefore do not apply in this case;

(b) Articles 17 and 23 provide that no one shall be subjected to arbitrary or unlawful interference with his family and that the family is entitled to protection by the State; these articles are not applicable since, except for a brief period of 2 years some 17 years ago, A. S. and her adopted daughter have not lived together as a family;

(c) Article 26 provides that all persons are entitled without any discrimination to the equal protection of the law; B was denied entry into Canada in conformity with the provisions of existing Canadian law, the application of which did not in the circumstances of the present case give rise to any question of discrimination on any of the grounds referred to in the Covenant.

9. Since, for the reasons stated above, the author's claims do not come within the scope of protection of the Covenant, the communication is "incompatible with the provisions of the Covenant" within the meaning of article 3 of the Optional Protocol.

The Human Rights Committee therefore decides:
The communication is inadmissible.

Communication No. 81/1980

Submitted by: K. L. on 23 December 1980

Alleged victim: The author

State party: Denmark

Date of decision on inadmissibility: 27 March 1981 (twelfth session)

Lack of effective remedy—Unsubstantiated allegations

Articles of Covenant: 2 (3) and 14 (1)

Article of Optional Protocol: 3

The author of the communication, dated 23 December 1980, K. L., Denmark, complains that decisions of the Supreme Court of Denmark, given on 12

December 1980 in three civil cases concerning the author, upholding the decisions of the lower court in the cases in question, constitute a breach by the Supreme Court of article 2 (3) (a), (b) and (c) of the International Covenant on Civil and Political Rights. The author requests the Human Rights Committee to so confirm and to prevail upon the State party to grant a judicial remedy to the author by way of reopening the three

cases. The author explains briefly that the lower court had found that the three cases had not been filed in due form. This, he states, should not have had any bearing upon the cases because the court, under Danish law, should have assisted him in correcting any procedural errors in the presentation of the three law suits; the court, however, failed in its duty and the Supreme Court merely upheld the lower court's decisions, without granting the remedy sought. The author encloses copies of the three Supreme Court decisions.

Article 2 (3) of the Covenant requires the State party to ensure that any person whose rights or freedoms recognized in the Covenant are violated shall have an effective remedy. The Committee observes therefore that there can be no breach of article 2 (3) unless a remedy is sought for the violation of one of the rights or freedoms

recognized elsewhere in the Covenant. The author does not indicate the subject matter of any of the three lawsuits and it does not appear that they were concerned with obtaining a remedy for the violation of any such rights or freedoms. Furthermore, the communication does not contain any substantial evidence that the right of fair hearing, as laid down in article 14 (1) of the Covenant, may have been violated.

Being unable to find that there are any grounds substantiating the author's allegations of violations of the Covenant, the Committee concludes, in accordance with article 3 of the Optional Protocol, that the communication is incompatible with the provisions of the Covenant, and therefore decides:

The communication is inadmissible.

FOURTEENTH SESSION

Communication No. 91/1981

Submitted by: A. R. S. on 8 May 1981

Alleged victim: The author

State party: Canada

Date of decision on inadmissibility: 28 October 1981 (fourteenth session)

Parole—Mandatory supervision—Heavier penalty subsequent to commission of offence—Concept of victim—Examination of law in abstracto—Compatibility of communication with Covenant—Inadmissibility ratione temporis et materiae

Articles of Covenant: 9 (1), (4) and (5), 11, 15 (1)

Articles of Optional Protocol: 1, 2 and 3

1. The author of this communication (initial letter dated 8 May 1981 and a further letter dated 8 June 1981) is A.R.S., a 42-year-old Canadian citizen serving a prison sentence at a Canadian federal penitentiary. He claims to be a victim of breaches by Canada of article 15 (1), as well as articles 9 (1), (4) and (5) and 11 of the International Covenant on Civil and Political Rights. He describes the facts of the claim as follows:

2.1 On 22 November 1971 the author was sentenced to 16 years' and 3 months' imprisonment for various offences committed between 30 January and 3 July 1970. The expiry date of the full sentence is 3 February 1988, but the author has been informed in writing that he has earned remission and been credited with statutory remission equal to one third of the sentence and that the date of his release has been set for 8 September 1982. He claims that certain provisions of the Parole Act, which entered into force on 1 August 1970 (i.e. after the dates of commission of each of his offences), introduced the element of "mandatory supervision" for convicted persons released before the expiration of their term of imprisonment.

2.2 The release of the author on 8 September 1982 is contingent on his signing the "mandatory supervision certificate", a requirement which, he claims, did not exist at the time of commission of the offences in question. He contends that "mandatory supervision" is therefore tantamount to a penalty heavier than the one that was applicable at the time when the criminal offences were committed and that this "heavier penalty" constitutes in his case a violation of article 15 (1) of the Covenant. The author further maintains that "mandatory supervision" constitutes a reimposition of punishment which should be regarded as remitted and that the demand that he sign the mandatory supervision certificate (an act, he claims, which would constitute a contract with penalties for failure of fulfilment), or else face the punishment of serving the entire sentence until 3 February 1988, constitutes a criminal action of intimidation in violation of section 382 of the Canadian Criminal Code and of article 11 of the Covenant. The author finally asserts that he is denied the right to challenge before a court the basic legal assumption that the term of imprisonment, in spite of earned remission of the sentence, continues in force after the date of release to the date of expiration, in violation of article 9 (1), (4) and (5) of the Covenant.

3. Before considering any claims contained in a communication, the Human Rights Committee shall, in accordance with rule 87 of its provisional rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4. The author of the communication claims that there have been breaches of articles 15 (1), 9 (1), (4) and (5) and 11 of the Covenant.

(a) Concerning the alleged breach of article 15 (1)

5.1 The author's principal complaint is against the introduction by the Parole Act 1970, in August 1970, after the commission of the punishable acts for which he was convicted, of a system of mandatory supervision for all prisoners benefiting from remission of sentence. However, the Committee is of the view that no action taken before the entry into force of the Covenant for the State party concerned can, as such, be judged in the light of the obligations deriving from the Covenant. Moreover, individuals may not criticize national laws in the abstract, since the Optional Protocol gives them the right to bring the matter before the Committee only where they claim to be victims of a violation of the Covenant.

5.2 With regard to the actual implementation of the mandatory supervision, which might give the author cause for complaint, the Committee notes that the author has not yet served the two thirds of his sentence for which he is not entitled to remission and that in addition his release, due on 8 September 1982, depends on his good conduct up to that date. The mandatory supervision system is therefore not yet applicable to him. The possibility of the remission he has earned being cancelled after his release is still more hypothetical. In the present situation, therefore, he has no actual grievance such as is required for the admissibility of a communication by an individual under articles 1 and 2 of the Optional Protocol.

5.3 The Committee notes also that mandatory supervision cannot be considered as equivalent to a penalty, but is rather a measure of social assistance in-

tended to provide for the rehabilitation of the convicted person, in his own interest. The fact that, even in the event of remission of the sentence being earned, the person concerned remains subject to supervision after his release and does not regain his unconditional freedom, cannot therefore be characterized as the imposition or re-imposition of a penalty incompatible with the guarantees laid down in article 15 (1) of the Covenant.

(b) Concerning the alleged violation of article 9 (1), (4) and (5)

6. The provisions of Canadian law under which a convicted person remains legally subject to deprivation of freedom until the expiry of the sentence, notwithstanding the remission he may have earned, do not in any way affect the guarantees against arbitrary arrest or detention set out in article 9 of the Covenant.

(c) Concerning the alleged breach of article 11

7. The argument that the legislation in force is contrary to article 11 of the Covenant is clearly groundless. The choice offered to a prisoner to accept release under the system of mandatory supervision or to continue to serve his sentence, does not result in a contractual obligation if the person concerned chooses release and signs the mandatory supervision certificate. It follows from the law itself that remission may be revoked if further offences are committed during the period of supervision.

8. In the light of the above, the Human Rights Committee considers that the claims of the author do not raise issues under any of the provisions of the Covenant. The Committee therefore concludes that the communication is incompatible with the provisions of the Covenant and, in accordance with article 3 of the Optional Protocol, decides:

The communication is inadmissible.

FIFTEENTH SESSION

Communication No. 79/1980

Submitted by: S. S. on 5 September 1980

Alleged victim: The author

State party: Norway

Date of decision on inadmissibility: 2 April 1982 (fifteenth session)

Interference with privacy and home—Protection of the law against interferences—Non-exhaustion of domestic remedies.

Articles of Covenant: 2 and 17

Article of Optional Protocol: 5 (2) (b)

1. The author of the communication (initial letter dated 5 September 1980 and further submission dated 16 November 1981) is a 77-year-old Norwegian national, living in Norway. He submits the communication on his own behalf.

2.1 The author complains that for over 20 years he has been the victim of relentless attacks upon his privacy by boys and youths in the town where he lives and that his repeated requests for protection and proper investigation have gone unheeded by the police. All windows on the ground floor and first floor of his house had been broken and he had given up on having them repaired and moved instead down to the basement, where he slept in a windowless room. Cars were frequently parked in front of his house illegally in such a manner that he had difficulties entering and leaving his house. In anguish and desperation the author had on a

number of occasions resorted to acts which he describes as self-defence (in 1978, twice throwing bucketfuls of excrement and urine over cars parked in front of his house, and, in 1979, firing shots from his shotgun in the direction of a group of youngsters across the street and accidentally wounding three of them). In the criminal court proceedings that ensued, the author explained that, in all cases, he had suspected the occupants of the cars and the group of youngsters across the street of being would-be stone throwers whom he only wanted to scare away. He was, however, found guilty of violating a number of provisions of the penal code, found liable for damages and sentenced to 30 days' imprisonment, suspended.

2.2 The author feels strongly that it is unjust that he has been found guilty and sentenced, as he sees it, merely for trying to defend himself and his property, while the real offenders, i.e. those who for years have been annoying him and damaging his property, have been neither apprehended nor charged. He also feels that a number of procedural errors have been made by the prosecuting authorities and the trial court in the conduct of his case.

2.3 The author did not initially specify the article or articles of the International Covenant on Civil and Political Rights which have allegedly been violated by Norway in his case. However, the facts set out in his letter dated 5 September 1980 indicate that he claims to be a victim of violations of the provisions of article 17 of the Covenant.

2.4 He requests the Human Rights Committee to consider his claim, pointing out that domestic remedies were exhausted by the refusal of the Supreme Court on 31 July 1980 to allow his appeal. He also maintains that other admissibility criteria, set out in the Optional Protocol, are fulfilled.

2.5 There is no indication in the communication that the same matter has been submitted to another procedure of international investigation or settlement.

3. By its decision of 27 March 1981, the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication, in so far as it may raise issues under article 17 of the International Covenant on Civil and Political Rights.

4.1 By a note dated 21 October 1981, the State party objected to the competence of the Human Rights Committee to consider the communication, stating that

if the communication is to be interpreted as alleging a breach of article 17 because S. S., acting in legitimate self-defence, was not acquitted in the criminal proceedings instituted against him, it is the opinion of the Norwegian authorities that the communication should be declared inadmissible as incompatible with the provisions of the Covenant in accordance with the provisions of article 3 *in fine* of the Optional Protocol. Article 17 provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. It does not contain any right to be acquitted because of self-defence.

4.2 The State party then continues that

Should one take the view that a right to self-defence falls within the scope of article 17, it is at any rate clear that the author went too far when exercising this (possible) right. In fact, three children were hit during the shooting incident. Considerable damage was caused to the cars of persons parking for a limited period of time at the bus-stop, in one case without any prior warning from the author. In the court's opinion, he exceeded his right to self-defence, and this must also be the result under article 17 of the Covenant.

Norwegian authorities have clearly not interfered with the privacy, home etc., of the author. The main problem in relation to article 17 is therefore whether the authorities have afforded sufficient protection to S. S. against interference by other persons, or, to put it differently, whether Norway has ensured the author the right recognized in article 17 of the Covenant (see article 2 (1) of that instrument).

Seen from this angle, the relevant domestic remedies are not in the hands of the courts, but of the various police authorities, which have as their major task to maintain public order and protect the rights of the individual. A person claiming that he has been harassed by others, has to address himself to the police authorities giving them the opportunity to investigate the matter with a view to preventing similar events in the future.

In the countryside, his first possibility is to inform the sheriff (*lensmannen*). If he is of the opinion that the sheriff is not pursuing the matter in an efficient manner, he may complain to the police, which will then investigate the matter and ask the sheriff for clarifications. If the person concerned is still not satisfied, he may complain to the Crown Prosecutor (*statsadvokaten*) and in the last instance to the Attorney-General (*riksadvokaten*). Accordingly, a hierarchical system of remedies is available to persons claiming to be subjected to harassment or other criminal acts.

In the case of S. S., it is a matter of clear fact that he never addressed himself to the police or the Crown Prosecutor because of the alleged harassment

4.3 The State party points out in this connection that "the author has not adopted an active attitude towards the police authorities" and that apart from the two incidents mentioned in the author's communication:

... the sheriff's office has never been informed by S. S. of alleged trouble on his property. According to S. S. he has been terrorized for a long time. The remedy open to him was then to report to the sheriff's office, a remedy of which he does not seem to have made adequate use. But at any rate he might have entered into contact with the police or the Crown prosecutor, arguing that he was not satisfactorily protected. As stated above, it is clear that he never did this.

Accordingly, it is the opinion of the Norwegian authorities that the author has not exhausted the domestic remedies available to him in accordance with article 2 of the Optional Protocol.

4.4 The State party adds:

... that the sheriff's office in fact kept an eye on S. S.'s house, situated about 6-8 km from the office, as the officers passed the house several times every day.

It should also be pointed out that the sheriff's area covers 240 km² with a population of about 6,500. The office has a heavy workload.

5.1 On 16 November 1981, the author of the communication forwarded his comments in reply to the State party's submission of 21 October 1981.

5.2 The author rejects the State party's contention that the communication does not reveal a violation of article 17 of the International Covenant on Civil and Political Rights and therefore is inadmissible, stating, in particular, that "it is extremely disheartening and disquieting that the Government should consider that the events and hooliganism ... to which I was subjected for a long time are not covered by article 17. For that mat-

ter the situation is also covered by article 12 of the Universal Declaration of Human Rights, whose wording corresponds fully with that of article 17."

5.3 He further claims that the right to self-defence has been acknowledged by the Norwegian courts in many cases similar to his own.

5.4 With regard to the specific incidents referred to in his communication and commented upon by the State party, the author states that he personally had informed automobile owners who parked illegally in front of his property "of that rather undesirable effect". He continues that:

Those who eventually claimed otherwise were quite familiar with the situation from hearing others say that the best way to tease 'the smith' was to ignore him completely and simply continue parking there. The way those cars were parked meant that my only access to my property was completely blocked each day. In wintertime, with high snow drifts, the situation was so bad that I was forced to go out via highway 120 behind my smithy and wade in through 1-metre-high snow in order to get back to my house. When, after a year it was impossible to get the authorities (sheriff) and the offenders to understand my hopeless situation and I was met with honking automobile horns and derisive laughter, an old 75-year-old man had no other possibility available than to take matters into his own hands on the basis of the right of retaliation under criminal law (see Criminal Code, paragraphs 228 and 250).

5.5 The author further rejects as untrue the State party's assertion that, apart from the incidents mentioned in the communication, he has never informed the sheriff's office of alleged trouble on his property.

5.6 He also refers to his defence counsel's statement made in the latest criminal case against him that "the sheriff's employees had themselves said that they had heard that 'S. the smith' was a 'special person' as soon as they came to the town, that is to say a man who was not entirely normal".

5.7 The author concludes:

My point is obvious: are complaints received from the "town crank" taken as seriously as those from respected citizens in Enebakk? ... It should obviously make no difference who reports criminal actions that are taking place in the town to the Enebakk Sheriff's Office. I have in no way remained passive and the means for complaint available to an old man have been exhausted without being heard by the authorities. The distance from the Sheriff's Office, the size of his district, the size of the population and his workload are irrelevant considerations here. The only determining factors are that the prosecuting authorities have not fully realized in this situation that their duty is to maintain law and order so that older people in particular are protected from hooliganism by children and youths.

6.1 The issue to be resolved by the Committee in the last resort relates to whether or not domestic remedies have been exhausted by the author of the communication.

6.2 It is not clear whether there were any remedies such as an action for trespass which the author of the communication might have been able to pursue in a court of law. However, the Committee concludes, on the basis of the information available to it, that the author has failed to pursue remedies which the State party has submitted were available to him, namely, to pursue the matter before the appropriate higher police authorities, the Crown Prosecutor and, in the last instance, the Attorney-General. The author appears to intimate that further efforts by him to exhaust available remedies might not have been taken "seriously" by the authorities. His doubts about the effectiveness of these remedies do not, however, absolve him from exhausting them, as required by article 5 (2) (b) of the Optional Protocol.

The Human Rights Committee therefore decides:

1. The communication is inadmissible;
2. This decision shall be communicated to the author and to the State party.

SIXTEENTH SESSION

Communication No. 121/1982

Submitted by: A. M. on 9 March 1982

Alleged victim: The author

State party: Denmark

Date of decision on inadmissibility: 23 July 1982 (sixteenth session)

State party's reservation to article 5 (2) (a) of Optional Protocol—Case already considered under other procedure of international investigation—European Commission of Human Rights

Decision on admissibility¹

1. The author of the communication (initial letter dated 9 March 1982 and further letters dated 20 April and 9, 29 and 30 June 1982) is a 39-year-old Pakistani

national at present serving a prison term in Denmark. He submits the communication on his own behalf.

2.1 The author states that he has been residing in Denmark since 1970, that in 1977 he married in Pakistan a citizen of that country, that his wife has since then lived with him in Denmark and that they have two children. He describes the facts of the case as follows:

2.2 On 31 July 1980, he was involved in a violent fight in Odense, Denmark, with several other men from Pakistan, Morocco and Algeria. At least four people were severely injured and one of them died. The author

¹ The text of an individual opinion submitted by a Committee member is appended to the present decision.

subsequently stood trial on charges including "bodily injuries with death as a result" and on 30 January 1981 he was convicted by the Eastern Court of Appeal (*Oestre Landsret*), sitting with a jury, and sentenced to three and a half years' imprisonment. The author applied to the Special Court for Revision (*Den saerlige klageret*) for a new trial. The Court rejected the request on 4 December 1981.

2.3 On 21 April 1981, A. M. was informed by the Danish immigration authorities that he would have to leave Denmark after serving his sentence. This decision was upheld by the Ministry of Justice and A. M. was so informed on 23 October 1981. He states that he is due to be released from prison on 15 August 1982 and that he will be deported on that date.

3.1 The author claims before the Human Rights Committee that he has been unjustly treated because he is a foreigner. He alleges that the police were dishonest in the conduct of pre-trial investigations into the matter and that the Court denied him a fair trial by giving undue weight to evidence against him, including testimony allegedly obtained from his Pakistani enemies in Denmark. He believes that a fair assessment of the evidence would have led to his acquittal. The author further claims that the decision of the Danish authorities to deport him upon release from prison constitutes degrading treatment and punishment.

3.2 In particular he claims to be a victim of breaches by Denmark of articles 5, 7 and 10 of the Universal Declaration of Human Rights as regards the right not to be subjected to degrading treatment or punishment, the right to equality before the law and the right to a fair trial. He also invokes article 11 (a) of the Universal Declaration of Human Rights concerning the presumption of innocence. These articles correspond, in substance, to articles 7, 14 and 26 of the International Covenant on Civil and Political Rights.

4. It appears from the communication that the author has submitted the same matter to the European Commission of Human Rights. His application before that body was declared inadmissible on 1 March 1982 as manifestly ill-founded.

5. Before considering any claims contained in a communication, the Human Rights Committee must decide whether the communication is admissible under the Optional Protocol to the Universal Covenant on Civil and Political Rights. The Committee observes in this connection that, when ratifying the Optional Protocol and recognizing the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction, the State party Denmark made a reservation, with reference to article 5 (2) (a) of the Optional Protocol, in respect of the competence of the Committee to consider a communication from an individual if the matter has already been considered under other procedures of international investigation.

6. In the light of the above-mentioned reservation and observing that the same matter has already been considered by the European Commission of Human

Rights and therefore by another procedure of international investigation within the meaning of article 5 (2) (a) of the Optional Protocol to the International Covenant on Civil and Political Rights, the Committee concludes that it is not competent to consider the present communication.

7. The Human Rights Committee, accordingly, decides:

That the communication is inadmissible.

8. This decision shall be communicated to the author of the communication and, for information, to the State party concerned.

APPENDIX

Individual opinion

Mr. Bernhard Graefrath, member of the Human Rights Committee, submits the following individual opinion relating to the admissibility of communication No. 121/1982 (A. M. v. Denmark):

I concur in the decision of the Committee that the communication is inadmissible. However, in my view the communication is inadmissible in accordance with article 3 of the Optional Protocol. The claims of the author do not raise issues under any of the provisions of the Covenant.

I cannot, however, share the view that the Committee is barred from considering the communication by the reservation of Denmark relating to article 5 (2) (a) of the Optional Protocol. That reservation refers to matters that have already been considered under other procedures of international investigation. It does not in my opinion refer to matters, the consideration of which has been denied under any other procedure by a decision of inadmissibility.

In the case of the author of communication No. 121/1982, the European Commission of Human rights has declared his application inadmissible as being manifestly ill-founded. It has thereby found that it has no competence to consider the matter within the legal framework of the European Convention. An application that has been declared inadmissible has not, in the meaning of the reservation, been "considered" in such a way that the Human Rights Committee is precluded from considering it.

The reservation aims at preventing the Human Rights Committee from reviewing cases that have been considered by another international organ of investigation. It does not seek to limit the competence of the Human Rights Committee to deal with communications merely on the ground that the rights of the Covenant allegedly violated may also be covered by the European Convention and its procedural requirements. If that had been the aim of the reservation, it would, in my opinion, have been incompatible with the Optional Protocol.

If the Committee interprets the reservation in such a way that it would be excluded from considering a communication when a complaint referring to the same facts has been declared inadmissible under the procedure of the European Convention, the effect would be that any complaint that has been declared inadmissible under that procedure could later on not be considered by the Human Rights Committee, despite the fact that the conditions for admissibility of communications are set out in a separate international instrument and are different from those under the Optional Protocol.

An application that has been declared inadmissible under the system of the European Convention is not necessarily inadmissible under the system of the Covenant and the Optional Protocol, even if it refers to the same facts. This is also true in relation to an application that has been declared inadmissible by the European Commission as being manifestly ill-founded. The decision that an application is manifestly ill-founded can necessarily be taken only in relation to rights set forth in the European Convention. These rights, however, differ in substance and in regard to their implementation procedures from the rights set forth in the Covenant. They, as well as the competence of the European Commission, derive from a separate and independent international instrument. A decision on non-admissibility of the European Commission, therefore, has no impact on a matter before the Human Rights Committee and cannot hinder the Human Rights Com-

mittee from reviewing the facts of a communication on its own legal basis and under its own procedure and from ascertaining whether they are compatible with the provisions of the Covenant. This might lead to a similar result as under the European Convention, but not necessarily so.

The reservation of Denmark was intended to avoid the same matter being considered twice. It did not aim at closing the door for a communication that might be admissible under the Optional Protocol despite the fact that it has been declared inadmissible by the European Commission.

DECISIONS TO DISCONTINUE OR SUSPEND CONSIDERATION

FIFTH SESSION

Communication No. 21/1977

Submitted by: I on 15 December 1977

Alleged victim: V

State party: S

Date of decision: 27 October 1978 (fifth session)

Author's failure to furnish sufficient information

As the information concerning the death of V furnished by the authors of communication No. 21/1977 in reply to requests of the Committee is insufficient to enable the Committee to consider the case under the Optional Protocol,

The Human Rights Committee therefore decides:

1. That proceedings on this communication be discontinued;
2. That this decision be communicated to the author.

Communication No. 22/1977

Submitted by: O. E. on 30 December 1977

Alleged victim: V (author's son)

State party: S

Date of decision: 27 October 1978 (fifth session)

Author's withdrawal of communication from Human Rights Committee to pursue communication before IACHR

Article of Optional Protocol: 5 (2) (a)

Taking note of the wish of the author of communication No. 22/1977 concerning V, conveyed to the Committee by his representative in a letter dated 16 October 1978, to withdraw the communication from considera-

tion by the Committee, on the grounds that the same matter has been submitted to and is being examined by the Inter-American Commission on Human Rights,

The Human Rights Committee therefore decides:

1. That proceedings on this communication be discontinued;
2. That this decision be communicated to the author and to the State party.

EIGHTH SESSION

Communication No. 1/1976

Submitted by: A *et al.* in August 1976

Alleged victims: A *et al.* and 1,180 other individuals

State party: S

Date of decision: 24 October 1979 (eighth session)

Authors' failure to respond to Committee

The Human Rights Committee,

Considering that no reply has been received from the authors of the communication in response to the Com-

mittee's request for further information, set out in paragraph 3 of its decision of 26 January 1978,

Recalling its decisions of 19 July 1978 and 18 April 1979 that the Committee would discontinue considera-

tion of the communication in the absence of a reply from the authors,

Considering that repeated reminders addressed to the authors pursuant to the Committee's decisions of 19 July 1978 and 18 April 1979 have been returned by the postal services after unsuccessful delivery,

Therefore decides:

1. That consideration of the communication be suspended;

2. That this decision be transmitted to the State party and, if possible, to the authors of the communication;

3. That an effort be made, at the same time, to transmit to the authors for information the text of the State party's submission of 5 October 1979 under rule 91 of the Committee's provisional rules of procedure.

NINTH SESSION

Communication No. 31/1978

Submitted by: Guillermo Waksman on 25 May 1978

Alleged victim: The author

State party: Uruguay

Date of decision: 28 March 1980 (ninth session)

Effective remedy provided by State party

Articles of Covenant: 12, 19

The author of the communication (dated 25 May 1978), Guillermo Waksman, is a Uruguayan citizen, journalist and translator, who for a number of years has lived outside Uruguay.

On 27 September 1977, upon expiry of his Uruguayan passport, he submitted an application for renewal of his passport at the Uruguayan Consulate in the city where he lived. He was subsequently informed that, after consultation with the Uruguayan Government, the Consulate was not authorized to renew his passport.

He maintained that this constituted a violation of articles 12 (2) and 19 of the International Covenant on Civil and Political Rights.

By a decision of 24 April 1979 the Human Rights Committee declared the communication to be admissible under the Optional Protocol to the International Covenant on Civil and Political Rights and, in ac-

cordance with article 4 (2) of the Protocol, requested the State party to submit to the Committee, within six months of the transmittal to it of the decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it.

In response to this decision, the State party informed the Committee that it had, on 16 August 1979, instructed its Consulate in the district where the author was at that time living, to renew his passport. This information was later confirmed by the author, who advised the Committee that he had received a new Uruguayan passport on 4 October 1979.

The Committee notes with satisfaction that the State party has taken appropriate steps to remedy the matter complained of.

The Human Rights Committee therefore decides:

1. To discontinue consideration of the communication;

2. That this decision be communicated to the State party and the author of the communication.

INTERLOCUTORY DECISIONS SUBSEQUENT TO ADMISSIBILITY DECISION

SIXTH SESSION

Communication No. 5/1977

Submitted by: Moriana Hernández Valentini de Bazzano on 15 February 1977

Alleged victims: The author, Luis María Bazzano Ambrosini, Martha Valentini de Massera and José Luis Massera

State party: Uruguay

Date of decision: 18 April 1979 (sixth session)

Request to State party for additional information under article 4 (2) of the Optional Protocol

The Human Rights Committee decides:

1. That the State party be informed that the Committee does not consider that its submission, dated 16 November 1978, is sufficient to comply with the requirements of article 4 (2) of the Optional Protocol, since it contains no explanations on the merits of the case under consideration;

2. That, to fulfil its obligation under article 4 (2) of the Optional Protocol, the State party be requested to supplement its submission by providing, not later than six weeks from the date of the transmittal of this decision to the State party, observations concerning the substance of the matter under consideration, and in particular on the specific violations of the Covenant alleged

to have occurred in respect of the treatment of Luis María Bazzano Ambrosini, Martha Valentini de Massera and José Luis Massera. The State party is requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration;

3. That upon receipt, the State party's supplementary submission under article 4 (2) of the Optional Protocol be transmitted to the author of the communication under rule 93 (3) of the provisional rules of procedure of the Committee, who may, within four weeks of the date of the transmittal, submit any additional observations to the Committee, in care of the Division of Human Rights, United Nations Office at Geneva;

4. That this decision be communicated to the State party and the author.

TENTH SESSION

Communication No. 24/1977

Submitted by: Sandra Lovelace on 29 December 1977

Alleged victim: The author

State party: Canada

Date of decision: 31 July 1980 (tenth session)

Minorities—Indian Act—Sex discrimination—Right to marry—Protection of the family—Right of residence—Request to author and State party for specific information to enable Committee to formulate views

Articles of Covenant: 2, 3, 23, 27

*Interim decision*¹

1. The author of the communication dated 29 December 1977, supplemented by letters of 17 April

¹ Pursuant to rule 85 of the provisional rules of procedure, Mr. Walter Surma Tarnopolsky did not participate in the consideration of this communication or in the adoption of this interim decision.

1978, 28 November 1979 and 20 June 1980, is a 32-year-old Canadian citizen of Indian origin, living in Canada. She was born and registered as a "Maliseet Indian" but lost her rights and status as an Indian, in accordance with Section 12 (1) (b) of the Indian Act, after having married a non-Indian on 23 May 1970. Pointing out that an Indian man who marries a non-Indian woman does not lose his Indian status, she claims that the Act is discriminatory on the grounds of sex and contrary to articles 2 (1), 3, 23 (1) and (4), 26 and 27 of the Covenant. As to the admissibility of the communication, she contends that she was not required to exhaust local remedies since the Supreme Court of Canada, in *The Attorney-General of Canada v. Jeanette Lavell*,

Richard Isaac et al. v. Yvonne Bédard [1974] S.C.R. 1349, held that section 12 (1) (b) does not contravene the Canadian Bill of Rights and was, therefore, fully operative.

2. By its decision of 18 July 1978 the Human Rights Committee transmitted the communication, under rule 91 of the provisional rules of procedure, to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication. This request for information and observations was reiterated by a decision of the Committee's Working Group, dated 6 April 1979.

3. By its decision of 14 August 1979 the Human Rights Committee declared the communication admissible and requested the author of the communication to submit additional information concerning her age and her marriage, which had not been indicated in the original submission. At that time no information or observations had been received from the State party concerning the question of admissibility of the communication.

4. In its submission dated 26 September 1979 relating to the admissibility of the communication, the State party informed the Committee that it had no comments on that point to make. This fact, however, should not be considered as an admission of the merits of the allegations or the arguments of the author of the communication.

5. In its submission under article 4 (2) of the Optional Protocol concerning the merits of the case, dated 4 April 1980, the State party recognized that "many of the provisions of the ... Indian Act, including section 12 (1) (b), require serious reconsideration and reform". The Government further referred to an earlier public declaration to the effect that it intended to put a reform bill before the Canadian Parliament. It none the less stressed the necessity of the Indian Act as an instrument designed to protect the Indian minority in accordance with article 27 of the Covenant. A definition of the Indian was inevitable in view of the special privileges granted to the Indian communities, in particular their right to occupy reserve lands. Traditionally, patrilineal family relationships were taken into account for determining legal claims. Since, additionally, in the farming societies of the nineteenth century, reserve land was felt to be more threatened by non-Indian men than by non-Indian women, legal enactments as from 1869 provided that an Indian woman who married a non-Indian man would lose her status as an Indian. These reasons were still valid. A change in the law could only be sought in consultation with the Indians themselves who, however, were divided on the issue of equal rights. The Indian community should not be endangered by legislative changes. Therefore, although the Government was in principle committed to amending section 12 (1) (b) of the Indian Act, no quick and immediate legislative action could be expected.

6. The author of the communication, in her submission of 20 June 1980, disputes that legal relationships

within Indian families were traditionally patrilineal in nature. Her view is that the reasons put forward by the Canadian Government do not justify the discrimination against Indian women in section 12 (1) (b) of the Indian Act. She concludes that the Human Rights Committee should recommend the State party to amend the provisions in question.

7. The Human Rights Committee recognizes that the relevant provision of the Indian Act, although not legally restricting the right to marry as laid down in article 23 (2) of the Covenant, entails serious disadvantages on the part of the Indian woman who wants to marry a non-Indian man and may in fact cause her to live with her fiancé in an unmarried relationship. There is thus a question as to whether the obligation of the State party under article 23 of the Covenant with regard to the protection of the family is complied with. Moreover, since only Indian women and not Indian men are subject to these disadvantages under the Act, the question arises whether Canada complies with its commitment under articles 2 and 3 to secure the rights under the Covenant without discrimination as to sex. On the other hand, article 27 of the Covenant requires States parties to accord protection to ethnic and linguistic minorities and the Committee must give due weight to this obligation. To enable it to form an opinion on these issues, it would assist the Committee to have certain additional observations and information.

8. In regard to the present communication, however, the Human Rights Committee must also take into account that the Covenant has entered into force in respect of Canada on 19 August 1976, several years after the marriage of Mrs. Lovelace. She consequently lost her status as an Indian at a time when Canada was not bound by the Covenant. The Human Rights Committee has held that it is empowered to consider a communication when the measures complained of, although they occurred before the entry into force of the Covenant, continued to have effects which themselves constitute a violation of the Covenant after that date. It is therefore relevant for the Committee to know whether the marriage of Mrs. Lovelace in 1970 has had any such effects.

9. Since the author of the communication is ethnically an Indian, some persisting effects of her loss of legal status as an Indian may, as from the entry into force of the Covenant for Canada, amount to a violation of rights protected by the Covenant. The Human Rights Committee has been informed that persons in her situation are denied the right to live on an Indian reserve with resultant separation from the Indian community and members of their families. Such prohibition may affect rights which the Covenant guarantees in articles 12 (1), 17, 23 (1), 24 and 27. There may be other such effects of her loss of status.

10. The Human Rights Committee, accordingly, invites the observations of the parties on the above considerations and requests them, as appropriate, to furnish replies to the following questions:

(a) How many Indian women marry non-Indian men on an average each year? Statistical data for the last twenty years should be provided.

(b) What is the legal basis of a prohibition to live on a reserve? Is it a direct result of the loss of Indian status or does it derive from a discretionary decision of the Council of the community concerned?

(c) What reasons are adduced to justify the denial of the right of abode on a reserve?

(d) What legislative proposals are under consideration for ensuring full equality between the sexes with regard to Indian status? How would they affect the position of Mrs. Lovelace? How soon can it be expected that legislation will be introduced?

(e) What was Mrs. Lovelace's place of abode prior to her marriage? Was she at that time living with other members of her family? Was she denied the right to reside on a reserve in consequence of her marriage?

ELEVENTH SESSION

Communication No. 29/1978

Submitted by: E. B. on 7 April 1978

Alleged victim: B (author's brother)

State party: S

Date of decision: 29 October 1980 (eleventh session)

Request to author for specific information to enable Committee to formulate views

Interim decision

The Human Rights Committee,

Noting the information submitted by the State party on 4 July 1980 explaining that B was released from detention on 5 January 1980 and expelled from S on 24 February 1980 bound for Spain,

Recalling that the communication was initially submitted to the Committee at a time when the alleged victim was detained in S,

Decides:

1. That the author of the communication be requested to confirm that his brother, B, was expelled from S, that he is living outside that country and that he wishes the Committee to pursue the matter;

2. That subject to the confirmation sought in operative paragraph 1, the alleged victim be requested to acquaint himself with the contents of the submissions previously made on his behalf and the submissions made by the State party, with a view to:

(a) correcting any inaccuracies which he may find in the submissions made on his behalf,

(b) commenting as he deems relevant on the submissions of the State party, and

(c) adding any further information which he may wish to place before the Human Rights Committee for consideration in his case;

3. That any submissions from the author of the communication or from the alleged victim pursuant to operative paragraphs 1 and 2 above should reach the Human Rights Committee, in care of the Division of Human Rights, United Nations Office at Geneva, within two months of the transmittal of this decision to the author of the communication;

4. That any information or observations received from the author of the communication or from the alleged victim pursuant to this decision be transmitted to the State party;

5. That, subject to the receipt of confirmation from the author of the communication or from the alleged victim to the effect that they wish the Committee to pursue the matter, the State party be requested to fulfil its obligation under article 4 (2) of the Optional Protocol, by supplementing its prior submission of 4 July 1980 in the manner set out in operative paragraph 4 of the Committee's decision on 14 August 1979;

6. That any submission from the State party pursuant to operative paragraph 5 of the present decision should reach the Human Rights Committee within two months of the date of transmittal to it of information or observations pursuant to paragraph 4 of the present decision;

7. That pursuant to rule 93 (3) of the Committee's rules of procedure, the author of the communication and/or the alleged victim be allowed six weeks to comment on any submission from the State party;

8. That this decision be communicated to the State party and to the author of the communication.

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5 (4) OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

SEVENTH SESSION

Communication No. 5/1977

Submitted by: Moriana Hernández Valentini de Bazzano on 15 February 1977

Alleged victims: The author, Luis María Bazzano Ambrosini, Martha Valentini de Massera and José Luis Massera

State party: Uruguay

Date of adoption of views: 15 August 1979 (seventh session)

Standing of author to act on behalf of alleged victims—Submission to IACHR.—Admissibility ratione temporis—Delays in proceedings—Detention incommunicado.—Habeas corpus—Detention despite release order—Torture—Fair trial—Prison conditions—Medical care in prison—Visits by family members—Restriction of political rights

Articles of Covenant: 7, 9 (1), (3) and (4), 10 (1), 14 (1), (2) and (3), 25

Articles of Optional Protocol: 2, 4 (2), 5 (2) (a) and (b)

Views under article 5 (4) of the Optional Protocol

1. The author of this communication (initial letter dated 15 February 1977 and further letters dated 4 August 1977 and 6 June 1979) is a Uruguayan national, residing in Mexico. She submitted the communication on her own behalf, as well as on behalf of her husband, Luis María Bazzano Ambrosini, her stepfather, José Luis Massera, and her mother, Martha Valentini de Massera.

2. The author alleges, with regard to herself, that she was detained in Uruguay from 25 April to 3 May 1975 and subjected to psychological torture. She states that she was released on 3 May 1975 without having been brought before a judge.

The author claims that her husband, Luis María Bazzano Ambrosini, was detained on 3 April 1975 and immediately thereafter subjected to various forms of torture such as *plantón* (the prisoner was forced to remain standing for 14 hours), electric shocks and *bastinado* (blows). He was accused of complicity in "assistance to subversive association" for having participated in a spontaneous demonstration and was placed at the disposal of a military judge, although the accusation was consistently denied by the prisoner. Nevertheless, the judge indicted him on the basis of his identification by a single alleged witness who did not, however, appear during the preliminary investigation in order to confirm his prior statement. After one year's detention, the

judge granted him conditional release, but this decision could not be put into effect since, shortly before, the prisoner had been removed from the place of detention without the judge's knowledge and had been taken to a place unknown to the judge. Once he had been notified of his release, the victim was taken again to an unidentified place where he was held prisoner, and confined incommunicado until, on 7 February 1977, he was tried on the charge of "subversive association", an offence punishable by three to eight years' imprisonment. He remained confined together with four other political prisoners in a cell measuring 4.50 by 2.50 metres in conditions seriously detrimental to his health. In a communication addressed to Mrs. Moriana Hernández de Bazzano, the victim's lawyer stated that he had twice requested that the defendant should be granted provisional release, but without success. He also said that under Uruguayan law, the defendant should have been discharged, but that the Court had ordered the preliminary investigation to be closed without the Prosecutor requesting the gathering of any additional evidence.

The author claims that her stepfather, José Luis Massera, professor of mathematics and former Deputy to the National Assembly, was arrested on 22 October 1975 and held incommunicado until his detention was made known in January 1976. She claims that he was denied the right of *habeas corpus* before the civil and military courts and that an application to the Commission on Respect for Human Rights of the Council of State went unanswered. On 15 August 1976 he was tried by a military court on the charge of "subversive association" for being one of the leaders of a banned political party. The author further states that her stepfather suffered permanent damage as a result of torture. In her letter of 4 August 1977 she states that, having been forced to remain standing with his head hooded for long hours, he lost his balance, fell down and broke his leg which was not immediately taken care of, resulting in that leg being now several centimetres shorter than the

other one. The author further submits that her stepfather remains imprisoned and that in his double quality as former Deputy and as an accused tried for a political offence, he has been deprived of all his political rights by a Government decree.

The author claims that her mother, Martha Valentini de Massera, was arrested on 28 January 1976 without any formal charges and that in September 1976 she was accused of "assistance to subversive association", an offence which carries a penalty of two to eight years' imprisonment. She was not allowed to receive visits until November 1976, but had again been taken to an unknown place at the time of the submission of the communication in February 1977. In a subsequent letter of 6 June 1979 the author states that her mother was tried by a military court and sentenced to three and a half years' imprisonment due to expire on 28 July 1979. Having been subjected to ill-treatment during her detention, her mother had furthermore suffered from the inadequate diet and the prevailing state of unhealthy working conditions, so that her health had been weakened.

3. On 26 August 1977, the Human Rights Committee decided to transmit the communication to the State party, under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility.

4. By letter dated 27 October 1977 the State party objected to the admissibility of the communication on three grounds:

(a) The same matter was already being examined by the Inter-American Commission on Human Rights;

(b) None of the alleged victims had exhausted all available domestic remedies;

(c) In so far as the author of the communication was concerned, the alleged violations are said to have taken place prior to 23 March 1976, the date on which the International Covenant on Civil and Political Rights and the Optional Protocol entered into force for Uruguay, and that they have not continued or had effects which themselves constitute a violation after that date.

5. On 1 February 1978, the Human Rights Committee,

(a) Having ascertained that cases concerning the alleged victims, which had been before the Inter-American Commission on Human Rights, had been withdrawn and were no longer under active consideration by that body,

(b) Being unable to conclude that, with regard to exhaustion of domestic remedies, on the basis of the information before it, there were any further remedies which the alleged victims should or could have pursued,

(c) Accepting the contention of the State party that in so far as the communication related to the alleged detention of the author, the Committee could not consider it since it concerned events which allegedly took place prior to the entry into force of the Covenant and the Optional Protocol in respect of Uruguay,

Therefore decided:

(a) That the author of the communication was justified by reason of close family connection in acting on behalf of the other alleged victims;

(b) That the communication was inadmissible in so far as it related to the alleged detention of the author of the communication;

(c) That the communication was admissible in so far as it related to alleged violations of the Covenant in respect of the treatment of Luis María Bazzano Ambrosini, Martha Valentini de Massera and José Luis Massera;

(d) That the attention of the State party be drawn to the concern expressed by the author of the communication for the health of Luis María Bazzano Ambrosini and José Luis Massera and that the State party be requested to arrange for them to be medically examined and given all necessary medication and treatment if this had not already been done;

(e) That the text of this decision be transmitted to the State party, together with the text of the relevant documents, and to the author;

(f) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter in so far as the communications related to Luis María Bazzano Ambrosini, Martha Valentini de Massera and José Luis Massera, and the remedy, if any, that may have been taken by it.

6. After expiry of the six-month time-limit, the State party submitted its explanations, dated 16 November 1978, which consisted of a "Review of the rights of the accused in cases before a military criminal tribunal, and domestic remedies available to him for protecting and safeguarding his rights in the national courts of justice".

7. On 18 April 1979, the Committee decided that the submission of the State party dated 16 November 1978 was not sufficient to comply with the requirements of article 4 (2) of the Optional Protocol, since it contained no explanations on the merits of the case under consideration and requested the State party to supplement its submission by providing, not later than six weeks from the date of the transmittal of this decision to the State party, observations concerning the substance of the matter under consideration.

8. The six-week extension granted by the decision of 18 April 1979 expired on 2 July 1979, but no response had reached the Division of Human Rights at the United Nations Office at Geneva by then, nor even by the time of the taking of this decision by the Committee.

9. The Human Rights Committee,

(a) Considering that this communication was registered over two years ago,

(b) Considering that this communication was declared admissible more than one year ago and that the six-month time period required by article 4 (2) of the Optional Protocol expired in September 1978,

(c) Considering that the State party did not comply with the requirements of article 4 (2) of the Optional Protocol since its submission dated 16 November 1978 did not contain any explanations and statements clarifying the matter,

(d) Considering that there has been no response from the State party even after a further extension of six weeks,

(e) Considering that the Committee has the obligation under article 5 (1) of the Optional Protocol, to consider this communication in the light of all written information made available to it by the author and the State party,

Hereby decides to base its views on the following facts which have not been contradicted by the State party:

(i) Luis María Bazzano Ambrosini was arrested on 3 April 1975 on the charge of complicity in "assistance to subversive association". Although his arrest had taken place before the coming into force of the International Covenant on Civil and Political Rights and of the Optional Protocol thereto, on 23 March 1976, his detention without trial continued after that date. After being detained for one year he was granted conditional release, but this judicial decision was not respected and the prisoner was taken to an unidentified place, where he was confined and held incommunicado until 7 February 1977. On that date he was tried on the charge of "subversive association" and remained imprisoned in conditions seriously detrimental to his health. His lawyer twice attempted to obtain his provisional release, but without success;

(ii) José Luis Massera, a professor of mathematics and former Deputy to the National Assembly, was arrested in October 1975 and has remained imprisoned since that date. He was denied the remedy of *habeas corpus*, and another application for remedy made to the Commission on Respect for Human Rights of the Council of State went unanswered. On 15 August 1976 he was tried on charges of "subversive association" and remained in prison. As a result of the maltreatment received, he has suffered permanent injury, as evidenced by the fact that one of his legs is several centimetres shorter than the other. In his double quality as former Deputy and as an accused tried for a political offence, he was deprived of all his political rights;¹

¹ Institutional Act No. 4 of 1 September 1976:

[...] The Executive Power, in exercise of the powers conferred on it by the institutionalization of the revolutionary process,

"DÉCREES:

"Art. 1. The following shall be prohibited, for a term of fifteen years, from engaging in any of the activities of a political nature authorized by the Constitution of the Republic, including the vote:

"(a) All candidates for elective office on the lists for the 1966 and 1971 elections of the Marxist and pro-Marxist Political Parties or Groups declared illegal by the resolutions of the Executive Power No. 1788/67 of 12 December 1967 and No. 1026/73 of 26 November 1973;

(iii) Martha Valentini de Massera was arrested on 28 January 1976. In September 1976 she was charged with "assistance to subversive association". She was kept in detention and was initially held incommunicado. In November 1976 for the first time a visit was permitted, but thereafter she was again taken to an unknown place of detention. She was tried by a military court and sentenced to three and a half years imprisonment, due to expire on 28 July 1979.

10. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that these facts in so far as they have occurred after 23 March 1976, disclose violations of the International Covenant on Civil and Political Rights, in particular of:

(i) With respect to Luis María Bazzano Ambrosini, Article 7 and article 10 (1), because he was detained under conditions seriously detrimental to his health; Article 9 (1), because he was kept in custody in spite of a judicial order of release;

Article 9 (3) and article 14 (1), (2) and (3), because he was not brought to trial within a reasonable time and was tried in circumstances in which he was denied the requisite safeguards of fair trial;

Article 9 (4), because he was denied any effective remedy to challenge his arrest and detention;

Article 10 (1), because he was held incommunicado for months and was denied the right to be visited by any family member;

(ii) With respect to José Luis Massera, Article 7 and article 10 (1), because during his detention he was tortured as a result of which he suffered permanent physical damage;

Article 9 (2), because he was not promptly informed of the charges brought against him;

Article 9 (3) and article 14 (1), (2) and (3), because he was not brought to trial within a reasonable time and was tried in circumstances in which he was denied the requisite safeguards of fair trial;

Article 9 (4), because he was denied any effective remedy to challenge his arrest and detention;

Article 10 (1), because for months he was denied the right to be visited by any family member;

Article 25, because of unreasonable restrictions on his political rights;

"(b) All persons who have been tried for crimes against the nation.

"Art. 2. The following shall be prohibited, for a term of fifteen years, from engaging in any of the activities of a political nature authorized by the Constitution of the Republic, except the vote:

"(a) All candidates for elective office on the lists for the 1966 and 1971 elections of the Political Organizations which were electorally associated with the organizations mentioned in the preceding article, subparagraph (a), under the same coincidental or joint slogan or subslogan;

"(b) All persons who have been tried for offences against the Public Administration committed during the exercise of their political functions. [...]"

(iii) With respect to Martha Valentini de Massera, Article 9 (2), because she was not promptly informed of the charges brought against her;
Article 10 (1), because for months she was held incommunicado and was denied visits by any family member;

Article 14 (1), (2) and (3), because she was tried in circumstances in which she was denied the requisite safeguards of fair trial;
and, accordingly, is of the view that the State party is under an obligation to take immediate steps to ensure strict observance of the provisions of the Covenant and to provide effective remedies to the victims.

EIGHTH SESSION

Communication No. 9/1977

Submitted by: Edgardo Dante Santullo Valcada on 20 February 1977

Alleged victim: The author

State party: Uruguay

Date of adoption of views: 26 October 1979 (eighth session)

Detention—Habeas corpus—Ill-treatment—Effective remedy—Burden of proof

Articles of Covenant: 2, 7, 9 (4) and (5)

Article of Optional Protocol: 5 (2) (b)

Views under article 5 (4) of the Optional Protocol¹

1. The author of this communication dated 20 February 1977 is a Uruguayan national residing in Mexico. He submitted the communication on his own behalf.

2. The author states that on 8 September 1976 he was arrested in the streets of Montevideo by four police officers dressed in civilian clothing and taken to the headquarters of the Investigation and Intelligence Department. There he learned that he was accused of receiving the clandestine newspaper *Carta*. The author described what ensued as follows: "On denying this, I was hooded and forced to remain standing in an unnatural position (feet one metre apart, body and head very erect, arms stretched out and raised to shoulder level, in my underwear and barefoot on a pile of grit); this caused me intense muscular pain. If I was overcome by fatigue and lowered my arms or head or put my legs a little further together, I was beaten brutally. This treatment was accompanied by punches, kicks, insults and threats of torturing my wife and two children (aged six and eight)." He further alleges that he was not given any food and that this situation lasted for three days. The day after his arrest, on 9 September 1976, at 3 a.m., his house was thoroughly searched, allegedly without his permission and without any warrant. On 16 September 1976 he was transferred to the Central Prison where he remained imprisoned for a further 50 days in complete solitary confinement in a cell measuring 1.2 by 2 metres. He was only allowed to leave his cell 15 minutes in the mornings and 15 minutes in the afternoons. On 23 October 1976, he was brought before a

military judge before whom he maintained what he had said previously. On 5 November 1976 he was again brought before the military court, where he was informed that, in the absence of any reasonable grounds for charging him with an offence, he could go free. The writer adds that at no time, during the 50 days of his detention, was he able to communicate with a defence counsel and that the recourse of *habeas corpus* was not applicable in his case because he was detained under the "prompt security measures". Finally he claims that he has not received any compensation for his imprisonment and for the resulting economic hardship suffered by his family.

3. On 25 August 1977, the Human Rights Committee decided to transmit the communication to the State party, under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility.

4. By letter dated 27 October 1977, the State party objected to the admissibility of the communication on the ground that the alleged victim had not exhausted all available domestic remedies, and made the general observation that every person in the national territory has free access to the courts and public and administrative authorities and freedom to avail himself of all the administrative and legal remedies available to him under Uruguay's internal law.

5. On 1 February 1978, the Human Rights Committee,

(a) Having ascertained that the case concerning the alleged victim has not been submitted to any other international body,

(b) Being unable to conclude that, with regard to exhaustion of domestic remedies, on the basis of the information before it, there were any further remedies which the alleged victim should or could have pursued,

Therefore decided:

(a) That the communication was admissible;

¹ The text of an individual opinion submitted by a Committee member is appended to these views.

(b) That the text of this decision be transmitted to the State party, together with the text of the relevant documents, and to the author;

(c) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it.

6. The time-limit for the State party's submission under article 4 (2) of the Optional Protocol expired on 3 September 1978. More than four months after expiry of the six-month time-limit, the State party submitted its explanations, dated 8 January 1979, which consisted of a "Review of the rights of the accused in cases before a military criminal tribunal, and domestic remedies available to him for protecting and safeguarding his rights in the national courts of justice". It contained a reference to the remedy of *habeas corpus* under article 17 of the Constitution, but it did not mention the fact that under the Uruguayan legal system the remedy of *habeas corpus* is not applicable to persons arrested and detained under the régime of prompt security measures.

7. On 10 April 1979, the Committee decided that the submission of the State party dated 8 January 1979 was not sufficient to comply with the requirements of article 4 (2) of the Optional Protocol, since it contained no explanations on the merits of the case under consideration and requested the State party to supplement its submission by providing, not later than six weeks from the date of the transmittal of this decision to the State party, observations concerning the substance of the matter under consideration.

8. The Committee's decision of 18 April 1979 was transmitted to the State party on 18 May 1979. The six weeks referred to therein, therefore, expired on 2 July 1979. More than three months after that date, a response was received from the State party, dated 9 October 1979. The State party informed that Mr. Santullo Valcada was arrested on 9 September 1976 in connection with the identification of persons acting as clandestine contacts for the proscribed Communist Party. During the inspection of his house, a great amount of subversive material was allegedly found and Mr. Santullo was detained under the "prompt security measures". On 6 November 1976 he was released and a few days later, on 25 November, he obtained political asylum at the Embassy of Mexico. It is maintained that, throughout the proceedings, all the provisions of the internal legal order were strictly complied with. The State party also referred in its submission to the régime of "prompt security measures" describing some of its characteristics. Under such régime, any person can be arrested on grounds of a grave and imminent danger to security and public order; the remedy of *habeas corpus* is not applicable. Furthermore the State party referred to the domestic legal provisions prohibiting any physical maltreatment in Uruguay. Without going into further details, the State party submitted that the author's allegations concerning violations of the Covenant were

unfounded, irresponsible and unaccompanied by the least shred of evidence and that they accordingly did not deserve further comment.

9. The Committee has noted that the submissions by the Government of Uruguay of 9 October 1979 were received after the expiry of the time-limit imposed by article 4 (2) of the Optional Protocol, and even after the time-limit following the Committee's renewed request of 18 April 1979. The Committee considered the present communication in the light of all information made available to it by the parties as provided for in article 5 (1) of the Optional Protocol.

10. The Human Rights Committee therefore decides to base its views on the following facts which have either been essentially confirmed by the State party or are unrepudiated or uncontested except for denials of a general character offering no particular information or explanations: Edgardo Dante Santullo Valcada was arrested on 8 or 9 September 1976. He was brought before a military judge on 25 October 1976 and again on 5 or 6 November 1976 when he was released. During his detention he did not have access to legal counsel. He had no possibility to apply for *habeas corpus*. Nor was there any decision against him which could be the subject of an appeal.

11. As regards the allegations of ill-treatment, the Committee noted that in his communication the author named the senior officers responsible for the ill-treatment which he alleged that he received. The State party has adduced no evidence that his allegations of ill-treatment have been duly investigated in accordance with the laws to which it drew attention in its submission of 9 October 1979. A refutation of these allegations in general terms is not enough. The State party should investigate the allegations in accordance with its laws.

12. The Human Rights Committee acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that these facts, having arisen after 23 March 1976, disclose violations of the International Covenant on Civil and Political Rights, in particular:

"of article 9 (4) because, *habeas corpus* being inapplicable in his case, Santullo Valcada was denied an effective remedy to challenge his arrest and detention."

As regards article 7 of the Covenant the Committee cannot find that there has not been any violation of this provision. In this respect the Committee notes that the State party has failed to show that it had ensured to the person concerned the protection required by article 2 of the Covenant.

13. The Committee, accordingly, is of the view that the State party is under an obligation to take immediate steps to ensure strict observance of the provisions of the Covenant and to provide effective remedies to the victim, including compensation in accordance with article 9 (5) of the Covenant.

APPENDIX

Individual opinion submitted by a member of the Human Rights Committee under rule 94 (3) of the Committee's provisional rules of procedure

Communication No. 9/1977

Individual opinion appended to the Committee's views at the request of Mr. Walter Surma Tarnopolsky:

Although I agree with the view of the Committee that it could not find that there has not been any violation of article 7 of the Covenant, I also conclude, for the reasons set out in paragraph 11 of the Committee's views, that there has been a violation of article 7 of the Covenant.

The following members of the Committee associated themselves with the individual opinion submitted by Mr. Tarnopolsky: Mr. Nájib Bouziri, Mr. Abdoulaye Diéye, Mr. Bernhard Graefrath, Mr. Dejan Janča, Mr. Waleed Sadi.

NINTH SESSION

Communication No. 8/1977

Submitted by: Ana María García Lanza de Netto on 20 February 1977, Beatriz Weismann on 28 September 1979 and Alcides Lanza Perdomo on 15 February 1980

Alleged victims: Beatriz Weismann and Alcides Lanza Perdomo

State party: Uruguay

Date of adoption of views: 3 April 1980 (ninth session)

Standing of author to act on behalf of alleged victims—Submission to IACHR—Same matter—Exhaustion of domestic remedies—Review of decision on admissibility—Joinder of subsequent communication—Arbitrary arrest—Detention incommunicado—Habeas corpus—Access to counsel—Torture—Delay in proceedings—Fair trial—Continued detention after serving sentence—Freedom of expression—Right of State party to derogate from Covenant—Burden of proof

Articles of Covenant: 4, 7, 9 (1), (3) and (4), 10 (1), 14 (1), (2) and (3) and 19 (2) and (3)

Article of Optional Protocol: 5 (2) (a) and (b)

Views under article 5 (4) of the Optional Protocol

1. The initial author of this communication, Ana María García Lanza de Netto (initial letter dated 20 February 1977) is a Uruguayan national, residing in Mexico. She submitted the communication on behalf of her aunt, Beatriz Weismann de Lanza, a 35-year-old Uruguayan citizen, and her uncle, Alcides Lanza Perdomo, a 60-year-old Uruguayan citizen and a former trade union leader, alleging that both had been arbitrarily arrested and detained in Uruguay.

2. Ana María García Lanza de Netto claimed that her uncle had been arrested early in February 1976 in the streets of Montevideo by the occupants of an army vehicle and that until the end of September 1976 his family was unable to locate him. She alleged that Alcides Lanza Perdomo was detained at various places, including the naval air base at Laguna del Sauce in the Department of Maldonado and that during this period of initial detention he had to be admitted to the Central Hospital of the Armed Forces four times, on one occasion almost completely suffocated. She further alleged that there were two months about which her uncle remembers absolutely nothing and that he supposes he

was unconscious all that time. She claimed that as a consequence of the mistreatment received, her uncle's hearing was seriously impaired and that he had difficulties moving about because of injuries which were caused to one hip, probably a fracture.

It is submitted that Alcides Lanza Perdomo was later held in the army barracks of the School of Weapons and Services, 14 kilometres along Camino Maldonado, where he was allegedly housed in a railway wagon together with 16 other prisoners, and that he was forced to work in the fields.

In respect of her aunt, Beatriz Weismann de Lanza, the initial author submitted that she had been arrested shortly after her husband by army personnel entering her home early one morning and taking her away together with her two small sons, who were handed over some hours later to their grandmother. The author claimed that her aunt's family and friends were unaware of her place of detention until late in 1976. She claimed that her aunt had been in good health until her disappearance in February 1976 but that due to torture inflicted upon her, she had no feeling from the waist downwards and could not move without the help of two female prisoners. She stated that Beatriz Weismann de Lanza had nevertheless been obliged to work.

Finally, Ana María García Lanza de Netto submitted that proceedings had been initiated with regard to her uncle before a military court, but that it was not clear whether her aunt had appeared before a court.

These submissions have later been supplemented by the alleged victims, as set out in paragraphs 9, 10 and 11 below.

3. On 26 August 1977, the Human Rights Committee decided to transmit the communication to the State party under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility. By that same decision the Committee requested Ana María García Lanza

de Netto to furnish detailed information on the grounds and circumstances justifying her acting on behalf of the alleged victims.

4. By letter dated 21 October 1977 the initial author explained that the alleged victims were unable to act on their own behalf and that she was acting on their behalf as their close relative, believing, on the basis of her personal acquaintance with them, that the alleged victims would agree to lodging a complaint.

5. By letter dated 27 October 1977 the State party objected to the admissibility of the communication on two grounds:

(a) That the same matter was already being examined by the Inter-American Commission on Human Rights;

(b) That the alleged victims had not exhausted all available domestic remedies.

6. On 1 February 1978, the Human Rights Committee,

(a) Having ascertained that the case concerning Beatriz Weismann de Lanza, which had been before the Inter-American Commission on Human Rights, had been withdrawn and was no longer under active consideration by that body,

(b) Having further ascertained that the cases concerning Alcides Lanza Perdomo were submitted to the Inter-American Commission on Human Rights in November 1974 and February 1976 respectively,

(c) Concluding that these two cases cannot relate to events alleged to have taken place on or after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay),

(d) Further concluding that, with regard to exhaustion of domestic remedies, on the basis of the information before it, there were no further remedies which the alleged victims should or could have pursued,

Therefore decided:

(a) That the author of the communication was justified by reason of close family connection in acting on behalf of the alleged victims;

(b) That the communication was admissible;

(c) That the text of this decision be transmitted to the State party together with the text of the relevant documents and to the author;

(d) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it.

With regard to the exhaustion of domestic remedies the Committee said that its decision "may be reviewed in the light of any further explanations which the State party may submit giving details of any domestic remedies which it claims to have been available to the alleged victims in the circumstances of their cases, together with evidence that there would be a reasonable prospect that such remedies would be effective".

7. By its decision of 18 April 1979, the Committee:

(a) Informed the State party of the Committee's concern that the State party had failed to fulfil its obligation to submit written explanations or statements under article 4 (2) of the Optional Protocol;

(b) Requested the State party, although the six-months' time-limit, established by article 4 (2) of the Optional Protocol, had expired on 3 September 1978, that a submission from the State party pursuant to that article should be made without further delay and should, in any event, reach the Human Rights Committee not later than six weeks from the date of the transmittal of the decision.

8. The time-limit set by the Committee in its decision of 18 April expired on 2 July 1979, at which time no further submission had yet been received. However, in a note dated 8 October 1979 the Government submitted, in the first place, that the Committee should review its decision regarding the admissibility of the communication, because domestic remedies had not been exhausted. It attached a summary of available remedies, noting that the authors had not indicated that they had actually applied for any remedies; furthermore, the Government stated that the effectiveness of the remedies was not for the Government to prove and that it could not be argued hypothetically that they were ineffective. Notwithstanding these contentions, however, the Government gave the following information:

Mr. Alcides Lanza was arrested for investigation on 2 February 1976 and detained under the prompt security measures. Subsequently, on 21 September 1976, he was charged by the military examining judge of fifth sitting with the offence of 'subversive association' referred to in article 60 (VI) of the Military Penal Code.

On 26 October 1977 he was sentenced to three years' severe imprisonment less the period spent in custody pending trial. On completion of his sentence, he was granted unconditional release on 2 February 1979 and left Uruguay for Sweden on 1 July 1979.

It should be noted that the appropriate legal assistance was available to Mr. Lanza at all times, his defence counsel being Dr. Juan Barbé.

Mrs. Weismann de Lanza was arrested for investigation on 17 February 1976 and detained under the prompt security measures. Subsequently, on 28 September 1976, she was charged by the military examining judge of first sitting with the offence of 'assistance to association' referred to in article 60 (VI) of the Military Penal Code.

She was sentenced on 4 April 1978. Her offence was deemed to have been purged by the period spent in custody pending trial, and she was released. She left Uruguay for Sweden on 11 February 1979.

It stated that it was clearly demonstrated by the plain statement of facts given above that the accusations of violations of the Covenant were "fallacious". "Although such accusations, being groundless, irresponsible and unaccompanied by the least shred of evidence, are not worthy of any further comment" some were referred to by way of example:

It is obvious that both of these persons were afforded all guarantees of due process, for they were brought before a competent judge in public proceedings, had the appropriate legal assistance from their defence counsel and were presumed innocent until proved guilty (article 14, paragraph 1, paragraphs 3 (b) and 3 (e) and paragraph 2).

The charges of alleged ill-treatment and torture suffered by the detainees are mere figments of the author's imagination; she is apparently unaware of Uruguay's long tradition in the matter, which has, throughout its history, earned it the recognition of the international

community. Only someone who is completely ignorant of the facts or is acting in obvious bad faith can conceivably accuse Uruguay of violating articles 7 and 10 (1) of the Covenant and article 5 of the Universal Declaration of Human Rights. Detainees are not subjected to any kind of torture or physical coercion in any detention establishment.

The Government of Uruguay trusts that the foregoing explanations will provide a sufficient basis for the Committee, on this occasion, to reject once and for all the communication under consideration, which is merely another instance of the campaign of defamation conducted against our country with the intention of discrediting its image abroad; none the less, it remains at the disposal of the Committee for any further clarification it may require.

9. Meanwhile, one of the alleged victims, Beatriz Weismann de Lanza, after arriving in Sweden, had submitted a communication (received on 28 February 1979 and first registered as No. 48/1979) on behalf of the other alleged victim, her husband Alcides Lanza Perdomo, containing further and detailed particulars about his case. In a further letter (of 30 April 1979) including a detailed statement of her own case, she requested to be regarded as co-sponsor and co-author of the present communication, and that her own communication (No. 48/1979) be regarded as part thereof and added thereto as further information.

She stated, *inter alia*, that her husband had been kept in different military quarters and prisons, held incommunicado for nine months and subjected to torture, such as electric shocks, hanging by his hands, immersion of his head in dirty water, near to asphyxia, *submarino seco*. She stated that her husband suffered from several serious health problems (hypertension, permanent trembling in his right arm and sometimes in his whole body and loss of memory due to brain damage) due to the treatment he was subjected to. He was tried on 21 September 1976 and sentenced to three years' imprisonment by a military court, and she claimed that he continued to be kept in detention in spite of having served his sentence. With regard to herself she described in detail her experience from the date of her arrest of 17 February 1976 until her release and departure from Uruguay in 1979. She said that after her arrest she was first detained in the barracks of unit No. 13 of the Armed Forces, called "El infierno" by prisoners. Almost constantly kept blindfolded and with her hands tied, she allegedly was subjected to various forms of torture, such as *caballete*, *submarino seco*, *picana* and *plantón*, which she describes in detail. On 29 July 1976, she was transferred to the barracks of the 6th Cavalry Unit where she was kept in a dirty cell in miserable hygienic conditions and without adequate clothes to protect her against the cold, still blindfolded most of the time. She stated that in those barracks the preliminary investigation took place on 26 August 1976. When she complained to the military judge about the torture which she had been subjected to, he advised her not to pursue her denunciation which could not be proven because otherwise she would probably end up again in "El infierno". On 25 September 1976 she was transferred to the barracks of Infantry Unit No. 1 on Camino Maldonado where she was at first confined to an individual cell measuring 2 by 1.5 m. During the day, prisoners were forced to remain seated without being

allowed to speak to each other. She received the first visit by a member of her family on 30 October 1976. Shortly afterwards, on 3 November 1976, she was transferred to the prison of Punta de Rieles where she was kept together with eleven other female prisoners in a cell designed for four prisoners only. Even female prisoners were forced to perform hard work in the fields suitable only for men. She stated that she was charged on 15 October 1976 with "assisting a subversive association", that in April 1977 the prosecutor asked for a sentence of 32 months, that one year later, in April 1978, a judge pronounced a sentence of 24 months, taking into account the time of her detention, and ordered her release, but that nevertheless her detention continued under the "prompt security measures" until she was released early in 1979.

10. The Committee decided to regard the information referred to in paragraph 9 above as relating to the present communication as requested by the author and therefore to discontinue its consideration of communication No. 48/1979 as a separate communication. This information was transmitted to the Government on 18 September 1979, as noted in the Government's submission dated 8 October 1979 (see para. 8 above).

By a further letter dated 28 September 1979, Beatriz Weismann informed the Committee that her husband had been expelled from Uruguay and that he obtained political asylum in Sweden on 2 July 1979.

11. In response to further inquiries from the Committee, Beatriz Weismann and Alcides Lanza, in a letter dated 15 February 1980, submitted the following additional information and observations:

(a) They stated that they had no legal assistance prior to their trial, at which time they were afforded the possibility to choose either a private lawyer or an officially appointed lawyer for their defence. Beatriz Weismann stated that she opted for a private lawyer, but that she never saw him, was never able to communicate with him and that she was never informed of her rights, possible remedies or recourses. Alcides Lanza stated that he opted for an officially appointed lawyer and that Dr. Antonio Seluja, whom he saw on that occasion, but was never able to speak with, was assigned as his defence lawyer. Alcides Lanza further stated that his defence counsel was later succeeded by Dr. Pereda and Dr. Juan Barbé, neither of whom he could ever communicate with. As they had no contact with lawyers, they were unable to appeal because they did not know what their rights were and had no one to assist them in exercising them.

(b) Beatriz Weismann was kept in detention until 11 February 1979, although her release had been ordered on 14 April 1978, at which time she was requested to place her signature on the release order. Alcides Lanza, having served his sentence on 2 February 1979, was nevertheless kept detained at various places of detention (the names of the places of detention are specified), until he was released on 1 July 1979.

(c) They confirmed, as true, the information previously submitted with regard to their treatment

while in detention, including the various forms of physical and mental torture to which they were allegedly subjected. They stated that due to the treatment which he had received, Alcides Lanza's state of health was still poor and, as evidence of this, they submitted a medical report dated 19 February 1980, from a doctor in Stockholm, together with copies of hospital and laboratory records relating thereto. They also enclosed several photographs showing scars on Alcides Lanza's legs, allegedly caused by cigarette burns as a means of torture. The doctor's report shows that Alcides Lanza continues to suffer from auditive disturbances, a tremor of his right hand and inability to use it properly and symptoms of mental depression.

12. The Committee has noted that the submissions of the Government of 8 October 1979 were received after the expiry of the time-limit imposed by article 4 (2) of the Optional Protocol and even after the time-limit following the Committee's renewed request of 18 April 1979. Nevertheless the Committee has considered the present communication in the light of all information made available to it by the parties, as provided for in article 5 (1) of the Optional Protocol.

13. With regard to the exhaustion of domestic remedies, the Committee notes that the submissions and explanations of the Government still do not show in any way that in the particular circumstances of the two individuals concerned at the time of the events complained of, there were remedies available which they should have pursued. The Committee has been informed by the Government in another case (No. 9/1977) that the remedy of *habeas corpus* is not applicable to persons arrested under prompt security measures. Moreover, Beatriz Weismann and Alcides Lanza have explained that they had no effective contact with lawyers to advise them of their rights or to assist them in exercising them.

14. The Committee therefore decides to base its views on the following considerations:

- (i) Alcides Lanza Perdomo was arrested for investigation on 2 February 1976 and detained under the "prompt security measures" as stated by the Government. He was kept incommunicado for many months. It is not in dispute that he was kept in detention for nearly eight months without charges, and later for another 13 months, on the charge of "subversive association" apparently on no other basis than his political views and connections. Then, after nearly 21 months in detention, he was sentenced for that offence by a military judge to three years severe imprisonment, less the period already spent in detention. Throughout his period of detention and during his trial he had no effective access to legal assistance. Although he had served his sentence on 2 February 1979, he was not released until 1 July 1979. His present state of physical and mental ill-health for which no other explanation has been offered by the Uruguayan Government, confirms the allegations of ill-treatment which he suffered while under detention.

- (ii) Beatriz Weismann de Lanza was arrested for investigation on 17 February 1976 and detained under the prompt security measures, as stated by the Government. She was kept incommunicado for many months. It is not in dispute that she was kept in detention for more than seven months without charges, and later, according to the information provided by the Government, she was kept in detention for over 18 months (28 September 1976 to April 1978) on the charge of "assisting a subversive association", apparently on similar grounds to those in the case of her husband. She was tried and sentenced in April 1978 by a military judge, at which time her offence was deemed to be purged by the period spent in custody pending trial. She was, however, kept in detention until 11 February 1979. Throughout her period of detention and during her trial she had no effective access to legal assistance. With regard to her allegations that during her detention she was subjected to ill-treatment and to physical and mental torture, she states that she complained to the military judge, but there is no evidence that her complaints have been investigated.

15. The Human Rights Committee has considered whether acts and treatment, which are *prima facie* not in conformity with the Covenant, could for any reasons be justified under the Covenant in the circumstances. The Government has referred to provisions of Uruguayan law, in particular the "prompt security measures". However, the Covenant (art. 4) does not allow national measures derogating from any of its provisions except in strictly defined circumstances, and the Government has not made any submissions of fact or law to justify such derogation. Moreover, some of the facts referred to above raise issues under provisions from which the Covenant does not allow any derogation under any circumstances.

As regards the observations of the Government quoted above (para. 8) it appears from the above findings of the Committee (para. 14) that various guarantees of due process have not been effectively observed, and that a number of quite specific allegations of ill-treatment and torture have only been deemed by the Government "not worthy of any further comment". In its decision of 26 October 1979 concerning case No. 9/1977, the Committee has emphasized that denials of a general character do not suffice. Specific responses and pertinent evidence (including copies of the relevant decisions of the courts and findings of any investigations which have taken place into the validity of the complaints made) in reply to the contentions of the author of a communication are required. The Government did not furnish the Committee with such information. Consequently, the Committee cannot but draw appropriate conclusions on the basis of the information before it.

16. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts set out above (para. 14), in so far as they

continued or occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay), disclose, for the reasons set out above (para. 15) violations of the International Covenant on Civil and Political Rights, with respect to both Alcides Lanza Perdomo and Beatriz Weismann de Lanza, in particular of:

Article 7 and article 10 (1), because of the treatment which they received during their detention;

Article 9 (1), because they were not released, in the case of Alcides Lanza Perdomo, for five months and, in the case of Beatriz Weismann de Lanza, for 10 months, after their sentences of imprisonment had been fully served.

Article 9 (3), because upon their arrest they were not brought promptly before a judicial officer and because they were not brought to trial within a reasonable time;

Article 9 (4), because they were unable effectively to challenge their arrest and detention;

Article 14 (1), (2) and (3), because they had no effective access to legal assistance, they were not brought to trial within a reasonable time, and further because they were tried in circumstances in which irrespective of the legislative provisions they could not effectively enjoy the safeguards of fair trial;

Article 19 of the Covenant provides that everyone shall have the right to hold opinions without interference and that the freedom of expression set forth in paragraph 2 of that article shall be subject only to such restrictions as are *necessary* (a) for respect of the rights and reputations of others and (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. The Government of Uruguay has submitted no evidence regarding the nature of the political activities in which Beatriz Weismann and Alcides Lanza were alleged to have been engaged and which led to their arrest, detention and trial. Information that they were charged with subversive association is not in itself sufficient. The Committee is therefore unable to conclude on the information before it that the arrest, detention and trial of Beatriz Weismann and Alcides Lanza were justified on any of the grounds mentioned in article 19 (3) of the Covenant.

17. Accordingly, while the Committee notes with satisfaction that Beatriz Weismann and Alcides Lanza have now been released, it is nevertheless of the view that the State party is under an obligation to provide them with effective remedies, including compensation, for the violations which they have suffered and to take steps to ensure that similar violations do not occur in the future.

TENTH SESSION

Communication No. 4/1977

Submitted by: William Torres Ramírez on 13 February 1977

Alleged victim: The author

State party: Uruguay

Date of adoption of views: 23 July 1980 (tenth session)

Submission to IACHR—Same matter—Exhaustion of domestic remedies—Burden of proof—Access to counsel—Habeus corpus—Torture—Continued detention despite release order—Extension of time for submission of State party's observations—Review of admissibility decision—State's duty to investigate—Derogation from Covenant

Articles of Covenant: 4, 7, 9 (1) and (4), 10 (1) and 14 (3)

Articles of Optional Protocol: 4 (2), and 5 (2) (a) and (b)

Views under article 5 (4) of the Optional Protocol

1. The author of this communication (initial letter dated 13 February 1977 and further letters dated 22 October 1977, 5 April 1978 and 20 May 1978) is a Uruguayan national, residing in Mexico. He submitted the communication on his own behalf.

2. The author claims that on 6 December 1975 he was arrested in his house in Montevideo by four men in

civilian clothes and that he was brought to the "Batallón de Infantería No. 13", also called "La Máquina". He describes various forms of torture to which detainees were allegedly subjected and, in particular, in his own case the use of *submarino* (suffocation in water), *plantón* (he was forced to remain standing for four days), hanging (by his arms, which were tied together, for about 36 hours) and blows (on one occasion he was allegedly beaten with such brutality that he had to be transferred to the military hospital). After being detained for almost one month, he was forced to sign a written declaration stating that he had not been mistreated during his detention and he had to answer a questionnaire about his activities as member of the Communist Party. On 31 December 1975, he was transferred to the "Regimiento de Artillería No. 1" in La Paloma, Cezzo. He states that the conditions of detention there were, to begin with, a little bit better than in "La Máquina", but after February 1976 they worsened. He alleges that detainees were continuously kept blindfolded, that they were subjected to ill-

treatment (lack of food and clothing) and torture (beatings, “plantones”) and that over a period of six months they were allowed to leave their cells for 15 minutes of recreation only eight times. In La Paloma he was again forced to sign a written declaration that he had not been mistreated and subjected to torture.

The author states that in February 1976 he was brought before a military judge for interrogation and in June 1976 he was again brought before the same judge who ordered his release subject to appearance at a later stage. He was, however, still kept in detention. He claims that he never had any legal assistance, that he was never tried as no charges were brought against him, and that he was informed by the court that, if he made any change to his previous written statements, he would be tried for perjury which was an offence punishable by imprisonment for a period of from three months to eight years.

He further alleges that on 1 July 1976 he was transferred to disciplinary block “B” in another sector of La Paloma where there were nine cells, the largest measuring 1.2 by 2 metres with two prisoners in each cell.

He states that on 6 August 1976 he was released and one month later he obtained political asylum in Mexico.

Mr. Torres Ramírez claims that the way he was treated during his detention virtually excluded any possibility of his having recourse to a legal counsel. With regard to the exhaustion of domestic remedies he comments that the only decision which the court made in his case was the one ordering his release; consequently he states that recourse to *habeas corpus* was not applicable to his case, since he was detained under the “prompt security measures”.

Finally, Mr. Torres Ramírez states that he did not receive any compensation after his release.

He submits, therefore, that he was a victim of violations of articles 7, 9 (1), (3) and (5), 10 (1) and (3), 14 (3) (b), (c), (d), (e) and (g), 18 (1) and (2) and 19 of the International Covenant on Civil and Political Rights.

3. On 26 August 1977, the Human Rights Committee decided to transmit the communication to the State party, under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility.

4. By letter dated 27 October 1977 the State party objected to the admissibility of the communication on two grounds:

(a) The same matter was already being examined by the Inter-American Commission on Human Rights;

(b) The alleged victim had not exhausted all available domestic remedies.

5. On 26 January 1978, the Human Rights Committee informed the State party that, in the absence of more specific information concerning the domestic remedies said to be available to the author of this communication, and the effectiveness of those remedies as enforced by the competent authorities in Uruguay, the Committee was unable to accept that he had failed to exhaust

such remedies and the communication would therefore not be considered inadmissible in so far as exhaustion of domestic remedies was concerned, unless the State party gave details of the remedies which it submitted had been available to the author in the circumstances of his case, together with evidence that there would be a reasonable prospect that such remedies would be effective.

6. By letter dated 5 April 1978 Mr. Torres Ramírez informed the Committee that his case had been withdrawn from consideration by the Inter-American Commission on Human Rights.

7. By letter dated 14 April 1978 the State party submitted information which consisted of a general description of the rights available to accused persons in the military criminal tribunals and of the domestic remedies at their disposal as means of protecting and safeguarding their rights under the Uruguayan judicial system. However, it did not specify which remedies were available to the author in the particular circumstances of his case.

8. By letter dated 20 May 1978 Mr. Torres Ramírez submitted that the remedies listed by the State party were not applicable in his case because he had not been put on trial and he was barred from recourse to *habeas corpus* because he was detained under the “prompt security measures”. He pointed out that none of the other remedies listed by the State party could have been utilized in the situation.

9. On 25 July 1978, the Human Rights Committee,

(a) Having concluded that article 5 (2) (a) of the Protocol did not preclude it from declaring the communication admissible, although the same matter had been submitted to another procedure of international investigation or settlement, if the matter had been withdrawn from and was no longer under active consideration in the other body at the time of the Committee’s decision on admissibility,

(b) Having concluded that article 5 (2) (b) of the Protocol did not preclude it from considering a communication received under the Protocol where the allegations themselves raise issues concerning the availability or effectiveness of domestic remedies and the State party, when expressly requested to do so by the Committee, did not provide details on the availability and effectiveness of domestic remedies in the particular case under consideration,

Therefore decided:

(a) That the communication was admissible;

(b) That the text of this decision be transmitted to the State party, together with the text of the relevant documents, and to the author;

(c) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it.

10. On 18 April 1979, the Committee decided to remind the State party that the six-month time-limit for

the submission of its explanations or statements under article 4 (2) of the Optional Protocol had expired on 28 March 1979 and requested the State party to submit, not later than six weeks from the date of the transmittal of this decision to the State party, observations concerning the substance of the matter under consideration, including copies of any court orders on decisions of relevance to the matter under consideration.

11. The Committee's decision of 18 April 1979 was transmitted to the State party on 18 May 1979. The six weeks referred to therein therefore expired on 2 July 1979. More than three months after that date a further submission, dated 11 October 1979, was received from the State party.

12. In its further submission of 11 October 1979 the State party while repeating the views expressed in its submission of 14 April 1978, namely that the question of admissibility should be reviewed by the Committee in the light of the explanations given by the State party on domestic procedures available to the accused and reaffirming its conviction that its reply of 14 April 1978 should have been sufficient to settle the matter once and for all, added the following explanations:

Mr. Ramírez was arrested on 6 December 1975 and detained under the "prompt security measures" for presumed connection with subversive activities. The case was taken over by the Military Presiding Judge of first sitting.

On 24 June 1976, an order was issued for his release subject to appearance at a later date, and on 3 August 1976 the proceedings relating to his case were closed.

On 21 October 1976, he took refuge in the Mexican embassy, and left for that country one week later.

As to the accusations of supposed violations of the Covenant, the State party claimed that they were groundless, irresponsible and entirely unproved and, by way of example, submitted the following information as an invalidation of the falsehoods:

(i) In Uruguay, physical coercion is expressly prohibited by article 26 of the Constitution and article 7 of Act No. 14,068 and any official who exceeds his powers and assaults a human being is criminally and civilly liable, incurs administrative responsibility and is subject to dismissal;

(ii) In Uruguay, there are no crimes of opinion and no persons are arrested for their ideas, but a person who invokes a philosophy or ideology which is revolutionary or disruptive of the social order freely established by the overwhelming majority of the people is and remains a common criminal. This means that the references to articles 18 and 19 of the Covenant are totally inappropriate;

(iii) Administrative detention under the "prompt security measures" does not require the existence of an offence, but simply serious and imminent danger to security and public order;

(iv) Act No. 14,068 on the security of the State of 10 July 1972 places under the jurisdiction of the military courts persons who commit military offences, even if

they are civilians, and this clearly explains why Mr. Torres Ramírez, who was arrested for presumed subversive activities, was placed under their jurisdiction;

(v) The body of provisions which constitute the military codes (Military Penal Code, Code on the Organization of the Military Courts and Code of Military Penal Procedure) define in detail the scope of action of the various organs of the military courts in such a way that the exercise of the jurisdictional function is hedged about by complete guarantees.

13. The Committee has considered the present communication in the light of all information made available to it by the parties, as provided in article 5 (1) of the Optional Protocol.

14. With regard to the exhaustion of domestic remedies, the Committee has been informed by the Government of Uruguay in another case (No. 9/1977) that the remedy of *habeas corpus* is not applicable to persons arrested under the "prompt security measures". Mr. Torres Ramírez stated that he could not avail himself of any other judicial remedy because he was never put on trial. There is no evidence from which the Committee can conclude that there was any other domestic remedy available to him which he should have exhausted.

15. The Committee therefore decides to base its views on the following facts which have either been essentially confirmed by the State party or are uncontested except for denials of a general character offering no particular information or explanation: William Torres Ramírez was arrested on 6 December 1975. He was brought before a military judge in February 1976 and again on 24 June 1976 when an order was issued for his release subject to appearance at a later date. He was however kept in detention until 6 August 1976. During his detention he did not have access to legal counsel. He had no legal possibility to apply for *habeas corpus*.

16. As regards the allegations of ill-treatment the Committee notes that in his communication of 13 February 1977, the author named the senior officer responsible for the ill-treatment which he alleged that he received from January 1976 to June 1976. The State party has adduced no evidence that these allegations have been duly investigated in accordance with the laws to which it drew attention in its submission of 11 October 1979. A refutation of these allegations in general terms is not sufficient. The State party should have investigated the allegations in accordance with its laws and its obligations under the Covenant and the Optional Protocol.

17. The Human Rights Committee has considered whether acts and treatment, which are *prima facie* not in conformity with the Covenant, could for any reasons be justified under the Covenant in the circumstances. The Government has referred to provisions of Uruguayan law, including the "prompt security measures". However, the Covenant (art. 4) does not allow national measures derogating from any of its provisions except in strictly defined circumstances, and the Government has not made any submissions of fact or law to justify such

derogation. Moreover, some of the facts referred to above raise issues under provisions from which the Covenant does not allow any derogation under any circumstances.

18. The Human Rights Committee acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that these facts, in so far as they continued or have occurred after 23 March 1976 (the date on which the Covenant entered into force in respect of Uruguay), disclose violations of the Covenant, in particular of:

Articles 7 and 10 (1), because of the treatment he received up to June 1976;

Article 9 (1), because he was not released for six weeks after his release was ordered by the military judge;

Article 9 (4), because recourse to *habeas corpus* was not applicable in his case;

Article 14 (3), because he did not have access to legal assistance.

19. The Committee, accordingly, is of the view that the State party is under an obligation to provide the victim with effective remedies, including compensation, for the violations which he has suffered and to take steps to ensure that similar violations do not occur in the future.

Communication No. 6/1977

Submitted by: Miguel A. Millán Sequeira on 16 February 1977

Alleged victim: The author

State party: Uruguay

Date of adoption of views: 29 July 1980 (tenth session)

Submission to IACHR—Same matter—Exhaustion of domestic remedies—Review of admissibility decision—Detention incommunicado—Access to counsel—Habeas corpus—Procedural delays—Extension of time for State party's observations—Views in default of State party's submission—Events prior to entry into force of Covenant—Derogation from Covenant

Articles of Covenant: 4, 9 (3) and (4) and 14 (1) and (3)

Articles of Optional Protocol: 4 (2) and 5 (2) (a) and (b)

Views under article 5 (4) of the Optional Protocol

1. The author of this communication (initial letter dated 16 February 1977 and further letters dated 20 October 1977 and 4 April and 18 May 1978) is a Uruguayan national, residing in Mexico. He was twenty years old at the time of the submission of the communication in 1977.

2. The author states that he was arrested in Uruguay in April and released in May 1975 and that he was then rearrested on 18 September 1975 and detained until he escaped from custody on 4 June 1976. On both occasions, those apprehending him indicated that the reason for his arrests was that he was suspected of being a militant communist, which he denied. He alleges that he was subjected to torture during the first period of detention and again during the first 15 days after he was rearrested. He describes the alleged torture methods in some detail and named several officers responsible for the treatment. The author alleges that after he was rearrested he was initially kept incommunicado for 65 days and thereafter transferred to El Cilindro sports stadium in Montevideo which he claims was used for low-security political detainees and where he remained for six months. He states that he was brought before a military judge on three occasions (23 October and 12

December 1975 and on 2 June 1976) but that no steps were taken to commit him for trial or to release him. On 4 June 1976 the author claims that he gained his freedom by escaping. The author claims that the following provisions of the International Covenant on Civil and Political Rights have been violated by the Uruguayan authorities: articles 7, 9, 10, 14 (1), (2), (3), 18 (1), (2), 19 (1), (2).

3. The author maintains that in practice there are no domestic remedies available in Uruguay because when applicable they are subjected to a very restrictive interpretation by the authorities concerned. He further states that the right of *habeas corpus* is denied to persons detained under "prompt security measures" (*Medidas prontas de seguridad*), which, he claims, constitutes an abusive interpretation of article 168 (17) of the Constitution. In addition, guarantees set forth in that article are allegedly never observed. He claims that he had no access to legal assistance while he was kept in detention, since the right to defence is not recognized by the authorities until a prosecution has been initiated. He states that he has not submitted his case to any other international organization.

4. On 26 August 1977, the Human Rights Committee decided to transmit the communication to the State party, under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility.

5. By a note dated 27 October 1977, the State party objected to the admissibility of the communication on two grounds:

(a) The same matter had already been examined by the Inter-American Commission on Human Rights under cases Nos. 1968 and 2109;

(b) The alleged victim had not exhausted all available domestic remedies.

6. On 26 January 1978, the Human Rights Committee

(a) Decided that case No. 1968 submitted to the Inter-American Commission on Human Rights on 26 July 1975, could not relate to events alleged to have taken place on or after 23 March 1976, the date on which the Covenant and the Optional Protocol entered into force for Uruguay and, therefore, did not preclude the Committee, under article 5 (2) (a) of the Optional Protocol, from consideration of the communication submitted to it on 16 February 1977;

(b) Requested clarification from the author of the communication about the other case allegedly concerning him before the Inter-American Commission on Human Rights (case No. 2109, October 1976); and

(c) Informed the State party that “unless the State party gives details of the remedies which it submits have been available to the author in the circumstances of his case, together with evidence that there would be a reasonable prospect that such remedies would be effective”, the communication will “not be considered inadmissible in so far as exhaustion of domestic remedies is concerned”.

7. In response, the author informed the Committee that the only possible reference to him in case No. 2109 before the Inter-American Commission on Human Rights is a two-line statement in a list of several hundred persons allegedly arbitrarily arrested. The State party furnished a general description of the rights available to accused persons before the military criminal tribunals and the domestic remedies designed to protect and safeguard the right of the accused under the Uruguayan judicial system. It also quoted article 17 of the Uruguayan Constitution concerning the remedy of *habeas corpus*. However, the State party did not specify which remedies have been available to the author in the particular circumstances of his case.

8. Commenting on the information concerning domestic remedies submitted by the State party, the author contended that the remedies listed by the State party were not applicable in his case, because he was not put to trial, and that he was barred from recourse to *habeas corpus*, as the authorities do not recognize the right to *habeas corpus* for those who are detained under the régime of “security measures”.

9. In a decision adopted on 25 July 1978, the Human Rights Committee concluded:

(a) That the two-line reference to Millán Sequeira in case No. 2109 before the Inter-American Commission on Human Rights—which case lists in a similar manner the names of hundreds of other persons allegedly detained in Uruguay—did not constitute the same matter as that described in detail by the author in his communication to the Human Rights Committee. Accordingly, the communication was not inadmissible under article 5 (2) (a) of the Optional Protocol. In arriving at this conclusion the Committee, however, indicated that it might be subject to review “in the light of further explanations relevant to this question which the State

party may submit under article 4 (2) of the Optional Protocol”;

(b) That article 5 (2) (b) of the Protocol did not preclude the Committee from considering a communication received under the Protocol, where the allegations themselves raised issues concerning the availability or effectiveness of domestic remedies and the State party, when expressly requested to do so by the Committee, did *not* provide details on the availability and effectiveness of domestic remedies in the particular case under consideration.

The Committee, therefore, decided:

(a) That the communication was admissible;

(b) That the text of this decision be transmitted to the State party and to the author;

(c) That in accordance with article 4 of the Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(d) That any explanations or statements received from the State party be communicated to the author under rule 93 (3) of the provisional rules of procedure of the Committee.

10. Having received no submissions from the State party under article 4 (2) of the Optional Protocol, the Human Rights Committee decided on 18 April 1979:

1. That the State party be reminded that the six-month time-limit for the submission of its explanation or statements under article 4 (2) of the Optional Protocol expired on 28 March 1979;

2. That the State party be requested to fulfil its obligations under article 4 (2) of the Optional Protocol without further delay and that its submission should reach the Committee in care of the Division of Human Rights, United Nations Office at Geneva, not later than six weeks from the date of the transmittal of this decision to the State party, to afford adequate time for the author of the communication to submit, before the next session of the Committee, additional information or observations, as provided in rule 93 (3) of the provisional rules of procedure of the Committee;

3. That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must primarily relate to the substance of the matter under consideration, and in particular the specific violations alleged to have occurred and included copies of any court orders or decisions of relevance to the matter under consideration.

11. The six-week time-limit referred to in the Committee's decision expired over one year ago, on 2 July 1979. By notes dated 23 November 1979 and 13 February 1980, the State party requested the Committee to accord a reasonable extension of time for the submission of its explanations or statements under article 4 (2) of the Optional Protocol. The only submission received

to date from the State party consists of a brief note, dated 10 July 1980, in which the State party requests the Committee to review its decision of 25 July 1978, by which the communication was declared admissible, arguing that although the reference to Millán Sequeira in case No. 2109 before the Inter-American Commission on Human Rights is only very brief, the mere fact that the issue was brought before the Inter-American Commission on Human Rights precluded the Human Rights Committee from considering the matter, in accordance with article 5 (2) (a) of the Optional Protocol. The Committee can see no justification for reviewing its decision on admissibility on this basis, for the reasons already set out in paragraph 9 (a) above.

12. The Human Rights Committee,

(a) Considering that this communication was received over three years ago,

(b) Considering that this communication was declared admissible two years ago and that the six-month time-period established by article 4 (2) of the Optional Protocol expired on 28 March 1979,

(c) Considering that the State party has not complied with the requirements of article 4 (2) of the Optional Protocol,

(d) Considering that there has been no response on the merits of the case from the State party even after further extensions of time,

(e) Considering that the Committee has the obligation, under article 5 (1) of the Optional Protocol, to consider this communication in the light of all written information made available to it by the author and the State party,

Hereby decides to base its views on the following facts, which have not been contradicted by the State party:

Miguel Angel Millán Sequeira, 20 years old at the time of the submission of the communication in 1977, was arrested in April and released in May 1975. He was rearrested on 18 September 1975 and detained until he escaped from custody on 4 June 1976. On both occasions he was told that the reason for his arrest was that he was suspected of being "a militant communist". Although brought before a military judge on three occasions, no steps were taken to commit him for trial or to order his release. He did not have access to legal

assistance and was not afforded an opportunity to challenge his arrest and detention.

13. The Human Rights Committee has been informed by the Government of Uruguay in another case (No. 9/1977), that the remedy of *habeas corpus* is not applicable to persons arrested under the "prompt security measures".

14. The Human Rights Committee has considered whether acts, which are *prima facie* not in conformity with the Covenant, could for any reasons be justified under the Covenant in the circumstances. The Covenant (art. 4) does not allow national measures derogating from any of its provisions except in strictly defined circumstances, and the Government has not made any submissions of fact or law to justify such derogation.

15. As to the allegations of ill-treatment and torture, the Committee notes that they relate to events said to have occurred prior to 23 March 1976 (the entry into force of the Covenant and the Optional Protocol for Uruguay).

16. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that these facts, in so far as they have occurred on or after 23 March 1976 (the date on which the Covenant entered into force in respect of Uruguay) or continued or had effects which themselves constitute a violation after that date, disclose violations of the Covenant, in particular of:

Article 9 (3), because Mr. Millán Sequeira was not brought to trial within a reasonable time;

Article 9 (4), because recourse to *habeas corpus* was not available to him;

Article 14 (1) and (3), because he had no access to legal assistance, was not brought to trial without undue delay, and was not afforded other guarantees of due process of law.

17. The Committee, accordingly, is of the view that the State party is under an obligation to provide effective remedies to Millán Sequeira, including compensation, for the violations which he has suffered and to take steps to ensure that similar violations do not occur in the future.

Communication No. 11/1977

Submitted by: Alberto Grille Motta on 25 April 1977

Alleged victims: The author and other persons

State party: Uruguay

Date of adoption of views: 29 July 1980 (tenth session)

Standing of author to act on behalf of alleged victims—Submission to IACHR—Same matter—Exhaustion of domestic remedies—Review of decision on admissibility—Sufficiency of State party's reply under article 4 (2) of Optional Protocol—Detention incommunicado—Access to counsel—Habeas cor-

pus—Torture—Freedom of expression—State party's duty to investigate—Burden of proof—Derogation from Covenant

Articles of Covenant: 7, 9 (3) and (4), 10 (1) and 19 (2) and (3)

Views under article 5 (4) of the Optional Protocol¹

1. The author of this communication (initial letter dated 25 April 1977 and further letter dated 12 December 1978) is a Uruguayan national, residing in Mexico. He submitted the communication on his own behalf as well as on behalf of other persons who allegedly were not in a position to submit a communication on their own.

2. The author claims that on 7 February 1976 he was arrested by a group of Montevideo policemen at the house of a woman friend, Ofelia Fernández. They were both brought to Department 5 of the National Directorate of Information and Intelligence (commanded by a superintendent named by the author), where after several hours of ill-treatment he was interrogated for the purpose of obtaining an admission that he held an important position in the Communist Party and in order to induce him to identify fellow detainees as active members of the Communist Youth.

The author further alleges that over a period of approximately 50 days, he and his fellow detainees were subjected to severe torture; he cites in his case, *inter alia*, the application of electric shocks, the use of the "submarino" (putting the detainee's hooded head into foul water), insertion of bottles or barrels of automatic rifles into his anus and forcing him to remain standing, hooded and handcuffed and with a piece of wood thrust into his mouth, for several days and nights. Mr. Grille Motta specifically names several alleged torturers and interrogators.

The author states that he was brought before a military judge without having any opportunity to see a lawyer beforehand and after having been totally isolated from the outside world; after making a statement before the Military Court he was transferred to the "Cilindro Municipal", a sports stadium that had been turned into a prison some years ago, where he remained for approximately another two months.

Mr. Alberto Grille Motta claims that on 20 May 1976 he was tried by a military judge on charges carrying sentences of from 8 to 24 years' imprisonment.

On 3 June 1976 the author and three of his fellow prisoners escaped to the Venezuelan embassy where they were granted "diplomatic" asylum.

Mr. Alberto Grille Motta claims that he has not submitted this case to any other international instance and that he has exhausted all possible domestic remedies, citing in this connection the dismissal by the Supreme Court of Justice of Uruguay of his appeal against certain decisions of the Military Court.

3. On 26 August 1977, the Human Rights Committee decided to transmit the communication to the State party, under rule 91 of the provisional rules of pro-

cedure, requesting information and observations relevant to the question of admissibility. The Committee also decided to request the author to furnish further information on the grounds and circumstances justifying his acting on behalf of the other alleged victims mentioned in the communication. No reply was received from the author in this regard.

4. By letter dated 27 October 1977, the State party objected to the admissibility of the communication on two grounds:

(a) The same matter had already been examined by the Inter-American Commission on Human Rights (IACHR);

(b) The alleged victims had not exhausted all available domestic remedies.

5. On 1 February 1978 the Human Rights Committee,

(a) Having ascertained that the case concerning the author of the communication which was before IACHR could not concern the same matter as it was submitted to IACHR on 10 March 1976 (prior to the entry into force of the International Covenant on Civil and Political Rights and the Optional Protocol for Uruguay),

(b) Being unable to conclude on the basis of the information before it that, with regard to the exhaustion of domestic remedies, there were any remedies which the alleged victim should or could have pursued,

(c) Being unable because of the lack of relevant additional information from the author, to consider the communication in so far as it related to other alleged victims,

Therefore decided:

(a) That the communication was admissible in so far as it related to the author, but inadmissible in so far as it related to other alleged victims;

(b) That the text of the decision be transmitted to the State party, together with the text of the relevant documents, and to the author;

(c) That, in accordance with article 4 of the Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of the decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it.

With regard to the exhaustion of domestic remedies, the Committee said that its decision "may be reviewed in the light of any further explanations which the State party may submit giving details of any domestic remedies which it claims to have been available to the author in the circumstances of his case, together with evidence that there would be a reasonable prospect that such remedies would be effective".

6. After expiry of the six-month time-limit the State party submitted its explanations, dated 6 November 1978, which consisted of a "Description of the rights available to the accused in the military criminal tribunals and of the domestic remedies at his disposal as

¹ The text of an individual opinion submitted by a Committee member is appended to these views.

a means of protecting and safeguarding his rights under the Uruguayan judicial system”.

7. In a letter dated 12 December 1978 and submitted under rule 93 (3) of the provisional rules of procedure the author reaffirmed his previous assertions that he has exhausted all domestic remedies available to him in practice. He pointed out that the remedy of *habeas corpus* was not applicable in his case and that his appeal against the only ruling by the military court which could be appealed against in his case was dismissed by the Supreme Court of Justice after his escape. He submitted that the Committee should declare that a serious violation has occurred of articles 3, 6, 7, 8, 9, 10, 14, 15, 17, 18 and 19 of the International Covenant on Civil and Political Rights.

8. On 18 April 1979, the Committee decided that the submission of the State party, dated 6 November 1978, was not sufficient to comply with the requirements of article 4 (2) of the Optional Protocol, since it contained no explanations on the merits of the case under consideration and requested the State party to supplement its submission by providing, not later than six weeks from the date of the transmittal of this decision to the State party, observations concerning the substance of the matter under consideration, including copies of any court orders or decisions of relevance to the matter under consideration.

9. The Committee's decision of 18 April 1979 was transmitted to the State party on 18 May 1979. The six weeks referred to therein therefore expired on 2 July 1979. More than three months after that date a further submission dated 5 October 1979 was received from the State party.

10. In its further submission of 5 October 1979 the State party, while repeating the views expressed in its submission of 6 November 1978, namely that the question of admissibility should be reviewed by the Committee in the light of the explanations given by the State party on domestic procedures available to the accused and reaffirming its conviction that its reply of 6 November 1978 should have been sufficient to settle the matter once and for all, added the following explanations:

Mr. Alberto Grille Motta, who had already been detained in 1967 for causing a disturbance on the premises of the Central Office of the Department of Montevideo, was again arrested on 7 February 1976 under “prompt security measures” for his alleged subversive activities from within the clandestine organization of the proscribed Communist Party.

He was placed at the disposal of the military courts which, by decision of 17 May 1976, ordered him to be tried on charges of subversive association and attempt to undermine the morale of the armed forces, under articles 60 (V) and 58 (3) respectively of the Military Penal Code.

At that time, contrary to what is stated in Mr. Grille Motta's communication, he appointed Dr. Susana Andreassen as his defence counsel.

On 3 June 1976, Mr. Grille Motta and three other detainees escaped from their place of detention, thus thwarting the course of justice.

The allegations that the author of the communication was subjected to ill-treatment and torture were nothing but a figment of the imagination of the author; they were nothing more than a further example of the campaign of defamation being waged against Uruguay with the object of discrediting its image abroad.

11. The Committee has considered the present communication in the light of all information made available to it by the parties, as provided in article 5 (1) of the Optional Protocol.

12. With regard to the exhaustion of domestic remedies, the Committee has been informed by the Government of Uruguay in another case (No. 9/1977) that the remedy of *habeas corpus* is not applicable to persons arrested under “prompt security measures”. Mr. Grille Motta states that he did in fact appeal to the Supreme Court of Uruguay against a ruling of the military court and that his appeal was dismissed. There is no evidence from which the Committee can conclude that there was any other domestic remedy available to him which he should have exhausted.

13. The Committee therefore decides to base its views on the following facts which have either been essentially confirmed by the State party or are uncontested except for denials of a general character offering no particular information or explanation: Alberto Grille Motta was arrested on 7 February 1976. About one month later, he was brought before a military judge without having any opportunity to consult a lawyer beforehand and after having been held completely incommunicado with the outside world. On 17 May 1976 he was ordered to be tried on charges of subversive association and an attempt to undermine the morale of the armed forces under articles 60 (V) and 58 (3) respectively of the Military Penal Code. The remedy of *habeas corpus* was not available to him. He was arrested, charged and committed for trial on the grounds of his political views, associations and activities.

14. As regards the serious allegations of ill-treatment and torture claimed by Mr. Grille Motta to have continued for about 50 days after his arrest on 7 February 1976, the Committee notes that it follows from this account that such treatment continued after 23 March 1976 (the date of the entry into force of the Covenant and the Optional Protocol for Uruguay). Furthermore, in his communication of 25 April 1977, which was transmitted by the Committee to the Uruguayan Government, Mr. Grille Motta named some of the officers of the Uruguayan Police who he stated were responsible. The State party has adduced no evidence that these allegations have been duly investigated in accordance with the laws to which it drew attention in its submission of 9 October 1979 in case No. 9/1977. A refutation of these allegations in general terms is not sufficient. The State party should have investigated the allegations in accordance with its laws and its obliga-

tions under the Covenant and the Optional Protocol and brought to justice those found to be responsible.

15. The Human Rights Committee has considered whether acts and treatment, which are *prima facie* not in conformity with the Covenant, could for any reasons be justified under the Covenant in the circumstances. The Government has referred to provisions of Uruguayan law, including the "prompt security measures". However, the Covenant (art. 4) does not allow national measures derogating from any of its provisions except in strictly defined circumstances, and the Government has not made any submissions of fact or law to justify such derogation. Moreover, some of the facts referred to above raise issues under provisions from which the Covenant does not allow any derogation under any circumstances.

16. The Human Rights Committee acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that these facts, in so far as they have occurred after 23 March 1976 (the date on which the Covenant entered into force in respect of Uruguay), disclose violations of the Covenant, in particular of:

Articles 7 and 10 (1), on the basis of evidence of torture and inhuman treatment, which has not been duly investigated by the Uruguayan Government and which is therefore unrefuted;

Article 9 (3), because Mr. Grille Motta was not brought promptly before a judge or other officer authorized by law to exercise judicial power;

Article 9 (4), because recourse to *habeas corpus* was not available to him.

17. As regards article 19, the Covenant provides that everyone shall have the right to hold opinions without interference and that the freedom of expression set forth in paragraph 2 of that article shall be subject only to such restrictions as are *necessary (a)* for respect of the rights and reputations of others or *(b)* for the protection of national security or of public order (*ordre public*), or of public health or morals. The Government of Uruguay has submitted no evidence regarding the

nature of the political activities in which Grille Motta was alleged to have been engaged and which led to his arrest, detention and committal for trial. Bare information from the State party that he was charged with subversive association and an attempt to undermine the morale of the armed forces is not in itself sufficient, without details of the alleged charges and copies of the court proceedings. The Committee is therefore unable to conclude on the information before it that the arrest, detention and trial of Grille Motta was justified on any of the grounds mentioned in article 19 (3) of the Covenant.

18. The Committee, accordingly, is of the view that the State party is under an obligation to provide the victim with effective remedies, including compensation, for the violations which he has suffered and to take steps to ensure that similar violations do not occur in the future.

APPENDIX

Individual opinion submitted by a member of the Human Rights Committee under rule 94 (3) of the Committee's provisional rules of procedure

Communication No. 11/1977

Individual opinion appended to the Committee's views at the request of Mr. Christian Tomuschat:

I can see no justification for a discussion of article 19 of the Covenant in relation to the last sentence of paragraph 13. To be sure, the petitioner has complained of a violation of article 19. But he has not furnished the Human Rights Committee with the necessary facts in support of his contention. The only concrete allegation is that, while detained, he was interrogated as to whether he held a position of responsibility in the outlawed Communist Youth. No further information has been provided by him concerning his political views, association and activities. Since the petitioner himself did not substantiate his charge of a violation of article 19, the State party concerned was not bound to give specific and detailed replies. General explanations and statements are not sufficient. This basic procedural rule applies to both sides. A petitioner has to state his case plainly. Only on this basis can the defendant Government be expected to answer the charges brought against it. Eventually, the Human Rights Committee may have to ask the petitioner to supplement his submission, which in the present case it has not done.

ELEVENTH SESSION

Communication No. 28/1978

Submitted by: Luciano Weinberger Weisz on 8 May 1978

Alleged victim: Ismael Weinberger

State party: Uruguay

Date of adoption of views: 29 October 1980 (eleventh session)

Submission to IACHR—Exhaustion of domestic remedies—Detention incommunicado—Access to counsel—Habeas corpus—Torture—Prison conditions—Fair and public hearing—Delay in proceedings—Presence of accused at trial—Retroactivity

of penal laws—Freedom of expression—Trade union activities—Right to engage in political activities

Articles of Covenant: 2 (1), 4, 7, 9 (3) and (4), 10 (1), 14 (1) and (3), 15 (1), 19 (2), 25 and 26

Views under article 5 (4) of the Optional Protocol

1. The author of this communication (initial letter dated 8 May 1978 and subsequent letters dated 16 June 1978, 11 February 1979 and 18 August 1980) is a Uruguayan citizen residing in Mexico. He submitted the communication on behalf of his brother, Ismael Weinberger, a journalist at present detained in Uruguay.

2. The author alleges the following: His brother was arrested in the presence of his relatives at his home in Montevideo, Uruguay, on 25 February 1976, without any warrant of arrest. He was held incommunicado for nearly 10 months, while Uruguayan authorities denied his detention for more than 100 days. Only in June 1976 did his name appear on a list of detained persons, but still his family was not informed about his place of detention, the prison of "La Paloma" in Montevideo. During this period of 10 months, he suffered severe torture, and was most of the time kept blindfolded with his hands tied together. In addition, like all other prisoners, he was forced to remain every day during 14 hours sitting on a mattress. He was not allowed to move around, nor to work or read. Food was scarce (a piece of bread and thin soup twice a day without any meat). When his family was allowed to visit him after 10 months, serious bodily harm (one arm paralysed, leg injuries, infected eyes) could be seen. He had lost 25 kgs and showed signs of application of hallucinogenic substances. At the end of 1976 or early 1977, he was transferred to the prison of "Libertad" in the Province of San José, where he received better treatment.

The author further states that Ismael Weinberger was brought before a military judge on 16 December 1976 and charged with having committed offences under article 60 (V) of the Military Penal Code ("subversive association") with aggravating circumstances of conspiracy against the Constitution (*asociación para delinquir con el agravante de atentado a la Constitución*). Only then could he avail himself of the assistance of legal counsel. Characterizing these accusations as a mere pretext, the author alleges that the real reasons for his brother's arrest and conviction were his political opinions, contrary to the official ideology of the present Government of Uruguay. He asserts that Ismael Weinberger was prosecuted solely for having contributed information on trade union activities to a newspaper opposed to the Government, i.e., for the exercise of rights expressly guaranteed by the Constitution of Uruguay to all citizens. Furthermore, he alleges that to be tried on a charge of "*asociación para delinquir*" amounted to prosecution for membership in a political party which had been perfectly lawful at the time when Ismael Weinberger was affiliated with it, and which had been banned only afterwards. In addition, he maintains that his brother did not have a fair and public hearing, since the trial of first instance was conducted in writing, military judges are subordinated to the military hierarchy and lack the required qualities of impartiality and independence, and his brother only had the assistance of

counsel after approximately 10 months of detention. Finally, the author alleges that the judgement against his brother was not made public.

The author also alleges that pursuant to *Acta Institucional* No. 4 of 1 September 1976, (arts. 1 (a), (b) and 2 (a))¹ his brother is now deprived of the right to engage in political activities for 15 years.

3. The author further claims that in practice domestic remedies do not exist in Uruguay. With regard to the recourse of *habeas corpus*, the authorities maintain that it is not applicable to the cases of persons detained under "prompt security measures", while an appeal against a sentence to a higher tribunal is in practice ineffective.

The author alleges that articles 2, 3, 7, 9, 10, 12, 14, 15, 25 and 26 of the International Covenant on Civil and Political Rights have been violated. He states in his letter of 16 June 1978 that the Inter-American Commission on Human Rights took note of his brother's case and, after having requested a report on it from the Government of Uruguay, decided to take no further action in the matter and to file it (case No. 2134).

4. On 26 July 1978, the Human Rights Committee decided to transmit the communication to the State party, under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility.

5. By a note dated 29 December 1978, the State party objected to the admissibility of the communication on three grounds:

(a) That the case had been considered by the Inter-American Commission on Human Rights (No. 2134) which had decided to shelve it when the complaint had been withdrawn by its author;

(b) That the date of the alleged violation of human rights (Ismael Weinberger was arrested on 18 January 1976) preceded the date of the entry into force for

¹ Institutional Act No. 4 of 1 September 1976:

"[...] The Executive Power, in exercise of the powers conferred on it by the institutionalization of the revolutionary process,

"DECREES:

"Art. 1. The following shall be prohibited, for a term of 15 years, from engaging in any of the activities of a political nature authorized by the Constitution of the Republic, including the vote:

"(a) All candidates for elective office on the lists for the 1966 and 1971 elections of the Marxist and pro-Marxist Political Parties or Groups declared illegal by the resolutions of the Executive Power No. 1788/67 of 12 December 1967 and No. 1026/73 of 26 November 1973;

"(b) All persons who have been tried for crimes against the nation.

"Art. 2. The following shall be prohibited, for a term of 15 years, from engaging in any of the activities of a political nature authorized by the Constitution of the Republic, except the vote:

"(a) All candidates for elective office on the lists for the 1966 and 1971 elections of the Political Organizations which were electorally associated with the organizations mentioned in the preceding article, subparagraph (a), under the same coincidental or joint slogan or subslogan; [...]"

Uruguay of the Covenant and the Optional Protocol (23 March 1976);

(c) That domestic remedies had not been exhausted (the State party enclosed an annex listing the domestic remedies in the Uruguayan legal system).

6. In a decision adopted on 24 April 1979, the Human Rights Committee concluded:

(a) That it was not barred from considering the case after having ascertained that case No. 2134, concerning the alleged victim, was no longer under consideration by the Inter-American Commission on Human Rights;

(b) That it was not barred from considering the case although the arrest of the alleged victim preceded the date of the entry into force for Uruguay of the Covenant and the Optional Protocol, since the alleged violations continued after that date;

(c) That, with regard to the exhaustion of domestic remedies, on the basis of the information before it, there were no further remedies which the alleged victim could have pursued;

The Committee therefore decided:

(a) That the communication was admissible;

(b) That, in accordance with article 4 (2) of the Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written observations or explanations concerning the substance of the matter under consideration and in particular on the specific violations of the Covenant alleged to have occurred. The State party was requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration;

(c) That this decision be communicated to the State party and to the author of the communication.

7. The six-month time-limit referred to in the Committee's decision expired on 25 November 1979. By a note dated 10 July 1980, the State party submitted its written explanations under article 4 (2) of the Optional Protocol.

8. In this submission the State party repeats the views expressed in its earlier note of 29 December 1978 as to the non-exhaustion of domestic remedies. The State party points out that the fact that Mr. Weinberger has not exhausted the available domestic remedies is proved by the appeal against the judgement of the court of first instance which the defence lodged with the Supreme Military Court on 19 August 1979 and which was brought before that Court on 29 September 1979.

As far as the merits of the case are concerned, the State party submits that Ismael Weinberger was not arrested because of his political beliefs or ideas or his trade-union membership, but for having participated directly in subversive activities.

The State party further contests the allegation that Ismael Weinberger has not been afforded legal assistance. The State party submits that he had at all times access to the help of a defence lawyer of his choosing, Dr. Moises Sarganas.

9. In his submission dated 18 August 1980, under rule 93 (3) of the provisional rules of procedure, the author comments upon the State party's reply of 10 July 1980.

With regard to the exhaustion of domestic remedies, the author reiterates that they are in practice inoperative. In substantiation of this allegation he repeats the dates relating to his brother's arrest (25 February 1976), the day the Government acknowledged that arrest (June 1976), the day charges were brought against him (16 December 1976), the day the indictment was pronounced (September 1978), and the day he was sentenced by a Military Court of First Instance (14 August 1979). The author points out that these dates and the fact that no final judgement has been pronounced in his brother's case more than four and a half years after his arrest prove that domestic remedies are not operating normally in Uruguay.

As regards the merits of the case, the author submits that the State party should have explained and specified in what subversive activities Ismael Weinberger has been involved. In substantiation of that allegation the State party should have complied with the request of the Human Rights Committee to "enclose copies of any court orders or decisions of relevance to the matter under consideration".

10. The Committee has considered the present communication in the light of all information made available to it by the parties as provided in article 5 (1) of the Optional Protocol.

11. With regard to the exhaustion of domestic remedies, the Committee has been informed by the Government of Uruguay in another case (No. 9/1977) that the remedy of *habeas corpus* is not applicable to persons arrested under "prompt security measures". The author as well as the State party have stated that an appeal was lodged on behalf of Ismael Weinberger with the Supreme Military Court on 19 August 1979. Up to date no final judgement has been rendered in the case of Ismael Weinberger, more than four and a half years after his arrest on 25 February 1976. The Committee concludes that in accordance with article 5 (2) (b) of the Optional Protocol, it is not barred from considering the case, as the application of the remedy is unreasonably prolonged.

12. The Committee therefore decides to base its views on the following facts which have either been essentially confirmed by the State party or are uncontested except for denials of a general character offering no particular information or explanation: Ismael Weinberger Weisz was arrested at his home in Montevideo, Uruguay, on 25 February 1976 without any warrant of arrest. He was held incommunicado at the prison of "La Paloma" in Montevideo for more than 100 days and could be visited by family members only 10 months after his arrest. During this period, he was most of the time kept blindfolded with his hands tied together. As a result of the treatment received during detention, he suffered serious physical injuries (one

arm paralysed, leg injuries and infected eyes) and substantial loss of weight.

Ismael Weinberger was first brought before a judge and charged on 16 December 1976, almost 10 months after his arrest. On 14 August 1979, three and a half years after his arrest, he was sentenced to eight years of imprisonment by the Military judge of the Court of First Instance for "subversive association" (art. 60 (V) of the Military Penal Code) with aggravating circumstances of conspiracy against the Constitution. The concrete factual basis of this offence has not been explained by the Government of Uruguay, although the author of the communication claims that the true reasons were that his brother had contributed information on trade-union activities to a newspaper opposed to the Government and his membership in a political party which had lawfully existed while the membership lasted. The Committee further notes in this connection that the State party did not comply with the Committee's request to enclose copies of any court orders or decisions of relevance to the matter under consideration. Ismael Weinberger was not granted the assistance of counsel during the first 10 months of his detention. Neither the alleged victim nor his counsel had the right to be present at the trial, the proceedings being conducted in writing. The judgement handed down against him was not made public.

Pursuant to *Acta Institucional No. 4* of 1 September 1976, Ismael Weinberger is deprived of the right to engage in political activities for 15 years.

13. As regards the treatment to which Ismael Weinberger has been subjected, the Committee notes that the State party did not at all comment thereon in its submission of 10 July 1980.

14. The Human Rights Committee has considered whether acts and treatment, which are *prima facie* not in conformity with the Covenant, could for any reasons be justified under the Covenant in the circumstances. The Government has referred to provisions of Uruguayan law, including the "prompt security measures". The Covenant (art. 4) allows national measures derogating from some of its provisions only in strictly defined circumstances, and the Government has not made any submissions of fact or law to justify such derogation. Moreover, some of the facts referred to above raise issues under provisions from which the Covenant does not allow any derogation under any circumstances.

15. The Human Rights Committee is aware that under the legislation of many countries criminal offenders may be deprived of certain political rights. Accordingly, article 25 of the Covenant only prohibits "unreasonable" restrictions. In no case, however, may a person be subjected to such sanctions solely because of his or her political opinion (arts. 2 (1) and 26). Furthermore, in the circumstances of the present case there is no justification for such a deprivation of all political rights for a period of 15 years.

16. The Human Rights Committee acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that these facts, in so far as they have occurred after 23 March 1976 (the date on which the Covenant entered into force in respect of Uruguay), disclose violations of the Covenant, in particular of:

Articles 7 and 10 (1), because of the severe treatment which Ismael Weinberger received during the first 10 months of his detention;

Article 9 (3), because he was not brought promptly before a judge or other officer authorized by law to exercise judicial power and because he was not tried within a reasonable time;

Article 9 (4), because recourse to *habeas corpus* was not available to him;

Article 14 (1), because he had no fair and public hearing and because the judgement rendered against him was not made public;

Article 14 (3), because he did not have access to legal assistance during the first 10 months of his detention and was not tried in his presence;

Article 15 (1), because the penal law was applied retroactively against him;

Article 19 (2), because he was detained for having disseminated information relating to trade-union activities;

Article 25, because he is barred from taking part in the conduct of public affairs and from being elected for 15 years in accordance with *Acta Institucional No. 4* of 1 September 1976.

17. The Committee, accordingly, is of the view that the State party is under an obligation to provide the victim with effective remedies, including his immediate release and compensation for the violations which he has suffered and to take steps to ensure that similar violations do not occur in the future.

TWELFTH SESSION

Communication No. 32/1978

Submitted by: Lucía Sala de Tourón on 16 May 1978

Alleged victim: Luis Tourón

State party: Uruguay

Date of adoption of views: 31 March 1981 (twelfth session)

Submission to IACHR—Same matter—Detention incommunicado—Access to counsel—Habeas corpus — Delay in proceedings—Public hearing—Presence of accused at trial—Political rights

Articles of Covenant: 4, 9 (3) and (4) and 14 (1) and (3)

Article of Optional Protocol: 5 (2) (a)

Views under article 5 (4) of the Optional Protocol

1. The author of this communication, dated 16 May 1978, is an Uruguayan national, residing in Mexico. She submitted the communication on behalf of her husband, Luis Tourón, a 54-year-old Uruguayan citizen and a former municipal official of the city of Montevideo, allegedly detained in Uruguay.

2.1 The author alleges that her husband was arrested on 21 January 1976 and subjected to cruel and inhuman treatment (of which she gives no details) during his detention incommunicado from the date of arrest until August 1976. She states that he was subsequently sentenced to 14 years' imprisonment by a military court and that at the time of writing (16 May 1978) his case was still pending before the second military instance (the Supremo Tribunal Militar). She further states that her husband, having been subjected during the first part of his detention to the régime of "prompt security measures", was denied the right to leave the country, although article 186 (17) of the Uruguayan Constitution provides that persons under that régime have the option to leave the country.

2.2 The author maintains that no formal charges were made against her husband and that he was not brought before a judge until seven months after his arrest, in August 1976, when he was formally charged with the offence of "subversive association" and afforded the right to have the assistance of a counsel; that the real reasons for his arrest were his political opinions and public activities; that he was never afforded a public hearing before a tribunal, as there are no public hearings during the whole procedure of first instance; that, as in the case of any person prosecuted under military justice in Uruguay, he was not allowed to be present at the trial or to defend himself in person; and that the judgement against him was not made public.

2.3 She further alleges that military tribunals do not have the competence to deal with the cases of civilian detainees under article 253 of the Constitution and that they are not impartial since, as part of the armed forces, they are subordinated to the military hierarchy. As for the recourse of *habeas corpus*, the authorities allegedly

claim that it is not applicable to the cases of persons detained under "prompt security measures".

2.4 The author also alleges that, pursuant to "Institutional Act No. 4" (*Acta Institucional No. 4*) of 1 September 1976, her husband has been deprived of the right to engage in political activities, including the right to vote, for 15 years.

2.5 The author claims that articles 2, 3, 7, 9 (1), (2), (3), (4), (5), 10 (1), (2a), (3), 12, 14 (1), (2), (3a, 3d, 3e and 3g), (5), 15, 25 (a and b) and 26 of the Covenant have been violated.

3. On 28 July 1978, the Human Rights Committee decided to transmit the communication to the State party, under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility of the communication. The time-limit for the State party's information or observations expired on 9 November 1978. No reply was received from the State party.

4. On 24 April 1979 the Human Rights Committee therefore decided:

(a) That the communication was admissible;

(b) That, in accordance with article 4 (2) of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter (including copies of any court orders or decisions relevant to the matter) and the remedy, if any, that may have been taken by it.

5. The time-limit for the State party's submission under article 4 (2) of the Optional Protocol expired on 25 November 1979. By notes dated 23 November 1979 and 13 February 1980, the State party requested the Committee to accord a reasonable extension of time. By a note dated 10 July 1980, the State party submitted the following explanations under article 4 (2) of the Optional Protocol:

... contrary to what is maintained in the communication under consideration, Mr. Luis Tourón was not detained without formal charges against him; as was fully proved by his own statements, he entered into association with others with a view to taking direct action to change the form of government by means which are inadmissible under internal public law and committed acts aimed at reorganizing the directive machinery of the banned Communist party with the object of adapting it for underground operations. The author refers in her communication to "the lack of a public hearing before a tribunal". It must be explained that public hearings do not exist under the Uruguayan legal order. The trial is conducted in writing and the accused has the opportunity to express himself through his counsel and by means of the formal statements before the judge. Another legal error in the communication under consideration is the assertion that

military tribunals are not competent to judge civilian detainees. Since the entry into force of the State Security Act (No. 14,068 of 6 July 1972, approved by Parliament) it has been established that offences against the State come within the jurisdiction of military courts. This Act gives effect to a constitutional norm, article 330, which provides: 'Anyone who takes action to upset the present Constitution, following its adoption and publication, or provides means for such action to be taken, shall be regarded, sentenced and punished as an offender against the State'. Consequently, the sole jurisdiction for these offences is the military, since, from the entry into force of the 1884 Military Penal Code, the duty to safeguard the nation comes specifically within the sphere of military competence.

On 29 September 1977 Mr. Tourón was sentenced by a court of first instance to 14 years' imprisonment for "subversive association" (article 60 (v) of the Military Penal Code) and "conspiracy to overthrow the Constitution followed by the preparatory acts" (articles 60 (I), paragraph 6, and 60 (XII)) in a combination of principal and secondary offences (Military Penal Code, article 7 and Ordinary Penal Code, article 56). On 10 October 1977 Colonel Otto Gilomen, counsel for the accused, appealed to the Supreme Court of Military Justice against the judgement rendered by the court of first instance. On 17 May 1979 final judgement was passed by a court of second instance, upholding the previous judgement, and it became enforceable on 29 June 1979. As may be observed, not only did the accused have the benefit of due legal assistance in the proceedings but he availed himself of the remedy of appeal to which Uruguayan legislation entitled him. It may be added that under Uruguayan law the remedy of appeal functions automatically in the case of final judgements imposing prison sentences of over three years, such sentences not being considered enforceable until they have been comprehensively reviewed on appeal by the Supreme Court of Military Justice; in other words, in such cases it is mandatory for counsel to appeal against such sentences. To continue with the erroneous or false assertions, it is stated in the communication that Mr. Tourón's case has not been submitted to any other international body, when in reality it was brought before and considered by the Inter-American Commission on Human Rights as case No. 2011. With regard to the reference to physical coercion, the Government of Uruguay categorically rejects this accusation.

6. The Human Rights Committee notes that the State party has informed the Committee in another case (No. 9/1977) that the remedy of *habeas corpus* is not applicable to persons detained under the "prompt security measures".

7. As to the State party's observation in its note dated 10 July 1980 that the case of Luis Tourón was brought before and considered by the Inter-American Commission on Human Rights as case No. 2011, the Committee recalls that it has already ascertained in connection with its consideration of other communications (e.g. No. 1/1976) that IACHR case No. 2011 (dated 27 January 1976, listing the names and dates of arrest of a large number of persons, offering no further details), predates the entering into force of the Covenant, and the Optional Protocol for Uruguay, and therefore does not concern the same matter which the Committee is competent to consider. Further, the Committee recalls that no objection was raised by the State party as to the admissibility of the present communication under rule 91 of the Committee's provisional rules of procedure.

8. The Human Rights Committee, considering the present communication in the light of all information made available to it by the parties, as provided in article 5 (1) of the Optional Protocol, hereby decides to base its views on the following facts which have either been essentially confirmed by the State party, or are unrefuted: Luis Tourón was arrested on 21 January

1976 and was detained incommunicado from the date of arrest until August 1976 when he was brought before a judge and formally charged with the offence of "subversive association" and "conspiracy to overthrow the Constitution followed by preparatory acts". It was not until then that he was afforded the right to have the assistance of counsel. He was not allowed to be present at his trial or to defend himself in person. There was no public hearing, and judgement was not delivered in public. On 29 September 1977 he was sentenced by a military court of first instance to 14 years' imprisonment. On 17 May 1979 a final judgement was passed by a court of second instance, upholding the previous judgement. He has been deprived of all his political rights, including the right to vote, for 15 years.

9. As to the allegations of ill-treatment, they are in such general terms that the Committee makes no finding in regard to them.

10. The Human Rights Committee has considered whether acts and treatment, which are *prima facie* not in conformity with the Covenant, could for any reasons be justified under the Covenant, in the circumstances. The Government has referred to provisions of Uruguayan law, including the "prompt security measures". The Covenant (art. 4) allows national measures derogating from some of its provisions only in strictly defined circumstances, and the Government has not made any submissions of fact or law to justify such derogation.

11. The Human Rights Committee is aware that under the legislation of many countries criminal offenders may be deprived of certain political rights. However, article 25 of the Covenant permits only reasonable restrictions. The Committee notes that Mr. Tourón has been sentenced to 14 years' imprisonment for "subversive association" and "conspiracy to overthrow the Constitution followed by preparatory acts". The State party has not responded to the Committee's request that it should be furnished with copies of any court orders or decisions relevant to the matter. The Committee is gravely concerned by this omission. Although similar requests have been made in a number of other cases, the Committee has never yet been furnished with the texts of any court decisions. This tends to suggest that judgements, even of extreme gravity, as in the present case, are not handed down in writing. In such circumstances, the Committee feels unable, on the basis of the information before it, to accept either that the proceedings against Luis Tourón amounted to a fair trial or that the severity of the sentence imposed or the deprivation of political rights for 15 years were justified.

12. In addition, the Human Rights Committee acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that the facts as found by the Committee, in so far as they continued or occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay), disclose violations of the International Covenant on Civil and Political Rights, in particular of:

Article 9 (3), because Luis Tourón was not brought promptly before a judge or other officer authorized to exercise judicial power;

Article 9 (4), because *habeas corpus* was not available to him;

Article 14 (1), because he had no public hearing and because the judgement rendered against him was not made public;

Article 14 (3), because he did not have access to legal assistance during the first seven months of his detention and was not tried in his presence.

13. The Committee, accordingly, is of the view that the State party is under an obligation to provide the victim with effective remedies, including compensation, for the violations he has suffered and to take steps to ensure that similar violations do not occur in the future.

Communication No. 33/1978

Submitted by: Leopoldo Buffo Carballal on 30 May 1978

Alleged victim: The author

State party: Uruguay

Date of adoption of views: 27 March 1981 (twelfth session)

Detention incommunicado—Access to counsel—Habeas corpus—Torture—Delays in proceedings—Detention despite release order—Extension of time for State party's observations—Derogation from Covenant—Burden of proof

Articles of Covenant: 7, 9 (1), (2) and (4), 10 (1), 14 (3) and 19

Article of Optional Protocol: 4 (2)

Views under article 5 (4) of the Optional Protocol

1. The author of this communication, dated 30 May 1978, is Leopoldo Buffo Carballal, a 36-year-old Uruguayan national, residing in Mexico. He submitted the communication on his own behalf.

2.1 The author states the following:

2.2 Upon arriving in Argentina on 4 January 1976 (by legally crossing the border between Uruguay and Argentina), he was arrested without a warrant of arrest and handed over to members of the Uruguayan Navy, who took him back to the city of Paysandú, Uruguay. He was not informed of why he had been deprived of his liberty. A few days later he was transferred to Montevideo.

2.3 During the first period of detention, until 12 February 1976, he was repeatedly subjected to torture (blows, hanging from his hands and forced to stand motionless—“*plantón*”—for long periods). On 12 February 1976, after having been forced to sign a statement to the effect that he had suffered no abuses, he was transferred to the military barracks of the Fifth Artillery. From there, he was taken to a large truck garage. The author describes the events as follows:

They moved us all to a large truck garage with a concrete roof and two big doors that were open summer and winter. We slept on the floor, which was covered with oil and grease. We had neither mattress nor blankets. For the first time since I was detained, I was allowed to take a bath, although I had to put on the same clothes, soiled by my own vomit, blood and excrement. When I took off the blindfold I became dizzy. Later on, my family was allowed to send me a mattress. In this dungeon I remained incommunicado, sitting on the rolled-up mattress during the day, blindfolded and with my hands bound. We were allowed to sleep at night. The only food was a cup of

soup in the morning and another at night. They would not allow our relatives to bring us food or medicine. I suffered from chronic diarrhoea and frequent colds.

2.4 On 5 May 1976 he appeared before a military court, and on 28 July 1976 he was brought before the court again to be notified that his release had been ordered.

2.5 In spite of the order for his release, he was still detained at the Fifth Artillery barracks under the régime of “prompt security measures” until 26 January 1977. He was, however, forbidden to leave Montevideo and ordered to report to the authorities every 15 days. He gained asylum in the Embassy of Mexico in Montevideo on 4 March 1977 with his wife and children. At the time his home was plundered and his belongings were taken away.

2.6 The author claims that during his detention he was effectively barred from any recourse, not only because he had no access to the outside world while he was held incommunicado (until 28 July 1976) but also, from then on, because of the interpretation given by the Uruguayan authorities to the relevant provision of the Constitution in respect of detention under “prompt security measures”. He states that he was never charged with any offence under the law and alleges that the sole reason for the injustices inflicted upon him was his political opinions, the nature of which, however, he fails to specify.

2.7 He states that he did not receive any compensation after his release.

2.8 He submits that he was a victim of violations of articles 7, 9 (1, 2, 3, 4, 5), 10 (1 and 3), 12, 17 and 19 (1) of the International Covenant on Civil and Political Rights.

3. On 28 July 1978, the Human Rights Committee decided to transmit the communication to the State party, under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility.

4. By letter dated 29 December 1978, the State party argued that the alleged violation took place on

4 January 1976, prior to the entry into force of the Covenant for Uruguay, and made the general observation that every person in the national territory has free access to the courts and to public administrative authorities and may exercise freely all the administrative and judicial remedies provided for under the legal system of the country.

5. On 24 April 1979, the Human Rights Committee,

(a) Having concluded that, although the date of arrest was prior to the entry into force of the Covenant for Uruguay, the alleged violations continued after that date,

(b) Being unable to conclude that, with regard to exhaustion of domestic remedies, on the basis of the information before it, there were any further remedies which the alleged victim should or could have pursued,

Therefore decided:

(a) That the communication was admissible;

(b) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it.

6. The time-limit for the State party's submission under article 4 (2) of the Optional Protocol expired on 25 November 1979. By notes dated 23 November 1979 and 13 February 1980, the State party requested the Committee to accord a reasonable extension of time. The only submission received to date from the State party consists of a brief note, dated 7 July 1980, in which the State party reaffirms that the legal system in force affords every guarantee of due process and adds the following explanations:

The author's assertions about the conditions of his detention under the prompt security measures are completely unfounded, for in no Uruguayan place of detention may any situation be found which could be regarded as violating the integrity of persons. Leopoldo Buffo Carballal was arrested on 4 January 1976 for his presumed connections with subversive activities and was interned under the prompt security measures; he was granted unconditional release on 28 June 1976. On 29 June 1976 the Fifth Military Court of Investigation closed the preliminary investigation proceedings for lack of evidence. Afterwards, Buffo Carballal took refuge in the Mexican Embassy before leaving for Mexico. The foregoing shows that justice in Uruguay is not arbitrary and that in the absence of any elements constituting proof of criminal acts, no one is deprived of his liberty. For all these reasons, the author's assertions, which are merely accusations devoid of all foundation, are hereby rejected.

7. The Human Rights Committee notes that it has been informed by the Government of Uruguay in another case (No. 9/1977) that the remedy of *habeas corpus* is not applicable to persons detained under the "prompt security measures".

8. The Human Rights Committee has received no further correspondence from the author subsequent to his original communication of 30 May 1978. Letters addressed to him by the Secretariat have been returned by the Mexican postal authorities as unclaimed.

9. The Human Rights Committee, considering the present communication in the light of all information

made available to it by the parties as provided in article 5 (1) of the Optional Protocol, hereby decides to base its views on the following facts which have been essentially confirmed by the State party, are unrefuted or are uncontested, except for denials of a general character offering no particular information or explanation. Leopoldo Buffo Carballal was arrested on 4 January 1976 and held incommunicado for more than five months, much of the time tied and blindfolded, in several places of detention. Recourse to *habeas corpus* was not available to him. He was brought before a military judge on 5 May 1976 and again on 28 June or 28 July 1976, when an order was issued for his release. He was, however, kept in detention until 26 January 1977.

10. As to the allegations of torture, the Committee notes that they relate explicitly to events said to have occurred prior to 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay). As regards the harsh conditions of Mr. Buffo Carballal's detention, which continued after that date, the State party has adduced no evidence that the allegations were duly investigated. A refutation in general terms to the effect that "in no Uruguayan place of detention may any situation be found which could be regarded as violating the integrity of persons" is not sufficient. The allegations should have been investigated by the State party, in accordance with its laws and its obligations under the Covenant and the Optional Protocol.

11. The Human Rights Committee has considered whether acts and treatment which *prima facie* are not in conformity with the Covenant could, for any reasons be justified under the Covenant in the circumstances. The Government has referred to provisions of Uruguayan law, including the "prompt security measures". The Covenant (art. 4) allows national measures derogating from some of its provisions only in strictly defined circumstances, and the Government has not made any submission of fact or law to justify derogation. Moreover, some of the facts referred to above raise issues under provisions from which the Covenant does not allow any derogation under any circumstances.

12. The Human Rights Committee has duly taken note of the State party's submission that Leopoldo Buffo Carballal was arrested and detained for his presumed connection with subversive activities. Such general reference to "subversive activities" does not, however, suffice to show that the measures of penal prosecution taken against Leopoldo Buffo Carballal were compatible with the provisions of the Covenant. The Covenant provides in article 19 that everyone shall have the right to hold opinions without interference and that the freedom of expression set forth in paragraph 2 of that article shall be subject only to such restrictions as are *necessary* (a) for respect of the rights and reputations of others or (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. To date, the State party has never explained the scope and meaning of "subversive

activities", which constitute a criminal offence under the relevant legislation. Such an explanation is particularly necessary in the present case, since the author of the communication contends that he has been prosecuted solely for his opinions.

13. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that these facts, in so far as they have occurred on or after 23 March 1976 (the date on which the Covenant entered into force in respect of Uruguay) or continued or had effects which themselves constitute a violation after that date, disclose violations of the Covenant, in particular of:

Articles 7 and 10 (1), because of the conditions under which Mr. Buffo Carballal was held during his detention;

Article 9 (1), because he was not released until approximately six or seven months after an order for his release was issued by the military court;

Article 9 (2), because he was not informed of the charges brought against him;

Article 9 (3), because he was not brought before a judge until four months after he was detained and 44 days after the Covenant entered into force for Uruguay;

Article 9 (4), because recourse to *habeas corpus* was not available to him;

Article 14 (3), because the conditions of his detention effectively barred him from access to legal assistance.

14. The Committee, accordingly, is of the view that the State party is under an obligation to provide effective remedies, if applied for, including compensation for the violations which Mr. Buffo Carballal has suffered, and to take steps to ensure that similar violations do not occur in the future.

Communication No. 34/1978

Submitted by: Jorge Landinelli Silva *et al.* on 30 May 1978

Alleged victims: The authors

State party: Uruguay

Date of adoption of views: 8 April 1981 (twelfth session)

Derogation from Covenant—State of emergency— Deprivation of political rights

Articles of Covenant: 4 and 25

Views under article 5 (4) of the Optional Protocol

1. The authors of this communication (initial letter dated 30 May 1978 and a further letter dated 26 February 1981) are Jorge Landinelli Silva, 34 years old, professor of history; Luis E. Echave Zas, 46 years old, farm labourer; Omar Patron Zeballos, 52 years old, assistant accountant; Niurka Sala Fernández, 49 years old, professor of physics; and Rafael Guarga Ferro, 39 years old, engineer, all Uruguayan citizens residing in Mexico. They submitted the communication on their own behalf.

2. The facts of the present communication are undisputed. The authors of the communication were all candidates for elective office on the lists of certain political groups for the 1966 and 1971 elections, which groups were later declared illegal through a decree issued by the new Government of the country in November 1973. In this capacity, Institutional Act No. 4 of 1 September 1976 (art. 1 (a))¹ has deprived the authors of the communication of the right to engage in

any activity of a political nature, including the right to vote, for term of 15 years.

3.1 The authors contend that such a deprivation of their rights goes beyond the restrictions envisaged in article 25 of the Covenant, since suspension of political rights under the Uruguayan juridical system, as in others, is only permissible as a sanction for certain categories of penal crimes. They further contend that the duration of the suspension of rights, as well as the number of categories of persons affected by this suspension, are without precedent in political history. In conclusion, the authors claim that the fundamental idea upon which the "Institutional Act No. 4" is based, is incompatible with the principles set forth in article 25 of the Covenant.

3.2 The authors of the communication state that they have not submitted the same case to any other procedure of international investigation or settlement.

4. Under rule 91 of the provisional rules of procedure of the Committee, the communication was transmitted to the State party on 28 September 1978 with the request that the State party submit, not later than 9 November 1978, information or observations which it might deem relevant to the question of the admissibility of the communication, in particular as regards the fulfilment of the conditions set out in article 5 (2) (a) and 5 (2) (b) of the Optional Protocol. No reply was received from the State party in this connection.

¹ The text reads as follows:

"[...] The Executive Power, in exercise of the powers conferred on it by the institutionalization of the revolutionary process,

"DECREES:

"Art. 1. The following shall be prohibited, for a term of 15 years, from engaging in any of the activities of a political nature authorized by the Constitution of the Republic, including the vote:

"(a) All Candidates for elective office on the lists for the 1966 and 1971 elections of the Marxist and pro-Marxist Political Parties or Groups declared illegal by the resolutions of the Executive Power No. 1788/67 of 12 December 1967 and No. 1026/73 of 26 November 1973; [...]"

5. The Committee found, on the basis of the information before it, that it was not precluded by article 5 (2) (a) of the Optional Protocol from considering the communication. The Committee was also unable to conclude that there were effective domestic remedies available to the alleged victims in the circumstances of their case, which they had failed to exhaust. Since, furthermore, no other procedural impediment had emerged, the Human Rights Committee declared the communication admissible on 24 April 1979.

6. On 10 July 1980, the State party submitted its observations under article 4 (2) of the Optional Protocol. Essentially, it invoked article 4 of the Covenant in the following terms:

The Government of Uruguay wishes to inform the Committee that it has availed itself of the right of derogation provided for in article 4 (3) of the International Covenant on Civil and Political Rights. The Secretary-General of the United Nations was informed of this decision and, through him, notes were sent to the States parties containing the notification of the Uruguayan State. Nevertheless, the Government of Uruguay wishes to state that it reiterates the information given on that occasion, namely that the requirements of article 4 (2) of the Covenant are being strictly complied with—requirements whose purpose is precisely to ensure the real, effective and lasting defence of human rights, the enjoyment and promotion of which constitute the basis of our existence as an independent, sovereign nation. Article 25, on which the authors of the communication argue their case, is not mentioned in the text of article 4 (2). Accordingly, the Government of Uruguay, as it has a right to do, has temporarily derogated from some provisions relating to political parties. Nevertheless, as is stated in the third preambular paragraph of Act No. 4, dated 1 September 1976, it is the firm intention of the authorities to restore political life.

7. The Committee has considered the present communication in the light of all information made available to it by the parties, as provided for in article 5 (1) of the Optional Protocol.

8.1 Although the Government of Uruguay, in its submission of 10 July 1980, has invoked article 4 of the Covenant in order to justify the ban imposed on the authors of the communication, the Human Rights Committee feels unable to accept that the requirements set forth in article 4 (1) of the Covenant have been met.

8.2 According to article 4 (1) of the Covenant, the States parties may take measures derogating from their obligations under that instrument in a situation of public emergency which threatens the life of the nation and the existence of which has been formally proclaimed. Even in such circumstances, derogations are only permissible to the extent strictly required by the exigencies of the situation. In its note of 28 June 1979 to the Secretary-General of the United Nations (reproduced in document CCPR/C/2/Add.3, p. 4), which was designed to comply with the formal requirements laid down in article 4 (3) of the Covenant, the Government of Uruguay has made reference to an emergency situation in the country which was legally acknowledged in a number of "Institutional Acts". However, no factual details were given at that time. The note confined itself to stating that the existence of the emergency situation was "a matter of universal knowledge"; no attempt was made to indicate the nature and the scope of the derogations actually resorted to with regard to the rights guaranteed by the Covenant, or to show that such

derogations were strictly necessary. Instead, the Government of Uruguay declared that more information would be provided in connection with the submission of the country's report under article 40 of the Covenant. To date neither has this report been received, nor the information by which it was to be supplemented.

8.3 Although the sovereign right of a State party to declare a state of emergency is not questioned, yet, in the specific context of the present communication, the Human Rights Committee is of the opinion that a State, by merely invoking the existence of exceptional circumstances, cannot evade the obligations which it has undertaken by ratifying the Covenant. Although the substantive right to take derogatory measures may not depend on a formal notification being made pursuant to article 4 (3) of the Covenant, the State party concerned is duty-bound to give a sufficiently detailed account of the relevant facts when it invokes article 4 (1) of the Covenant in proceedings under the Optional Protocol. It is the function of the Human Rights Committee, acting under the Optional Protocol, to see to it that States parties live up to their commitments under the Covenant. In order to discharge this function and to assess whether a situation of the kind described in article 4 (1) of the Covenant exists in the country concerned, it needs full and comprehensive information. If the respondent Government does not furnish the required justification itself, as it is required to do under article 4 (2) of the Optional Protocol and article 4 (3) of the Covenant, the Human Rights Committee cannot conclude that valid reasons exist to legitimize a departure from the normal legal régime prescribed by the Covenant.

8.4 In addition, even on the assumption that there exists a situation of emergency in Uruguay, the Human Rights Committee does not see what ground could be adduced to support the contention that, in order to restore peace and order, it was necessary to deprive all citizens, who as members of certain political groups had been candidates in the elections of 1966 and 1971, of any political right for a period as long as 15 years. This measure applies to everyone, without distinction as to whether he sought to promote his political opinions by peaceful means or by resorting to, or advocating the use of, violent means. The Government of Uruguay has failed to show that the interdiction of any kind of political dissent is required in order to deal with the alleged emergency situation and pave the way back to political freedom.

9. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol, is of the view that, by prohibiting the authors of the communication from engaging in any kind of political activity for a period as long as 15 years, the State party has unreasonably restricted their rights under article 25 of the Covenant.

10. Accordingly, the Human Rights Committee is of the view that the State party concerned is under an obligation to take steps with a view to enabling Jorge Landinelli Silva, Luis E. Echave Zas, Omar Patrón Zeballos, Niuska Sala Fernández and Rafael Guarga Ferro to participate again in the political life of the nation.

Communication No. 35/1978

Submitted by: Shirin Aumeeruddy-Cziffra and 19 other Mauritian women on 2 May 1978

Alleged victims: The author and other Mauritian women

State party: Mauritius

Date of adoption of views: 9 April 1981 (twelfth session)

Actio popularis—Concept of victim—Standing of authors—Aliens—Immigration—Deportation—Naturalization—Residence—Right to marry—Protection of family—Sex discrimination—Equal protection of the law—Political rights

Articles of Covenant: 2 (1), 3, 17, 23, 25 and 26

Articles of Optional Protocol: 1 and 2

Views under article 5 (4) of the Optional Protocol¹

1.1 The authors of this communication (initial letter dated 2 May 1978 and a further letter dated 19 March 1980) are 20 Mauritian women, who have requested that their identity should not be disclosed to the State party.² They claim that the enactment of the Immigration (Amendment) Act, 1977, and the Deportation (Amendment) Act, 1977, by Mauritius constitutes discrimination based on sex against Mauritian women, violation of the right to found a family and home, and removal of the protection of the courts of law, in breach of articles 2, 3, 4, 17, 23, 25 and 26 of the International Covenant on Civil and Political Rights. The authors claim to be victims of the alleged violations. They submit that all domestic remedies have been exhausted.

1.2 The authors state that prior to the enactment of the laws in question, alien men and women married to Mauritian nationals enjoyed the same residence status, that is to say, by virtue of their marriage, foreign spouses of both sexes had the right, protected by law, to reside in the country with their Mauritian husbands or wives. The authors contend that, under the new laws, alien husbands of Mauritian women lost their residence status in Mauritius and must now apply for a "residence permit" which may be refused or removed at any time by the Minister of Interior. The new laws, however, do not affect the status of alien women married to Mauritian husbands who retain their legal right to residence in the country. The authors further contend that under the new laws alien husbands of Mauritian women may be deported under a ministerial order which is not subject to judicial review.

2. On 27 October 1978, the Human Rights Committee decided to transmit the communication to the State party, under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility.

¹ Pursuant to rule 85 of the provisional rules of procedure, Mr. Rajsoomer Lallah did not participate in the consideration of this communication or in the adoption of the views of the Committee under article 5 (4) of the Optional Protocol in this matter.

² Subsequently one of the authors agreed to the disclosure of her name.

3. The State party, in its reply of 17 January 1979, informed the Committee that it had no objection to formulate against the admissibility of the communication.

4. On 24 April 1979, the Human Rights Committee,
(a) Concluding that the communication, as presented by the authors, should be declared admissible;

(b) Considering, however, that it might review this decision in the light of all the information which would be before it when it considered the communication on the merits;

Therefore decided:

(a) That the communication was admissible;

(b) That in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements on the substance of the matter under consideration;

(c) That the State party be requested, in this connection, to transmit copies of any relevant legislation and any relevant judicial decisions.

5.1 In its submission dated 17 December 1979, the State party explains the laws of Mauritius on the acquisition of citizenship and, in particular on the naturalization of aliens. The State party further elaborates on the deportation laws, including a historical synopsis of these laws. It is admitted that it was the effect of the Immigration (Amendment) Act, 1977 and of the Deportation (Amendment) Act, 1977 to limit the right of free access to Mauritius and immunity from deportation to the wives of Mauritian citizens only, whereas this right had previously been enjoyed by all spouses of citizens of Mauritius irrespective of their sex. Both Acts were passed following certain events in connection with which some foreigners (spouses of Mauritian women) were suspected of subversive activities. The State party claims, however, that the authors of the communication do not allege that any particular individual has in fact been the victim of any specific act in breach of the provisions of the Covenant. The State party claims that the communication is aimed at obtaining a declaration by the Human Rights Committee that the Deportation Act and the Immigration Act, as amended, are capable of being administered in a discriminatory manner in violation of articles 2, 3, 4, 17, 23, 25 and 26 of the Covenant.

5.2 The State party admits that the two statutes in question do not guarantee similar rights of access to residence in Mauritius to all foreigners who have married Mauritian nationals, and it is stated that the "discrimination", if there is any, is based on the sex of the spouse. The State party further admits that foreign

husbands of Mauritian citizens no longer have the right to free access to Mauritius and immunity from deportation therefrom, whereas prior to 12 April 1977, this group of persons had the right to be considered, *de facto*, as residents of Mauritius. They now must apply to the Minister of the Interior for a residence permit and in case of refusal of the permit they have no possibility to seek redress before a court of law.

5.3 The State party, however, considers that this situation does not amount to a violation of the provisions of the Covenant which—in the State party's view—does not guarantee a general right to enter, to reside in and not to be expelled from a particular country or a certain part of it and that the exclusion or restriction upon entry or residence of some individuals and not others cannot constitute discrimination in respect of a right or freedom guaranteed by the Covenant. The State party concludes that if the right “to enter, reside in and not to be expelled from” Mauritius is not one guaranteed by the Covenant, the authors cannot claim that there has been any violation of articles 2 (1), 2 (2), 3, 4 or 26 of the Covenant on the grounds that admission to Mauritius may be denied to the authors' husbands or prospective husbands or that these husbands or prospective husbands may be expelled from Mauritius, and that such exclusion of their husbands or prospective husbands may be an interference in their private and family life.

5.4 As far as the allegation of a violation of article 25 of the Covenant is concerned, the State party argues that if a citizen of Mauritius chooses to go and live abroad with her husband because the latter is not entitled to stay in Mauritius, she cannot be heard to say that she is thus denied the right to take part in the conduct of public affairs and to have access on general terms of equality to public service in her country. The State party claims that nothing in the law prevents the woman, as such, from exercising the rights guaranteed by article 25, although she may not be in a position to exercise the said rights as a consequence of her marriage and of her decision to live with her husband abroad. The State party mentions, as an example of a woman who has married a foreign husband and who is still playing a prominent role in the conduct of public affairs in Mauritius, the case of Mrs. Aumeeruddy-Cziffra, one of the leading figures of the Mouvement Militant Mauricien opposition party.

5.5 The State party further argues that nothing in the laws of Mauritius denies any citizen the right to marry whomever he may choose and to found a family. Any violation of articles 17 and 23 is denied by the State party which argues that this allegation is based on the assumption that “husband and wife are given the right to reside together in their own countries and that this right of residence should be secure”. The State party reiterates that the right to stay in Mauritius is not one of the rights guaranteed by the provisions of the Covenant, but it admits that the exclusion of a person from a country where close members of his family are living can amount to an infringement of the person's right under article 17 of the Covenant, i.e. that no one should be

subjected to arbitrary and unlawful interference with his family. The State party argues, however, that each case must be decided on its own merits.

5.6 The State party recalls that the Mauritian Constitution guarantees to every person the right to leave the country, and that the foreign husband of a Mauritian citizen may apply for a residence permit or even naturalization.

5.7 The State party is of the opinion that if the exclusion of a non-citizen is lawful (the right to stay in a country not being one of the rights guaranteed by the provisions of the Covenant), then such an exclusion (based on grounds of security or public interest) cannot be said to be an arbitrary or unlawful interference with the family life of its nationals in breach of article 17 of the Covenant.

6.1 In their additional information and observations dated 19 March 1980, the authors argue that the two Acts in question (Immigration (Amendment) Act, 1977 and Deportation (Amendment) Act, 1977) are discriminatory in themselves in that the equal rights of women are no longer guaranteed. The authors emphasize that they are not so much concerned with the unequal status of the spouses of Mauritian citizens—to which the State party seems to refer—but they allege that Mauritian women who marry foreigners are themselves discriminated against on the basis of sex, and they add that the application of the laws in question may amount to discrimination based on other factors such as race or political opinions. The authors further state that they do not claim “immunity from deportation” for foreign husbands of Mauritian women but they object that the Deportation (Amendment) Act, 1977 gives the Minister of the Interior an absolute discretion in the matter. They argue that, according to article 13 of the Covenant, the alien who is lawfully in the country has the right not to be arbitrarily expelled and that, therefore, a new law should not deprive him of his right of hearing.

6.2 As has been stated, the authors maintain that they are not concerned primarily with the rights of non-citizens (foreign husbands) but of Mauritian citizens (wives). They allege:

(a) That female citizens do not have an unrestricted right to married life in their country if they marry a foreigner, whereas male citizens have an unrestricted right to do so;

(b) That the law, being retroactive, had the effect of withdrawing from the female citizens the opportunity to take part in public life and restricted, in particular, the right of one of the authors in this respect;

(c) That the “choice” to join the foreign spouse abroad is only imposed on Mauritian women and that only they are under an obligation to “choose” between exercising their political rights guaranteed under article 25 of the Covenant, or to live with their foreign husbands abroad.

(d) That the female citizen concerned may not be able to leave Mauritius and join her husband in his country of origin for innumerable reasons (health, long-term

contracts of work, political mandate, incapacity to stay in the husband's country of origin because of racial problems, as, for example, in South Africa);

(e) That by rendering the right of residence of foreign husbands insecure, the State party is tampering with the female citizens' right to freely marry whom they choose and to found a family.

The authors do not contest that a foreign husband may apply for a residence permit, as the State party has pointed out in its submission; but they maintain that foreign husbands should be granted the rights to residence and naturalization. The authors allege that in many cases foreign husbands have applied in vain for both and they claim that such a decision amounts to an arbitrary and unlawful interference by the State party with the family life of its female citizens in breach of article 17 of the Covenant, as the decision is placed in the hands of the Minister of the Interior and not of a court of law, and as no appeal against this decision is possible.

6.3 The authors enclose as an annex to their submission a statement by one of the co-authors, Mrs. Shirin Aumeeruddy-Cziffra, to whose case the State party had referred (see para. 5.4 above). She states *inter alia* that on 21 April 1977, in accordance with the new laws, her foreign husband applied for a residence permit and later for naturalization. She alleges that during 1977 her husband was twice granted a one-month visa and that an application for a temporary work permit was refused. She states that when returning to Mauritius, after a one-week stay abroad, her husband was allowed to enter the country on 24 October 1978 without question and that he has been staying there since without a residence or work permit. She remarks that her husband is slowly and gradually giving up all hope of ever being naturalized or obtaining a residence permit. The author, an elected member of the legislative assembly, points out that this situation is a cause of frustration for herself and she alleges that the insecurity has been deliberately created by the Government to force her to abandon politics in view of the forthcoming elections in December 1981. She stresses that she does not want to leave Mauritius, but that she intends, after the expiry of her present mandate, to be again a candidate for her party.

7.1 The Human Rights Committee bases its view on the following facts, which are not in dispute:

7.2 Up to 1977, spouses (husbands and wives) of Mauritian citizens had the right of free access to Mauritius and enjoyed immunity from deportation. They had the right to be considered *de facto* as residents of Mauritius. The coming into force of the Immigration (Amendment) Act, 1977, and of the Deportation (Amendment) Act, 1977, limited these rights to the wives of Mauritius citizens only. Foreign husbands must apply to the Minister of the Interior for a residence permit and in case of refusal of the permit they have no possibility to seek redress before a court of law.

7.3 Seventeen of the co-authors are unmarried. Three of the co-authors were married to foreign husbands when, owing to the coming into force of the

Immigration (Amendment) Act, 1977, their husbands lost the residence status in Mauritius which they had enjoyed before. Their further residence together with their spouses in Mauritius is based under the statute on a limited, temporary residence permit to be issued in accordance with section 9 of the Immigration (Amendment) Act, 1977. This residence permit is subject to specified conditions which might at any time be varied or cancelled by a decision of the Minister of the Interior, against which no remedy is available. In addition, the Deportation (Amendment) Act, 1977, subjects foreign husbands to a permanent risk of being deported from Mauritius.

7.4 In the case of Mrs. Aumeeruddy-Cziffra, one of the three married co-authors, more than three years have elapsed since her husband applied to the Mauritian authorities for a residence permit, but so far no formal decision has been taken. If her husband's application were to receive a negative decision, she would be obliged to choose between either living with her husband abroad and giving up her political career; or living separated from her husband in Mauritius and there continuing to participate in the conduct of public affairs of that country.

8.1 The Committee has to consider, in the light of these facts, whether any of the rights set forth in the Covenant on Civil and Political Rights have been violated with respect to the authors by Mauritius when enacting and applying the two statutes in question. The Committee has to decide whether these two statutes, by subjecting only the foreign husband of a Mauritian woman—but not the foreign wife of a Mauritian man—to the obligation to apply for a residence permit in order to enjoy the same rights as before the enactment of the statutes, and by subjecting only the foreign husband to the possibility of deportation, violate any of the rights set forth under the Covenant, and whether the authors of the communication may claim to be victims of such a violation.

8.2 Pursuant to article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights, the Committee only has a mandate to consider communications concerning individuals who are alleged to be themselves victims of a violation of any of the rights set forth in the Covenant.

9.1 The Human Rights Committee bases its views on the following considerations:

9.2 In the first place, a distinction has to be made between the different groups of the authors of the present communication. A person can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she is actually affected. It is a matter of degree how concretely this requirement should be taken. However, no individual can in the abstract, by way of an *actio popularis*, challenge a law of practice claimed to be contrary to the Covenant. If the law or practice has not already been concretely applied to the detriment of that individual, it must in any event be applicable in such a way that the alleged victim's risk of being affected is more than a theoretical possibility.

9.2 (a) In this respect the Committee notes that in the case of the 17 unmarried co-authors there is no question of actual interference with, or failure to ensure equal protection by the law to any family. Furthermore there is no evidence that any of them is actually facing a personal risk of being thus affected in the enjoyment of this or any other rights set forth in the Covenant by the laws complained against. In particular it cannot be said that their right to marry under article 23 (2) or the right to equality of spouses under article 23 (4) are affected by such laws.

9.2 (b) 1 The Committee will next examine that part of the communication which relates to the effect of the laws of 1977 on the family life of the three married women.

9.2 (b) 2 The Committee notes that several provisions of the Covenant are applicable in this respect. For reasons which will appear below, there is no doubt that they are actually affected by these laws, even in the absence of any individual measure of implementation (for instance, by way of a denial of residence, or an order of deportation, concerning one of the husbands). Their claim to be "victims" within the meaning of the Optional Protocol has to be examined.

9.2 (b) 2 (i) 1 First, their relationships to their husbands clearly belong to the area of "family" as used in article 17 (1) of the Covenant. They are therefore protected against what that article calls "arbitrary or unlawful interference" in this area.

9.2 (b) 2 (i) 2 The Committee takes the view that the common residence of husband and wife has to be considered as the normal behaviour of a family. Hence, and as the State party has admitted, the exclusion of a person from a country where close members of his family are living can amount to an interference within the meaning of article 17. In principle, article 17 (1) applies also when one of the spouses is an alien. Whether the existence and application of immigration laws affecting the residence of a family member is compatible with the Covenant depends on whether such interference is either "arbitrary or unlawful" as stated in article 17 (1), or conflicts in any other way with the State party's obligations under the Covenant.

9.2 (b) 2 (i) 3 In the present cases, not only the future possibility of deportation, but the existing precarious residence situation of foreign husbands in Mauritius represents, in the opinion of the Committee, an interference by the authorities of the State party with the family life of the Mauritian wives and their husbands. The statutes in question have rendered it uncertain for the families concerned whether and for how long it will be possible for them to continue their family life by residing together in Mauritius. Moreover, as described above (para. 7.4) in one of the cases, even the delay for years, and the absence of a positive decision granting a residence permit, must be seen as a considerable inconvenience, among other reasons because the granting of a work permit, and hence the possibility of the husband to contribute to supporting the family, depends on the residence permit, and because deportation without judicial review is possible at any time.

9.2 (b) 2 (i) 4 Since, however, this situation results from the legislation itself, there can be no question of regarding this interference as "unlawful" within the meaning of article 17 (1) in the present cases. It remains to be considered whether it is "arbitrary" or conflicts in any other way with the Covenant.

9.2 (b) 2 (i) 5 The protection owed to individuals in this respect is subject to the principle of equal treatment of the sexes which follows from several provisions of the Covenant. It is an obligation of the State parties under article 2 (1) generally to respect and ensure the rights of the Covenant "without distinction of any kind, such as ... (*inter alia*) sex", and more particularly under article 3 "to ensure the equal right of men and women to the enjoyment" of all these rights, as well as under article 26 to provide "without any discrimination" for "the equal protection of the law".

9.2 (b) 2 (i) 6 The authors who are married to foreign nationals are suffering from the adverse consequences of the statutes discussed above only because they are women. The precarious residence status of their husbands, affecting their family life as described, results from the 1977 laws which do not apply the same measures of control to foreign wives. In this connection the Committee has noted that under section 16 of the Constitution of Mauritius sex is not one of the grounds on which discrimination is prohibited.

9.2 (b) 2 (i) 7 In these circumstances, it is not necessary for the Committee to decide in the present cases how far such or other restrictions on the residence of foreign spouses might conflict with the Covenant if applied without discrimination of any kind.

9.2 (b) 2 (i) 8 The Committee considers that it is also unnecessary to say whether the existing discrimination should be called an "arbitrary" interference with the family within the meaning of article 17. Whether or not the particular interference could as such be justified if it were applied without discrimination does not matter here. Whenever restrictions are placed on a right guaranteed by the Covenant, this has to be done without discrimination on the ground of sex. Whether the restriction in itself would be in breach of that right regarded in isolation, is not decisive in this respect. It is the enjoyment of the rights which must be secured without discrimination. Here it is sufficient, therefore, to note that in the present position an adverse distinction based on sex is made, affecting the alleged victims in their enjoyment of one of their rights. No sufficient justification for this difference has been given. The Committee must then find that there is a violation of articles 2 (1) and 3 of the Covenant, in conjunction with article 17 (1).

9.2 (b) 2 (ii) 1 At the same time each of the couples concerned constitutes also a "family" within the meaning of article 23 (1) of the Covenant, in one case at least—that of Mrs. Aumeeruddy-Cziffra—also with a child. They are therefore as such "entitled to protection by society and the State" as required by that article, which does not further describe that protection. The Committee is of the opinion that the legal protection or

measures a society or a State can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions.

9.2 (b) 2 (ii) 2 Again, however, the principle of equal treatment of the sexes applies by virtue of articles 2 (1), 3 and 26, of which the latter is also relevant because it refers particularly to the "equal protection of the law". Where the Covenant requires a substantial protection as in article 23, it follows from those provisions that such protection must be equal, that is to say not discriminatory, for example on the basis of sex.

9.2 (b) 2 (ii) 3 It follows that also in this line of argument the Covenant must lead to the result that the protection of a family cannot vary with the sex of the one or the other spouse. Though it might be justified for Mauritius to restrict the access of aliens to their territory and to expel them therefrom for security reasons, the Committee is of the view that the legislation which only subjects foreign spouses of Mauritian women to those restrictions, but not foreign spouses of Mauritian men, is discriminatory with respect to Mauritian women and cannot be justified by security requirements.

9.2 (b) 2 (ii) 4 The Committee therefore finds that there is also a violation of articles 2 (1), 3 and 26 of the Covenant in conjunction with the right of the three married co-authors under article 23 (1).

9.2 (c) 1 It remains to consider the allegation of a violation of article 25 of the Covenant, which provides that every citizen shall have the right and the opportunity without any of the distinctions mentioned in article 2 (*inter alia* as to sex) and without unreasonable restrictions, to take part in the conduct of public affairs, as further described in this article. The Committee is not called upon in this case to examine any restrictions on a citizen's right under article 25. Rather, the question is whether the opportunity also referred to there, i.e. a *de facto* possibility of exercising this right, is affected contrary to the Covenant.

9.2 (c) 2 The Committee considers that restrictions established by law in various areas may prevent citizens in practice from exercising their political rights, i.e. deprive them of the opportunity to do so, in ways which might in certain circumstances be contrary to the purpose of article 25 or to the provisions of the Covenant against discrimination, for example if such interference

with opportunity should infringe the principle of sexual equality.

9.2 (c) 3 However, there is no information before the Committee to the effect that any of this has actually happened in the present cases. As regards Mrs. Aumeeruddy-Cziffra, who is actively participating in political life as an elected member of the legislative assembly of Mauritius, she has neither in fact nor in law been prevented from doing so. It is true that on the hypothesis that if she were to leave the country as a result of interference with her family situation, she might lose this opportunity as well as other benefits which are in fact connected with residence in the country. The relevant aspects of such interference with a family situation have already been considered, however, in connection with article 17 and related provisions above. The hypothetical side-effects just suggested do not warrant any finding of a separate violation of article 25 at the present stage, where no particular element requiring additional consideration under that article seems to be present.

10.1 Accordingly, the Human Rights Committee acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts, as outlined in paragraph 7 above, disclose violations of the Covenant, in particular of articles 2 (1), 3 and 26 in relation to articles 17 (1) and 23 (1) with respect to the three co-authors who are married to foreign husbands, because the coming into force of the Immigration (Amendment) Act, 1977, and the Deportation (Amendment) Act, 1977, resulted in discrimination against them on the ground of sex.

10.2 The Committee further is of the view that there has not been any violation of the Covenant in respect of the other provisions invoked.

10.3 For the reasons given above, in paragraph 9 (a), the Committee finds that the 17 unmarried co-authors cannot presently claim to be victims of any breach of their rights under the Covenant.

11. The Committee, accordingly, is of the view that the State party should adjust the provisions of the Immigration (Amendment) Act, 1977 and of the Deportation (Amendment) Act, 1977 in order to implement its obligations under the Covenant, and should provide immediate remedies for the victims of the violations found above.

Communication No. 37/1978

Submitted by: Esther Soriano de Bouton on 7 June 1978

Alleged victim: The author

State party: Uruguay

Date of adoption of views: 27 March 1981 (twelfth session)

Detention incommunicado—Habeas corpus—Ill treatment—Procedural delays—Continued detention despite release order—Extension of time for State party's submission—State's duty to investigate—Derogation from Covenant

Articles of Covenant: 4, 7, 9 (1), (3) and (4) and 10 (1).

Article of Optional Protocol: 4 (2).

Views under article 5 (4) of the Optional Protocol

1. The author of this communication, dated 7 June 1978, is Esther Soriano de Bouton, a Uruguayan national, residing in Mexico. She submitted the communication on her own behalf.

2.1 The author alleges that she was arrested in Montevideo, Uruguay, on 19 February 1976 by members of the "Fuerzas Conjuntas" (Joint Forces), with no warrant of arrest being shown to her. She was allegedly kept in detention, without charges, for eight months and then taken before a military court which, within one month, decided she was innocent and ordered her release. However, the release was allegedly only effected one month later, on 25 January 1977.

2.2 The author claims that she was detained at three different places (one called "El Galpon", another "La Paloma", with the third one being not known to her by name) and that she was subjected to moral and physical ill-treatment during detention.

2.3 She states, *inter alia*, that once she was forced to stand for 35 hours, with minor interruptions; that her wrists were bound with a strip of coarse cloth which hurt her and that her eyes were continuously kept bandaged. During day and night she could hear the cries of other detainees being tortured. During interrogation she was allegedly threatened with "more effective ways than conventional torture to make her talk".

2.4 The author states that, due to the continuing threats and tension, she signed a paper which she could not read, apparently confessing that she had attended "certain meetings" in 1974. She was then transferred to a detention centre called "La Paloma" where she allegedly was told by an official that "people came to recover from the ill-treatment suffered at the first place" ("El Galpón"). She claims that at this second place of detention she and the other detainees continued to be subjected to inhuman and degrading treatment.

2.5 In September 1976 the author, together with other women, was taken to a third place where conditions grew worse. There she was allegedly kept sitting on a mattress, blindfolded, not allowed to move, for many days. She was allowed to take a bath every 10 or 15 days. After approximately one month at this detention

centre, by the end of which she had completed eight months in detention, absolutely incommunicado, she was brought before a military court and the next day the incommunicado order was lifted. Nevertheless, it took the court another month to decide that the author was innocent of any offence and order her release. She was released on 25 January 1977, nearly one year after her arrest.

2.6 The author therefore alleges that in violation of the International Covenant on Civil and Political Rights, she suffered arbitrary arrest, detention without charges and cruel and inhuman treatment. She further claims that during her detention she was kept incommunicado, and thus deprived of any contact with her family, lawyers or other persons who could file a recourse on her behalf, and that the recourse of *habeas corpus* is not accepted by the Uruguayan courts under the régime of "prompt security measures". She claims that other recourses were not applicable, since once she was taken before a judge he ordered her release. Finally, she alleges that it is impossible to expect that under the present Uruguayan Government compensation for the wrongs inflicted on her would be granted.

2.7 The author maintains that although she was arrested a few days before the entry into force of the Covenant for Uruguay, her detention and the alleged events took place for the most part after 23 March 1976. She states that she has not submitted her case to any other international body.

3. On 27 October 1978, the Human Rights Committee decided to transmit the communication to the State party, under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility. No reply was received from the State party to this request.

4. The Committee found, on the basis of the information before it, that it was not precluded by article 5 (2) (a) of the Optional Protocol from considering the communication. The Committee was also unable to conclude that there were effective domestic remedies, available to the alleged victim in the circumstances of her case, which she had failed to exhaust. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (b) of the Optional Protocol.

5. On 24 April 1979, the Human Rights Committee therefore decided:

1. That the communication was admissible;

2. That, in accordance with article 4 (2) of the Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it, written explanations or statements

clarifying the matter and the remedy, if any, that may have been taken by it;

3. That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Protocol must primarily relate to the substance of the matter under consideration, and in particular the specific violations of the Covenant alleged to have occurred. The State party was requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration.

6.1 On 23 November 1979, two days before expiry of the six-month time-limit, the State party informed the Human Rights Committee, through its Chairman, that its submission under article 4 (2) of the Optional Protocol would be presented "as soon as possible".

6.2 On 13 February 1980, the State party, again through the same channels, informed the Committee that, due to reasons of a technical nature, its submission was not ready and requested "a reasonable" extension of time for its submission.

7. On 10 July 1980, the State party submitted its observations under article 4 (2) of the Optional Protocol. It informed the Committee that Mrs. Soriano de Bouton was arrested on 12 February 1976 under the "prompt security measures" because of "presumptive connections with subversive activities"; that on 2 December 1976 a military judge ordered her "conditional" release ("*libertad con carácter de emplazada*") of which Mrs. Soriano was informed the same day. The State party further submits that, on 11 February 1977, Mrs. Soriano applied for authorization to leave Uruguay for Mexico, which was granted to her the same day. It categorically refuted the allegations of mistreatment made by the author of the complaint, declaring that in all Uruguayan prisons the personal integrity of all detainees is guaranteed. In this connection, the State party asserted that members of diplomatic missions in Uruguay as well as members of international humanitarian organizations are free to visit any detainee, without any witnesses, and it referred, for example, to a recent visit by the International Committee of the Red Cross.

8. The Committee has been informed by the Government of Uruguay in another case (No. 9/1977) that the remedy of *habeas corpus* is not applicable to persons arrested under "prompt security measures".

9. The Committee has considered the present communication in the light of all information made available to it by the parties, as provided in article 5 (1) of the Optional Protocol.

10. The Committee decides to base its views on the following facts which have either been essentially confirmed by the State party or are uncontested except for denials of a general character offering no particular information or explanation: Esther Soriano de Bouton

was arrested on 12 February 1976, allegedly without any warrant. Although her arrest took place before the coming into force of the International Covenant on Civil and Political Rights and of the Optional Protocol thereto on 23 March 1976 in respect of Uruguay, her detention without trial continued after 23 March 1976. Following her arrest, Esther Soriano de Bouton was detained for eight months incommunicado, before she was taken before a military court which, within one month, decided that she was innocent and ordered her release. Her release was effected one month later on 25 January 1977.

11. As regards the serious allegations of ill-treatment made by Mrs. Soriano de Bouton, the State party has adduced no evidence that these allegations have been investigated. A refutation of these allegations in general terms, as contained in the State party's submission of 10 July 1980, is not sufficient.

12. The Human Rights Committee has considered whether acts and treatment, which are *prima facie* not in conformity with the Covenant, could for any reasons be justified under the Covenant in the circumstances. The Government, in its submission, has referred to the provisions of Uruguayan law, such as the "prompt security measures". However, the Covenant (art. 4) does not allow national measures derogating from any of its provisions except in strictly defined circumstances and the Government has not made any submissions of fact or law to justify such derogation. Moreover, some of the facts referred to above raise issues under provisions from which the Covenant does not allow any derogation under any circumstances.

13. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by it, in so far as they have occurred after 23 March 1976 (the date on which the Covenant entered into force in respect of Uruguay), disclose violations of the Covenant, in particular of:

Articles 7 and 10 (1), on the basis of evidence of inhuman and degrading treatment of Esther Soriano de Bouton;

Article 9 (1), because she was not released until one month after an order for her release was issued by the military court;

Article 9 (3), because she was not brought before a judge until eight months after she was detained;

Article 9 (4), because recourse to *habeas corpus* was not available to her.

14. Accordingly, the Committee is of the view that the State party is under an obligation to provide Esther Soriano de Bouton with effective remedies, including compensation, for the violations which she has suffered and to take steps to ensure that similar violations do not occur in the future.

Submitted by: Erkki Hartikainen on 30 September 1978

Alleged victims: The author and other members of the Union of Free Thinkers

State party: Finland

Date of adoption of views: 9 April 1981 (twelfth session)

*Concept of victim—Competence of Committee
—Religious education—Atheism—Parental rights*

Article of Covenant: 18

Articles of Optional Protocol: 1 and 2

Views under article 5 (4) of the Optional Protocol

1. The author of this communication (initial letter dated 30 September 1978 and several further letters received between December 1978 and January 1981) is Erkki Juhani Hartikainen, a Finnish school teacher residing in Finland. He submitted the communication on his own behalf and also in his capacity as General Secretary of the Union of Free Thinkers in Finland and on behalf of other alleged victims, members of the Union.

2.1 The author claims that the School System Act of 26 July 1968, paragraph 6, of Finland is in violation of article 18 (4) of the Covenant inasmuch as it stipulates obligatory attendance in Finnish schools, by children whose parents are atheists, in classes on the history of religion and ethics. He alleges that since the textbooks on the basis of which the classes have been taught were written by Christians, the teaching has unavoidably been religious in nature. He contends that there is no prospect of remedying this situation under the existing law. He states that letters seeking a remedy have been written, in vain, to the Prime Minister, the Minister of Education and members of Parliament. He argues that it would be of no avail to institute court proceedings, as the subject matter of the complaint is a law which creates the situation of which he and others are the victims.

2.2 A copy of the law in question (in Finnish) is attached to the communication. This, in translation, reads as follows:

The curriculum of a comprehensive school shall, as provided for by decree, include religious instruction, social studies, mother tongue, one foreign language, study of the second domestic language, history, civics, mathematics, physics, chemistry, natural history, geography, physical education, art, music, crafts, home economics as well as studies and practical exercises closely related to the economy and facilitating the choice of occupation.

Five or more students who by virtue of the Religious Freedom Act have been exempted from religious instruction and who do not receive any comparable instruction outside of school, shall instead of religious instruction receive instruction in the study of the history of religions and ethics. Where five or more students of the same religious denomination have by virtue of the Religious Freedom Act been exempted from the general religious instruction of a school and the guardians of those students demand religious instruction of that denomination, such instruction shall be given in that school.

2.3 The author seeks amendment of the law so as to make the classes (teaching) complained of, neutral or non-compulsory in Finnish schools.

3. On 27 October 1978, the Human Rights Committee decided: (a) to transmit the communication to the State party, under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility of the communication in so far as it related to the author in his personal capacity, and to request the State party, if it contended that domestic remedies had not been exhausted, to give details of the effective remedies available to the alleged victim in the particular circumstances of his case, and (b) to inform the author that it could not consider the communication in so far as it had been submitted by him in his capacity as General Secretary of the Union of Free Thinkers in Finland, unless he furnished the names and addresses of the persons he claimed to represent together with information as to his authority for acting on their behalf.

4. In December 1978 and January 1979, the author submitted the signatures and other details of 56 individuals, authorizing him to act on their behalf as alleged victims.

5. In its reply dated 17 January 1979, the State party admitted that the Finnish legal system did not contain any binding method for solving a possible conflict between two rules of law enacted by Parliament in accordance with the Constitution, i.e., the School System Act of 26 July 1968 and the International Covenant on Civil and Political Rights which had been brought into force by Decree No. 108 of 30 January 1976. The State party stated further that "thus it could be said that there were no binding local remedies for such a case".

6. On 14 August 1979, the Human Rights Committee noted that, as regards the question of exhaustion of local remedies, the State party had admitted in its reply that no such remedies were available and the Committee found therefore that the communication was not inadmissible under article 5 (2) (b) of the Optional Protocol. The Human Rights Committee therefore *decided*:

1. That the communication was admissible;

2. That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it.

7.1 In its submission under article 4 (2) of the Optional Protocol, dated 7 March 1980, the State party refutes the allegation that there has been a violation of the Covenant on Civil and Political Rights in Finland. It affirms that the Finnish legislation concerning religious freedom, including the School System Act, paragraph 6, was scrutinized in connection with the process

of ratifying the Covenant and found to be in conformity with it. It points out that not only is religious freedom guaranteed by the Constitution of Finland, but the Religious Freedom Act (which is referred to in the School System Act, paragraph 6) stipulates in paragraph 8 that:

If religious instruction according to any specific denomination is given at a government-subsidized primary or elementary school or other institute of learning, a student who adheres to another denomination, or no denomination, shall upon the demand of the guardian be exempted from such religious instruction.

7.2 Having regard to the relevant legislation, the State party submits that it can be stated that religious education is not compulsory in Finland. It adds that there is, however, the possibility that students, who by virtue of the Religious Freedom Act have been exempted from religious instruction, may receive instruction in the study of the history of religions and ethics; such instruction is designed to give the students knowledge of a general nature deemed to be useful as part of their basic education in a society in which the overwhelming majority of the population belongs to a religious denomination. The State party claims that the directives issued by the National Board of Education concerning the principal aims of the instruction to be given show that the instruction is not religious in character. However, the State party explains that there have in some cases been difficulties in the practical application of the teaching plan relating to this study and that in January 1979 the National Board of Education established a working group consisting of members representing both religious and non-religious views to look into these problems and to review the curriculum.

8.1 On 13 April 1980, the author submitted additional information and observations in response to the State party's submission under article 4 (2) of the Optional Protocol. A copy of the author's submission was forwarded to the State party for information.

8.2 In his submission the author claims that an application which he had made for the privilege of not attending religious events in the school where he was a teacher had not by then been accepted. He reiterates the Free Thinkers' belief that the Finnish constitutional laws do not guarantee freedom of religion and belief to a sufficient extent and contends that the result of the School System Act, paragraph 6, and the Comprehensive School Statute, paragraph 16, is that there is compulsory instruction for atheists on the history of religions and ethics. In support of this contention he quotes a part of the teaching plan for this course of instruction¹ and refers to certain cases which had allegedly

occurred. As to the working group established by the National Board of Education (referred to in paragraph 7.2 above), the author claims that there was only one distinctly atheist member of this working group and since he had been left in a minority he could not have any influence on the work of the group. Further letters were received from the author dated 25 September, 28 October and 7 November 1980.

9.1 The State party submitted additional comments under article 4 (2) of the Optional Protocol in a note dated 2 December 1980. A copy of the State party's submission was transmitted to the author of the communication with the request that any comments which he might wish to submit thereon should reach the Human Rights Committee not later than 16 January 1981.

9.2 In its submission, the State party observed that the letter of Mr. Erkki Juhani Hartikainen, dated 13 April 1980, to which reference is made in paragraph 8 above, included elements that went beyond the scope of the original communication to the Human Rights Committee. It explained that, owing to the lack of precise information about the concrete cases referred to in the author's letter of 13 April 1980, it was unable to verify the facts of these claims. However, it pointed out that the Finnish legal system provides an extensive network of domestic remedies for concrete violation of rights.

9.3 In order to illustrate the efforts made in Finland to improve the teaching of the history of religions and ethics, the State party annexed to its submission a report of the working group established by the National Board of Education, which was handed to the Board on 16 October 1980. The report classifies the contents of the teaching of the subject according to the following objectives:

1. Education for human relationships which function on ethical principles;
2. Education promoting full development of an individual's personality;
3. Education for understanding the cultural heritage of our own nation as well as our present culture, with special reference to different beliefs;

"What was Jesus like? Jesus' attitude to people thrown away outside the community, to the disliked and the despised (the ill, blind, invalid, poor, starving, illiterate, women and children).

"Stories about what Jesus did. Jesus heals the son of the official. Jesus heals the daughter of Jairus ... The feeding of 5,000 people. The meaning of the stories about the activities of Jesus: the value of them does not depend on the verity of details.

"Jesus as ideal. Jesus was good and helped those in need of support. The ideal of Jesus in modern world: the use of knowledge and skills for the benefit of people in need of help. Jesus disliked no one. Jesus saw in every human also good.

"The church building and service. Lutheran, Orthodox and Roman Catholic church building and service.

"Development aid. Help in different emergency situations. The permanent aid of the developing countries. The early form of development aid, missionary work.

"Francis of Assisi and his solar song. Francis: man, who experienced God so strongly that even others realized that. Legends about Francis ... The solar song."

¹ "Second class

"Spring term

"Stories of the childhood of Jesus. Jesus is brought to the temple. The Magi. The flight to Egypt. The return from Egypt to Nazareth. What was the home area of Jesus like? A Jewish home and manners. The education of a Jewish boy.

"What Jesus taught. The good Samaritan. Applications of the story for children's life in modern time.

4. Education for understanding the cultural heritage of various nations, with special reference to different beliefs in the present world.²

The State party observes that Mr. Hartikainen was among the experts consulted by the working group and that the National Board of Education intends to request the Union of Free Thinkers in Finland, among others, to give its comments on the working group's proposal for a curriculum before the working group is asked to work out a teacher's guide. However, the Government of Finland submits that it is beyond the competence of the Human Rights Committee to study the formulation of school curricula and repeats its conclusion that no legislative inconsistency with the Covenant has been established.

10.1 The Committee has considered the present communication in the light of all information made available to it by the parties as provided for in article 5 (1) of the Optional Protocol. Its views are as follows:

10.2 Article 18 (4) of the International Covenant on Civil and Political Rights provides that:

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

² The author, in his submission of 5 January 1981, offers the following translation of these objectives:

- "1. Education for ethically rightly functioning human relationships;
- "2. Education for individual, communal and social consciousness, sense of responsibility and functioning;
- "3. Education to understand the cultural heritage of our own nation and our present culture, especially material from world view;
- "4. Education to understand the cultural heritage of various nations, especially different world views in the present world."

10.3 The Committee notes that the information before it does not sufficiently clarify the precise extent to which the author and the other alleged victims can actually be said to be personally affected, as parents or guardians under article 1 of the Optional Protocol. This is a condition for the admissibility of communications. The concept of a "victim" has been further examined in other cases, for instance in the final views in case No. 35/1978. However, this case having been declared admissible without objection on this point, the Committee does not now consider it necessary to reopen the matter, for the following reasons.

10.4 The Committee does not consider that the requirement of the relevant provisions of Finnish legislation that instruction in the study of the history of religions and ethics should be given instead of religious instruction to students in schools whose parents or legal guardians object to religious instruction is in itself incompatible with article 18 (4), if such alternative course of instruction is given in a neutral and objective way and respects the convictions of parents and guardians who do not believe in any religion. In any event, paragraph 6 of the School System Act expressly permits any parents or guardians who do not wish their children to be given either religious instruction or instruction in the study of the history of religions and ethics to obtain exemption therefrom by arranging for them to receive comparable instruction outside of school.

10.5 The State party admits that difficulties have arisen in regard to the existing teaching plan to give effect to these provisions, (which teaching plan does appear, in part at least, to be religious in character), but the Committee believes that appropriate action is being taken to resolve the difficulties and it sees no reason to conclude that this cannot be accomplished, compatibly with the requirements of article 18 (4) of the Covenant, within the framework of the existing laws.

Communication No. 44/1979

Submitted by: Alba Pietraroia in January 1979

Alleged victim: Rosario Pietraroia, also known as Rosario Royá Zapala (author's father)

State party: Uruguay

Date of adoption of views: 27 March 1981 (twelfth session).

Submission to IACHR—Exhaustion of domestic remedies—Health of victim—Detention incommunicado—Access to counsel—Habeas corpus—Procedural delays—Fair and public hearing—Presence of accused at trial—Retroactivity of penal law—Freedom of expression—Trade union activities—Political rights—Derogation from Covenant

Articles of Covenant: 4, 9 (2), (3) and (4), 10 (1), 14 (1) and (3), 15 (1), 19 (2) and (3), and 25

Article of Optional Protocol: 5 (2)(a) and (b)

Views under article 5 (4) of the Optional Protocol

1. The author of the communication (initial letter dated January 1979 and further letters dated 11 June and 13 August 1979 and 18 August 1980) is a Uruguayan national, residing in Peru. She submitted the communication on behalf of her father, Rosario Pietraroia (or Royá) Zapala, a 68-year-old Uruguayan citizen, a former trade-union leader and alternate member of the Chamber of Deputies in the Uruguayan Parliament, at present detained in Uruguay. She states that from his early youth her father had worked as a lathe operator,

that he had held the post of General-Secretary of the National Union of Metal and Allied Workers and that he had been Vice-President of the Trade Unions International of Workers in the Metal Industry.

2.1 The author claims that her father was arrested in Montevideo on 19 January 1976 without any court order. She further alleges that her father was held incommunicado and virtually in isolation, since not only the place in which he had been imprisoned but also the fact of his arrest was kept absolutely secret for four months. She submits that, thereafter, the family received indirect confirmation of the fact that he was alive and in detention, her mother being visited by two officials asking for her husband's clothes. After two further months the author's mother was permitted to see him for the first time. The author submits that she is not in a position to give precise details of the treatment her father suffered during that first period of his detention but that, at least on two occasions, he was committed to the military hospital, which, according to the author, is done only in extremely serious cases.

2.2 She further states that after six months in administrative detention, her father was charged on 10 August 1976 by a military court with the alleged offences under the Military Penal Code of "subversive association" ("*asociación subversiva*") and "an attack on the Constitution in the degree of conspiracy" ("*atentado a la Constitución en grado de conspiración*") and that, in May 1977, the military prosecutor called for a penalty of 12 years' rigorous imprisonment, a sentence which was pronounced by a military judge in September 1978. In this connection, the author submits that her father did not enjoy a position of equality before the court which tried him, because persons arrested on charges of trade-union or political activities are subjected to systematic discrimination before the military courts, i.e., that they are not presumed innocent before the trial. She further states that her father has been prosecuted and held guilty for acts which were not illegal at the time when they were committed. She submits that he was not given a public hearing, since the trial took place in writing, the accused not being present, and that not even the judgement was made public in such cases. She further alleges that the tribunal was not a competent tribunal, since under the Constitution military judges are prohibited from trying civilians. She also claims that the choice of defence counsel was prevented by the systematic harassment of lawyers who tried to take up cases of political prisoners. The author further states that the case is now before the military court of second instance, beyond which it could not go, and that her father is at present held in the "military detention establishment" at Libertad, after having been held before in various other military units.

2.3 The author also points out that her father's right to take part in public affairs was suspended for a period of 15 years up to September 1991 under the provision of the "Institutional Act No. 4" dated 1 September 1976,

ordering the suspension of all political rights of "all candidates for election office, appearing in the 1966 and 1971 election lists of Marxist or pro-Marxist parties or political groups declared illegal by Executive Power resolutions No. 1788/67 of 12 December 1967 and No. 1026/73 of 26 November 1973".

2.4 The author declared that the complaint on behalf of her father had not been submitted for examination under any other procedure of international investigation or settlement. With regard to domestic remedies, the author alleged that there were no effective local remedies, *habeas corpus* not being applicable under "prompt security measures" when the prisoner was before a military judge, but that, nevertheless, an appeal against the sentence of the first military instance had been lodged, although no appeal was possible against the procedure that led to the sentence of 12 years' imprisonment.

2.5 The author claims that the following provisions of the International Covenant on Civil and Political Rights have been violated by the Uruguayan authorities in respect of her father: 2; 7; 9 (1), (2), (3), (4) and (5); 10 (1), (2) and (3); 12 (2); 14 (1), (2), (3) and (5); 15; 17; 18 (1); 19 (1) and 22 (1 and 3).

3. By its decision of 24 April 1979, the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication, and requested the author to furnish additional information regarding the progress and outcome, if any, of the appeal lodged and in substantiation of her claim that there were no effective remedies to be exhausted in the case.

4. In response to the Human Rights Committee's request, the author, in her letter dated 11 June 1979, claimed that "judicial" remedies under the military process consisted solely of an appeal against the decision. She stated that that remedy had been used in her father's case, but that it remained ineffective, no decision having been given to date. The author further drew attention to her father's state of health, claiming that he was suffering from various disorders, one of which threatened to blind him. She requested the Committee to call upon the State party to report promptly on her father's state of health.

5. The State party, in its response dated 13 July 1979, stated that the case of Rosario Pietraroia Zapala had been submitted to the Inter-American Commission on Human Rights for consideration. The State party further submitted that Rosario Pietraroia Zapala had been arrested on 7 March 1976 for involvement in subversive activities and detained under emergency measures, that he had been charged ("*procesado*") on 10 August 1976 before the examining magistrate of the Military Court for offences committed contrary to articles 60 (V), "subversive association", and 60 (XII) in conjunction with 60 (i) clause 6 of the Military Criminal Code, "conspiracy to violate the Constitution, followed by acts preparatory thereto". The State party further

¹ See also cases Nos. 5/1977 (p. 37), 10/1977 (p. 6), 28/1978 (p. 57) and 34/1978 (p. 65).

stated that Rosario Pietraroia Zapala had been sentenced on 28 August 1978 to 12 years' imprisonment, that the legal proceedings instituted against him had been entirely consistent with the provisions of the Uruguayan legal code, that he had appeared before a court as soon as his trial began on 10 August 1978² and that for his defence he had benefited at all times from the legal constitutional guarantees.

6. On 14 August 1979, the Human Rights Committee,

(a) Having noted, as regards the question of exhaustion of domestic remedies, that the State party had not raised any objection to the admissibility of the communication on this ground, and

(b) Having ascertained that the case concerning Rosario Pietraroia, which had been submitted to the Inter-American Commission of Human Rights under case No. 2020, had been effectively withdrawn,

Therefore decided:

1. That the communication was admissible;

2. That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

3. That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must primarily relate to the substance of the matter under consideration and, in particular, the specific violations of the Covenant alleged to have occurred. That the State party be requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration;

4. That the attention of the State party be drawn to the concern expressed by the author of the communication with regard to the state of health of her father and that the State party be requested to furnish information to the Committee thereon.

7. In a further letter, dated 13 August 1979, the author submitted her comments on the State party's submission under rule 91 of the Committee's provisional rules of procedure. Those comments were received after the adoption of the Committee's decision on 14 August 1979. The author reiterated that her father was arrested on 19 January 1976 and that for nearly eight months (from 19 January to 10 August 1976) he had not been brought before any form of judicial authority.

8. In a further note, dated 5 October 1979, the State party submitted its comments on the author's reply of 11 June 1979 to the Human Rights Committee's request for further information under rule 91 of its provisional rules of procedure. Concerning the state of health of Rosario Pietraroia, the State party informed the Com-

mittee that "because of congenital glaucoma, his left eye had to be removed by surgery carried out at the Central Hospital of the Armed Forces three months ago. During his illness, Mr. Pietraroia enjoyed all the guarantees of medical, surgical and hospital care afforded to all detainees, and his current state of health is good."

9. The six-month time-limit referred to in the Committee's decision of 14 August 1979 expired on 12 April 1980. By a note dated 10 July 1980, the State party submitted its written explanations under article 4 (2) of the Optional Protocol.

10. In that submission, the State party informed the Committee that a judicial decision had been delivered on the appeal lodged by the defence of the alleged victim and gave the following explanations:

On 9 October 1979, the Supreme Military Court rendered a judgement in second instance confirming the judgement of the first instance. Consequently, the author's assertions concerning domestic remedies are wholly groundless, since, at the time of submission of the communication to which this reply refers, the domestic remedies could not be considered to have been exhausted. Furthermore, for the guidance of the Committee, the Government of Uruguay reiterates that the remedies of appeal for reversal and appeal for review may be exercised in respect of final judgements rendered by military courts in second instance. In such cases, the court of justice which hears and delivers a decision on the appeal is formed by five civilian members and two high-ranking officers. With regard to the author's request to be informed about her father's state of health, the Government of Uruguay has already replied to the Committee, explaining the reason for his operation. As he was found to be suffering from congenital glaucoma of the left eye, the eye had to be removed. In the course of that operation, carried out in the Central Hospital of the Armed Forces, and also during his convalescence, Mr. Pietraroia received constant medical care, just as all detainees needing any kind of intensive care have received and are receiving such care. He is currently being held at Military Detention Establishment M.1, and his state of health is good. All prisoners receive permanent medical care. In addition, they are visited regularly by eye, ear, nose and throat, and heart specialists. Any persons requiring more specialized care and/or surgical operations are taken to the Central Hospital of the Armed Forces, where they remain as long as is necessary for their recovery.

11. In a further submission, dated 18 August 1980, under rule 93 (3) of the Committee's provisional rules of procedure, the author states that, with regard to the remedies of appeals for reversal and for review, these remedies can only be invoked when the person concerned has served half his sentence, i.e., in her father's case in two years' time. Concerning her father's state of health, she maintained the following:

The deafness from which my father has been suffering since the early months when he was held incommunicado has not been treated, since it was diagnosed as an "old person's complaint"; I must advise the Committee that he had never before had hearing problems. This, together with the problem of his sight, is a consequence of being beaten about the head. As a result of being strung up his spine and collar-bone have been damaged. In early April of the present year, one of his forefingers was operated on because, once bent, it did not return to its normal position, but the operation was a failure because it did not correct the defect and he has been suffering from pain in his hand ever since.

In the barracks where he was detained before being transferred to the Libertad prison, where he is held at present, he put out his knee performing military drill and his leg has not been right since. A short while ago "he fell into a well he had not noticed" and gravely injured his leg, which causes him considerable pain. Finally, his feet get very cold, which is a sign of a serious deterioration in his physical condi-

² This may be a typing error in the State party's submission. From the context, the correct date would appear to be 10 August 1976.

tion. Nevertheless, his morale is high, which accounts for the fact that his physical appearance may seem good.

My father is now 68 years old and unless he receives constant and adequate medical attention, I think that his physical condition will be further undermined in view of the harassment and 'accidents' to which he has been and continues to be exposed.

12. The Human Rights Committee notes that it has been informed by the Government of Uruguay in another case (No. 9/1977) that the remedy of *habeas corpus* is not applicable to persons detained under the "prompt security measures". As regards the question of exhaustion of domestic remedies the Committee observes that, notwithstanding the fact that an appeal against the judgement of the first instance was pending at the time of the submission of the communication in January 1979 and at the time the communication was declared admissible on 14 August 1979, the State party did not, in its submissions of 13 July 1979 under rule 91 of the Committee's provisional rules of procedure, raise any objection to the admissibility of the communication on that ground and, in any event, that remedy has since been exhausted. As regards the possibility of invoking the remedies of cassation ("*casación*") or review ("*revisión*"), the State party has informed the Committee in several other cases that these remedies are of an exceptional nature. The Committee is not satisfied that they are applicable in the present case and, in any event, to require resort to them would unreasonably prolong the exhaustion of domestic remedies.

13.1 The Human Rights Committee has considered the present communication in the light of all information made available to it by the parties as provided in article 5 (1) of the Optional Protocol. It hereby decides to base its views on the following facts, which have either been essentially confirmed by the State party, or are uncontested, except for denials of a general character offering no particular information or explanation:

13.2 Rosario Pietraroia Zapala was arrested in Uruguay, without a warrant for arrest, early in 1976 (according to the author on 19 January 1976; according to the State party on 7 March 1976), and held incommunicado under the "prompt security measures" for four to six months. During the first period of his detention he was at least on two occasions committed to the military hospital. His trial began on 10 August 1976, when he was charged by a military court with the offences of "subversive association" ("*asociación subversiva*") and "conspiracy to violate the Constitution, followed by acts preparatory thereto" ("*atentado contra la Constitución en el grado de conspiración seguida de actos preparatorios*"). In this connection, the Committee notes that the Government of Uruguay has offered no explanations as regards the concrete factual basis of the offences for which Rosario Pietraroia was charged in order to refute the claim that he was arrested, charged and convicted on account of his prior political and trade-union activities which had been lawful at the time engaged in. In May 1977, the military prosecutor called for a penalty of 12 years' rigorous imprisonment and on 28 August 1978 Rosario Pietraroia was sentenced to 12 years' imprisonment, in a closed trial, con-

ducted in writing and without his presence. His right to a defence counsel of his own choice was curtailed, and the judgement of the court was not made public. On 9 October 1979, the Supreme Military Court rendered a judgement of second instance, confirming the judgement of the first instance. The Committee notes that the State party did not comply with the Committee's request to enclose copies of any court orders or decisions of relevance to the matter under consideration. Pursuant to Acta Institucional No. 4 of 1 September 1976, Rosario Pietraroia is deprived of the right to engage in political activities for 15 years.

14. The Human Rights Committee has considered whether acts and treatment which are *prima facie* not in conformity with the Covenant could, for any reasons, be justified under the Covenant in the circumstances. The Government has referred to provisions of Uruguayan law, including the "prompt security measures". The Covenant (art. 4) allows national measures derogating from some of its provisions only in strictly defined circumstances, and the Government has not made any submissions of fact or law to justify such derogation. Moreover, some of the facts referred to above raise issues under provisions from which the Covenant does not allow any derogation under any circumstances.

15. As regards article 19, the Covenant provides that everyone shall have the right to hold opinions without interference and that the freedom of expression set forth in paragraph 2 of that article shall be subject only to such restrictions as are necessary (a) for respect of the rights and reputations of others or (b) for the protection of national security or of public order ("*ordre public*"), or of public health or morals. The Government of Uruguay has submitted no evidence regarding the nature of the activities in which Rosario Pietraroia was alleged to have been engaged and which led to his arrest, detention and committal for trial. Bare information from the State party that he was charged with subversive association and conspiracy to violate the Constitution, followed by preparatory acts thereto, is not in itself sufficient, without details of the alleged charges and copies of the court proceedings. The Committee is therefore unable to conclude on the information before it that the arrest, detention and trial of Rosario Pietraroia was justified on any of the grounds mentioned in article 19 (3) of the Covenant.

16. The Human Rights Committee is aware that the sanction of deprivation of certain political rights is provided for in the legislation of some countries. Accordingly, article 25 of the Covenant prohibits "unreasonable" restrictions. In no case, however, may a person be subjected to such sanctions solely because of his or her political opinion (arts. 2 (1) and 26). Furthermore, the principle of proportionality would require that a measure as harsh as the deprivation of all political rights for a period of 15 years be specifically justified. No such attempt has been made in the present case.

17. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International

Covenant on Civil and Political Rights, is of the view that these facts, in so far as they occurred after 23 March 1976 (the date on which the Covenant entered into force in respect of Uruguay), disclose violations of the Covenant, in particular of:

Article 9 (2), because Rosario Pietraroia Zapala was not duly informed of the charges against him;

Article 9 (3), because he was not brought promptly before a judge or other officer authorized by law to exercise judicial power and because he was not tried within a reasonable time;

Article 9 (4), because recourse to *habeas corpus* was not available to him;

Article 10 (1), because he was held incommunicado for months;

Article 14 (1), because he had no fair and public hearing and because the judgement rendered against him was not made public;

Article 14 (3), because he did not have access to legal assistance during his detention incommunicado and was not tried in his presence;

Article 15 (1), because the penal law was applied retroactively against him;

Article 19 (2), because he was arrested, detained and tried for his political and trade-union activities;

Article 25, because he is barred from taking part in the conduct of public affairs and from being elected for 15 years, in accordance with Acta Institucional No. 4 of 1 September 1976.

18. The Committee, accordingly, is of the view that the State party is under an obligation to provide the victim with effective remedies, including his immediate release and compensation for the violations which he has suffered, and to take steps to ensure that similar violations do not occur in the future.

Communication No. 58/1979

Submitted by: Anna Maroufidou on 5 September 1979

Alleged victim: The author

State party: Sweden

Date of adoption of views: 9 April 1981 (twelfth session)

Expulsion of aliens—Refugee—Interpretation and application of domestic legislation

Article of Covenant: 13

Views under article 5 (4) of the Optional Protocol

1. The author of this communication (initial letter dated 5 September 1979 and further letters of 20 December 1979, 30 May 1980 and 20 January 1981) is Anna Maroufidou, a Greek citizen. She submitted the communication on her own behalf through her legal representative.

2.1 The author alleges that she is a victim of a breach by Sweden of article 13 of the International Covenant on Civil and Political Rights. She describes the relevant facts as follows:

2.2 In 1975 she came to Sweden seeking asylum. In 1976 she was granted a residence permit. Early in 1977 several aliens and Swedish citizens were arrested in Sweden on suspicion of being involved in a plan to abduct a former member of the Swedish Government. This plan had allegedly been contrived by the alleged terrorist Norbert Kröcher from the Federal Republic of Germany, who was at the time staying in Sweden illegally. He and other arrested foreigners were subsequently expelled from Sweden.

2.3 The author of the communication was arrested in connection with the foregoing events in April 1977, because she had met some of the suspects in the Refugee Council's office in Stockholm which was a meeting place for young people of many nationalities and also a

counselling centre for persons seeking asylum. At first the author was held as a suspect under the Swedish law governing arrest and remand in custody in criminal cases (Rattengångsbalken 24/5) as it was suspected that information concerning acts of sabotage had been communicated to her. It seems that after a few days this allegation was dropped and that she continued to be detained under the Swedish Aliens Act of 1954 (Utlänningslagen sec. 35, nom. 1). The Government, however, raised the issue of her expulsion as a presumed terrorist. A lawyer was appointed to represent her in that connection. Her expulsion was decided upon on 5 May 1977. The decision was immediately executed and she was transported, under guard, to Greece. In spite of a certificate, issued by the Swedish Embassy in Athens on 6 May 1977, that she was not being prosecuted for any punishable act in Sweden, her expulsion as a potential terrorist made it impossible for her to find any meaningful employment in Greece. She was harassed and even physically attacked by persons whom she assumed to be right-wing extremists. She returned illegally to Sweden at the end of 1978 in order to apply for reconsideration of her case, which seemed to her to be the only solution to her problems. A review of the case was granted, but on 14 June 1979 the Swedish Government confirmed its previous decision of 5 May 1977.

2.4 The Swedish Government based its decisions on the Aliens Act of 1954 which, since 1975, contains provisions against terrorism. The relevant provisions applied in the author's case were in sections 20, 29, 30 and 31. Section 29 provides that an alien may be ex-

pelled from Sweden "if there is founded reason to assume that he belongs to, or works for, [a terrorist] organization or group", as defined in section 20, and if "there is a danger, considering what is known about his previous activities or otherwise, that he will participate in Sweden in an act" as referred to in section 20. Section 20 defines a terrorist organization or group as "an organization or group which, considering what is known about its activities, can be expected to use violence, threat or force outside its home country for political purposes and, in this connection, to commit such acts in Sweden". According to section 30 of the Aliens Act, the decision to expel an alien would in these cases be taken by the Government, which, however, must first hear the views of the Central Immigration Authority. According to section 31 expulsion has to be preceded by an interrogation of the person concerned.¹

2.5 The decision of the Swedish Government to expel her is contested by the author on the ground that it was based only on the allegation that she had had such contact with Kröcher and other persons involved in the kidnapping plan that she was not likely to have remained ignorant about the planned abduction. She denies such knowledge and argues further that even if she had had such knowledge this would not have been a sufficient basis to expel her under the Aliens Act because that law stipulates that the person concerned has to belong to, or work for, an organization or group as described by its provisions. Mere knowledge of planned terrorist activities was, therefore, in her submission, not sufficient to justify an expulsion in accordance with the law. In addition, she points out that Kröcher and other persons involved had not formed a group or organization as described by the Aliens Act. They were just several young persons of various nationalities who had met in Stockholm, and therefore their "home country" in that context should be considered to be Sweden.

2.6 For these reasons the author considers that the decision to expel her from Sweden, while she was lawfully staying in that country, was not taken in accordance with Swedish law and was therefore in violation of article 13 of the International Covenant on Civil and Political Rights.

2.7 The author states that all available domestic remedies have been exhausted.

3. On 14 March 1980 the Working Group of the Human Rights Committee decided to transmit the communication to the State party, under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility.

4. The State party, in its reply of 19 May 1980, did not contest the admissibility of the communication, but reserved its right to reply on the merits, stating merely that it considered the complaint to be unfounded.

5. On 25 July 1980, the Human Rights Committee therefore decided:

(a) That the communication was admissible;

¹ The English translation of the quoted section is that provided by the State party.

(b) That, in accordance with article 4 (2) of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it.

6.1 In its submission under article 4 (2) of the Optional Protocol, dated 8 December 1980, the State party stated that Anna Maroufidou was arrested on 4 April 1977. She was interrogated by the police on 15, 25 and 26 April. On 28 April 1977 the Central Immigration Authority declared that, in its opinion, there was good reason to assume that Anna Maroufidou belonged to, or worked for, an organization of the kind dealt with in section 20 of the Aliens Act, and that there was a danger that she would participate in Sweden in an act envisaged by that article. The Central Immigration Authority therefore concluded that the conditions for her expulsion pursuant to section 29 of the Aliens Act were fulfilled. On 5 May 1977 the Swedish Government decided to expel Anna Maroufidou and the decision was immediately executed. In a petition dated 15 September 1978 Anna Maroufidou, through her lawyer, asked the Government to revoke its decision to expel her. After obtaining the comments of the National Board of the Police as well as the reply of Anna Maroufidou's lawyer to these comments the Government decided on 14 June 1979 to reject the petition.

6.2 As to the application of article 13 of the Covenant, the Swedish Government is of the opinion that article 13 requires that there shall be a legal basis for a decision regarding expulsion. The decision shall be taken by a public authority which has competence in the matter, and in accordance with procedure prescribed by law. The decision shall also be taken on the basis of legal provisions or rules which lay down the conditions for expulsion. On the other hand, the interpretation of national law must primarily be the task of the competent national authorities. In this regard the task of the Human Rights Committee should be limited to an examination of whether the national authorities interpreted and applied the law in good faith and in a reasonable manner.

6.3 The State party pointed out that the conditions for expulsion which were found to be fulfilled in the case of Anna Maroufidou were laid down in sections 20 and 29 of the Aliens Act. The provisions of these articles were interpreted and applied by the State party in good faith and in a reasonable manner. Kröcher and his collaborators must be considered to constitute an organization or group of the kind envisaged in section 20, and there were clear indications that Anna Maroufidou had been actively involved in the work of that organization or group. She was known to have found a flat for Kröcher and to have taken steps, after Kröcher's arrest, to remove from the flat objects which were of interest as evidence against Kröcher. Suspensions against Anna Maroufidou were further strengthened by certain objects (masking equipment, etc.) which were found in her possession. Subsequent disclosures, in particular at the trial against the Swedish nationals involved in the

Kröcher conspiracy, confirmed, in the opinion of the State party, that she was a close collaborator of Kröcher and had been actively involved in discussions concerning the planned abduction and that she had been designated by Kröcher to play an active role in the abduction itself.

6.4 The State party submitted therefore that the decision to expel Anna Maroufidou was “reached in accordance with law” and that there has been no violation of article 13 of the Covenant in this case.

7.1 On 20 January 1981, the author of the communication submitted, through her legal representative, comments on the State party’s submissions under article 4 (2) of the Optional Protocol. In her comments she states that she does not dispute the opinion of the Swedish Government that article 13 of the Covenant requires a legal basis for a decision to expel an alien. In the opinion of the author, however, if the ground for the decision is one which cannot be found in the applicable domestic law of the State party, then the conclusion must be drawn that article 13 has been violated. In this regard the author submits that it is clear that mere knowledge of a terrorist plan is not a ground for expulsion under the relevant provisions of the Swedish Aliens Act. She contends that it is obvious from the *travaux préparatoires* of this law and all legal literature about it that the legislation against terrorism is of an extraordinary nature and that it should be applied in a restrictive manner. It is also clear, in her submission, that the only charge against her at the time of the decision which she is contesting was this alleged knowledge. She maintains that all the circumstances mentioned by the State party have natural explanations and are by no means decisive. As stated in her original communication, all the refugees who met and made each other’s acquaintance at the Refugee Council’s office in Stockholm found themselves in a similar situation and often had common interests. Many of them had difficulties in finding rooms or flats to live. It was common knowledge that they assisted each other and often crowded into rather small quarters. They frequently rented their rooms on short-term conditions and there was for this reason much moving around. The author helped several people to find a place to live. After Kröcher’s arrest she was afraid that she might be arrested herself. The newspapers were full of news and big headlines about this arrest and Kröcher’s dramatic plans of terrorism. Therefore she did hide certain things not to protect Kröcher but to protect herself against any unjust suspicion of collaboration with him.

7.2 The author argues that, if it was true that she had participated in the preparations for the crimes planned by Kröcher, she would have been prosecuted for conspiracy and preparations for those crimes under Swedish law, but she was not. In addition, subsequent disclosures at the trial against the Swedish nationals involved in the Kröcher conspiracy could not justify the decision to expel her because that trial took place a long time afterwards, and because the author as well as many other foreigners who had been expelled were not present at that trial. So the Swedish citizens then accused were

free, without being challenged, to make any reference to the absent aliens which they and their defence counsel saw fit.

7.3 The author also argues that section 20 of the Swedish Aliens Act requires that the organization or group must, while being suspected of planning or committing acts in Sweden, be outside its home country. She claims, therefore, that the application of the relevant provisions of this law to a group which has been formed in Sweden is an evident misinterpretation.

7.4 For all these reasons, the author does not agree with the State party’s statement that the task of the Human Rights Committee should be limited to an examination of whether the competent authorities have applied the law in good faith and in a reasonable manner. She states that it is not her intention to enter into a debate as to whether the Swedish Government at the time of the decision acted in good faith or not: her case is that this decision was not reached in accordance with the provisions of the Aliens Act since it was based on one ground which was not to be found in those provisions and on another ground which was an obvious misinterpretation of them.

8. The Committee considering the present communication in the light of all information made available to it by the parties as provided for in article 5 (1) of the Optional Protocol, hereby decides to base its views on the following facts which have been essentially confirmed by the State party: Anna Maroufidou, a Greek citizen, who came to Sweden seeking asylum, was granted a residence permit in 1976. Subsequently on 4 April 1977 she was arrested on suspicion of being involved in a plan of a terrorist group to abduct a former member of the Swedish Government. In these circumstances the Central Immigration Authority on 28 April 1977 raised the question of her expulsion from Sweden on the ground that there was good reason to believe that she belonged to, or worked for, a terrorist organization or group, and that there was a danger that she would participate in Sweden in a terrorist act of the kind referred to in sections 20 and 29 of the Aliens Act. A lawyer was appointed to represent her in the proceedings under the Act. On 5 May 1977 the Swedish Government decided to expel her and the decision was immediately executed.

9.1 Article 13 of the International Covenant on Civil and Political Rights provides that

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

9.2 Article 13 lays down a number of conditions which must be complied with by the State party concerned when it expels an alien from its territory. The article applies only to an alien “lawfully in the territory” of the State party, but it is not in dispute that when the question of Anna Maroufidou’s expulsion arose in April 1977 she was lawfully resident in Sweden. Nor is

there any dispute in this case concerning the due observance by the State party of the procedural safeguards laid down in article 13. The only question is whether the expulsion was "in accordance with law".

9.3 The reference to "law" in this context is to the domestic law of the State party concerned, which in the present case is Swedish law, though of course the relevant provisions of domestic law must in themselves be compatible with the provisions of the Covenant. Article 13 requires compliance with both the substantive and the procedural requirements of the law.

10.1 Anna Maroufidou claims that the decision to expel her was in violation of article 13 of the Covenant because it was not "in accordance with law". In her submission it was based on an incorrect interpretation of the Swedish Aliens Act. The Committee takes the view that the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned. It is not within the powers or functions of the Committee to evaluate whether the competent

authorities of the State party in question have interpreted and applied the domestic law correctly in the case before it under the Optional Protocol, unless it is established that they have not interpreted and applied it in good faith or that it is evident that there has been an abuse of power.

10.2 In the light of all written information made available to it by the individual and the explanations and observations of the State party concerned, the Committee is satisfied that in reaching the decision to expel Anna Maroufidou the Swedish authorities did interpret and apply the relevant provisions of Swedish law in good faith and in a reasonable manner and consequently that the decision was made "in accordance with law" as required by article 13 of the Covenant.

11. The Human Rights Committee acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights is therefore of the view that the above facts do not disclose any violation of the Covenant and in particular of article 13.

THIRTEENTH SESSION

Communication No. 24/1977

Submitted by: Sandra Lovelace on 29 December 1977

Alleged victim: The author

State party: Canada

Date of adoption of views: 30 July 1981 (thirteenth session)

Concept of victim—Events prior to entry into force of Covenant and Optional Protocol—Minorities—Indian Act—Sex discrimination—Protection of the family—Right to marry—Right of residence

Articles of Covenant 2 (1), 3, 12 (1) and (3), 17, 23 (1), 24, 26 and 27

Views under article 5 (4) of the Optional Protocol^{1, 2}

1. The author of the communication dated 29 December 1977 and supplemented by letters of 17 April 1978, 28 November 1979 and 20 June 1980, is a 32-year-old woman, living in Canada. She was born and registered as "Maliseet Indian" but has lost her rights and status as an Indian in accordance with section 12 (1) (b) of the Indian Act, after having married a non-Indian on 23 May 1970. Pointing out that an Indian man who marries a non-Indian woman does not lose his Indian status, she claims that the Act is discriminatory on the grounds of sex and contrary to articles 2 (1), 3, 23 (1) and (4), 26 and 27 of the Covenant. As to the admissibility of the communication, she contends that she

was not required to exhaust local remedies since the Supreme Court of Canada, in *The Attorney-General of Canada v. Jeanette Lavell, Richard Isaac et al. v. Yvonne Bédard* [1974] S.C.R. 1349, held that decision 12 (1) (b) was fully operative, irrespective of its inconsistency with the Canadian Bill of Rights on account of discrimination based on sex.

2. By its decision of 18 July 1978 the Human Rights Committee transmitted the communication, under rule 91 of the provisional rules of procedure, to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication. This request for information and observations was reiterated by a decision of the Committee's Working Group, dated 6 April 1979.

3. By its decision of 14 August 1979 the Human Rights Committee declared the communication admissible and requested the author of the communication to submit additional information concerning her age and her marriage, which had not been indicated in the original submission. At that time no information or observations had been received from the State party concerning the question of admissibility of the communication.

4. In its submission dated 26 September 1979 relating to the admissibility of the communication, the State party informed the Committee that it had no com-

¹ Pursuant to rule 85 of the provisional rules of procedure, Mr. Walter Surma Tarnopolsky, did not participate in the consideration of this communication or in the adoption of the views of the Committee under article 5 (4) of the Optional Protocol in this matter.

² The text of an individual opinion submitted by a Committee member is appended to these views.

ments on that point to make. This fact, however, should not be considered as an admission of the merits of the allegations or the arguments of the author of the communication.

5. In its submission under article 4 (2) of the Optional Protocol concerning the merits of the case, dated 4 April 1980, the State party recognized that "many of the provisions of the ... Indian Act, including section 12 (1) (b), require serious reconsideration and reform". The Government further referred to an earlier public declaration to the effect that it intended to put a reform bill before the Canadian Parliament. It none the less stressed the necessity of the Indian Act as an instrument designed to protect the Indian minority in accordance with article 27 of the Covenant. A definition of the Indian was inevitable in view of the special privileges granted to the Indian communities, in particular their right to occupy reserve lands. Traditionally, patrilineal family relationships were taken into account for determining legal claims. Since, additionally, in the farming societies of the nineteenth century, reserve land was felt to be more threatened by non-Indian men than by non-Indian women, legal enactments as from 1869 provided that an Indian woman who married a non-Indian man would lose her status as an Indian. These reasons were still valid. A change in the law could only be sought in consultation with the Indians themselves who, however, were divided on the issue of equal rights. The Indian community should not be endangered by legislative changes. Therefore, although the Government was in principle committed to amending section 12 (1) (b) of the Indian Act, no quick and immediate legislative action could be expected.

6. The author of the communication, in her submission of 20 June 1980, disputes the contention that legal relationships within Indian families were traditionally patrilineal in nature. Her view is that the reasons put forward by the Canadian Government do not justify the discrimination against Indian women in section 12 (1) (b) of the Indian Act. She concludes that the Human Rights Committee should recommend the State party to amend the provisions in question.

7.1 In an interim decision, adopted on 31 July 1980, the Human Rights Committee set out the issues of the case in the following considerations:

7.2 The Human Rights Committee recognized that the relevant provision of the Indian Act, although not legally restricting the right to marry as laid down in article 23 (2) of the Covenant, entails serious disadvantages on the part of the Indian woman who wants to marry a non-Indian man and may in fact cause her to live with her fiancé in an unmarried relationship. There is thus a question as to whether the obligation of the State party under article 23 of the Covenant with regard to the protection of the family is complied with. Moreover, since only Indian women and not Indian men are subject to these disadvantages under the Act, the question arises whether Canada complies with its commitment under articles 2 and 3 to secure the rights under the Covenant without discrimination as to sex. On the

other hand, article 27 of the Covenant requires States parties to accord protection to ethnic and linguistic minorities and the Committee must give due weight to this obligation. To enable it to form an opinion on these issues, it would assist the Committee to have certain additional observations and information.

7.3 In regard to the present communication, however, the Human Rights Committee must also take into account that the Covenant entered into force in respect of Canada on 19 August 1976, several years after the marriage of Mrs. Lovelace. She consequently lost her status as an Indian at a time when Canada was not bound by the Covenant. The Human Rights Committee has held that it is empowered to consider a communication when the measures complained of, although they occurred before the entry into force of the Covenant, continued to have effects which themselves constitute a violation of the Covenant after that date. It is therefore relevant for the Committee to know whether the marriage of Mrs. Lovelace in 1970 has had any such effects.

7.4 Since the author of the communication is ethnically an Indian, some persisting effects of her loss of legal status as an Indian may, as from the entry into force of the Covenant for Canada, amount to a violation of rights protected by the Covenant. The Human Rights Committee has been informed that persons in her situation are denied the right to live on an Indian reserve with resultant separation from the Indian community and members of their families. Such prohibition may affect rights which the Covenant guarantees in articles 12 (1), 17, 23 (1), 24 and 27. There may be other such effects of her loss of status.

8. The Human Rights Committee invited the parties to submit their observations on the above considerations and, as appropriate, to furnish replies to the following questions:

(a) How many Indian women marry non-Indian men on an average each year? Statistical data for the last 20 years should be provided.

(b) What is the legal basis of a prohibition to live on a reserve? Is it a direct result of the loss of Indian status or does it derive from a discretionary decision of the Council of the community concerned?

(c) What reasons are adduced to justify the denial of the right of abode on a reserve?

(d) What legislative proposals are under consideration for ensuring full equality between the sexes with regard to Indian status? How would they affect the position of Mrs. Lovelace? How soon can it be expected that legislation will be introduced?

(e) What was Mrs. Lovelace's place of abode prior to her marriage? Was she at that time living with other members of her family? Was she denied the right to reside on a reserve in consequence of her marriage?

(f) What other persisting effects of Mrs. Lovelace's loss of status are there which may be relevant to any of the rights protected by the Covenant?

9.1 In submissions dated 22 October and 2 December 1980 the State party and the author, respectively, commented on the Committee's considerations and furnished replies to the questions asked.

9.2 It emerges from statistics provided by the State party that from 1965 to 1978, on an average, 510 Indian women married non-Indian men each year. Marriages between Indian women and Indian men of the same band during that period were 590 on the average each year; between Indian women and Indian men of a different band 422 on the average each year; and between Indian men and non-Indian women 448 on the average each year.

9.3 As to the legal basis of a prohibition to live on a reserve, the State party offers the following explanations:

Section 14 of the Indian Act provides that "(an Indian) woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that band".³ As such, she loses the right to the use and benefits, in common with other members of the band, of the land allotted to the band.⁴ It should, however, be noted that "when (an Indian woman) marries a member of another band, she thereupon becomes a member of the band of which her husband is a member". As such, she is entitled to the use and benefit of lands allotted to her husband's band.

An Indian (including a woman) who ceases to be a member of a band ceases to be entitled to reside by right on a reserve. None the less it is possible for an individual to reside on a reserve if his or her presence thereon is tolerated by a band or its members. It should be noted that under section 30 of the Indian Act, any person who trespasses on a reserve is guilty of an offence. In addition, section 31 of the Act provides that an Indian or a band (and of course its agent, the Band Council) may seek relief or remedy against any person, other than an Indian, who is or has been

- (a) unlawfully in occupation or possession of,
 - (b) claiming adversely the right to occupation or possession of, or
 - (c) trespassing upon
- a reserve or part thereof.

9.4 As to the reasons adduced to justify the denial of the right of abode on a reserve, the State party states that the provisions of the Indian Act which govern the right to reside on a reserve have been enacted to give effect to various treaty obligations reserving to the Indians exclusive use of certain lands.

9.5 With regard to the legislative proposals under consideration, the State party offers the following information:

Legislative proposals are being considered which would ensure that no Indian person, male or female, would lose his or her status under any circumstances other than his or her own personal desire to renounce it.

In addition, changes to the present sections under which the status of the Indian woman and minor children is dependent upon the status of her spouse are also being considered.

Further recommendations are being considered which would give Band Councils powers to pass by-laws concerning membership in the band; such by-laws, however, would be required to be non-discriminatory in the areas of sex, religion and family affiliation.

³ Mrs. Lovelace married a non-Indian. As such, she ceased to be a member of the Tobique band. In addition, by the application of subparagraph 12 (1), (b) of the Indian Act, she lost her Indian status.

⁴ It should be noted that when an Indian ceases to be a member of a band, he is entitled, if he meets the conditions set out in sections 15 and 16 of the Indian Act, to compensation from Her Majesty for this loss of membership.

In the case of Mrs. Lovelace, when such new legislation is enacted, she would then be entitled to be registered as an Indian.

Legislative recommendations are being prepared for presentation to Cabinet for approval and placement on the Parliamentary Calendar for introduction before the House by mid-1981.

9.6 As to Mrs. Lovelace's place of abode prior to her marriage both parties confirm that she was at that time living on the Tobique Reserve with her parents. Sandra Lovelace adds that as a result of her marriage, she was denied the right to live on an Indian reserve. As to her abode since then the State party observes:

Since her marriage and following her divorce, Mrs. Lovelace has, from time to time, lived on the reserve in the home of her parents, and the Band Council has made no move to prevent her from doing so. However, Mrs. Lovelace wishes to live permanently on the reserve and to obtain a new house. To do so, she has to apply to the Band Council. Housing on reserves is provided with money set aside by Parliament for the benefit of registered Indians. The Council has not agreed to provide Mrs. Lovelace with a new house. It considers that in the provision of such housing priority is to be given to registered Indians.

9.7 In this connection the following additional information has been submitted on behalf of Mrs. Lovelace:

At the present time, Sandra Lovelace is living on the Tobique Indian Reserve, although she has no right to remain there. She has returned to the Reserve, with her children because her marriage has broken up and she has no other place to reside. She is able to remain on the reserve in violation of the law of the local Band Council because dissident members of the tribe who support her cause have threatened to resort to physical violence in her defence should the authorities attempt to remove her.

9.8 As to the other persisting effects of Mrs. Lovelace's loss of Indian status the State party submits the following:

When Mrs. Lovelace lost her Indian status through marriage to a non-Indian, she also lost access to federal government programs for Indian people in areas such as education, housing, social assistance, etc. At the same time, however, she and her children became eligible to receive similar benefits from programs the provincial government provides for all residents of the province.

Mrs. Lovelace is no longer a member of the Tobique band and no longer an Indian under the terms of the Indian Act. She however is enjoying all the rights recognized in the Covenant, in the same way as any other individual within the territory of Canada and subject to its jurisdiction.

9.9 On behalf of Sandra Lovelace the following is submitted in this connection:

All the consequences of loss of status persist in that they are permanent and continue to deny the complainant rights she was born with.

A person who ceases to be an Indian under the Indian Act suffers the following consequences:

- (1) Loss of the right to possess or reside on lands on a reserve (ss. 25 and 28 (1)). This includes loss of the right to return to the reserve after leaving, the right to inherit possessory interest in land from parents or others, and the right to be buried on a reserve;
- (2) An Indian without status cannot receive loans from the Consolidated Revenue Fund for the purposes set out in section 70;
- (3) An Indian without status cannot benefit from instruction in farming and cannot receive seed without charge from the Minister (see section 71);
- (4) An Indian without status cannot benefit from medical treatment and health services provided under section 73 (1) (g);
- (5) An Indian without status cannot reside on tax exempt lands (section 87);

- (6) A person ceasing to be an Indian loses the right to borrow money for housing from the Band Council (Consolidated Regulations of Canada, 1978, c. 949);
- (7) A person ceasing to be an Indian loses the right to cut timber free of dues on an Indian reserve (section 4—Indian Timber Regulations, c. 961, 1978 Consolidated Regulations of Canada);
- (8) A person ceasing to be an Indian loses traditional hunting and fishing rights that may exist;
- (9) The major loss to a person ceasing to be an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity.

10. The Human Rights Committee, in the examination of the communication before it, has to proceed from the basic fact that Sandra Lovelace married a non-Indian on 23 May 1970 and consequently lost her status as a Maliseet Indian under section 12 (1) (b) of the Indian Act. This provision was—and still is—based on a distinction *de jure* on the ground of sex. However, neither its application to her marriage as the cause of her loss of Indian status nor its effects could at that time amount to a violation of the Covenant, because this instrument did not come into force for Canada until 19 August 1976. Moreover, the Committee is not competent, as a rule, to examine allegations relating to events having taken place before the entry into force of the Covenant and the Optional Protocol. Therefore as regards Canada it can only consider alleged violations of human rights occurring on or after 19 August 1976. In the case of a particular individual claiming to be a victim of a violation, it cannot express its view on the law in the abstract, without regard to the date on which this law was applied to the alleged victim. In the case of Sandra Lovelace it follows that the Committee is not competent to express any view on the original cause of her loss of Indian status, i.e. the Indian Act as applied to her at the time of her marriage in 1970.

11. The Committee recognizes, however, that the situation may be different if the alleged violations, although relating to events occurring before 19 August 1976, continue, or have effects which themselves constitute violations, after that date. In examining the situation of Sandra Lovelace in this respect, the Committee must have regard to all relevant provisions of the Covenant. It has considered, in particular, the extent to which the general provisions in articles 2 and 3 as well as the rights in articles 12 (1), 17 (1), 23 (1), 24, 26 and 27, may be applicable to the facts of her present situation.

12. The Committee first observes that from 19 August 1976 Canada had undertaken under article 2 (1) and (2) of the Covenant to respect and ensure to all individuals within its territory and subject to its jurisdiction, the rights recognized in the Covenant without distinction of any kind such as sex, and to adopt the necessary measures to give effect to these rights. Further, under article 3, Canada undertook to ensure the equal right of men and women to the enjoyment of these rights. These undertakings apply also to the position of Sandra Lovelace. The Committee considers, however, that it is not necessary for the purposes of her communication to decide their extent in all respects. The full scope of the obligation of Canada to remove the effects

or inequalities caused by the application of existing laws to past events, in particular as regards such matters as civil or personal status, does not have to be examined in the present case, for the reasons set out below.

13.1 The Committee considers that the essence of the present complaint concerns the continuing effect of the Indian Act, in denying Sandra Lovelace legal status as an Indian, in particular because she cannot for this reason claim a legal right to reside where she wishes to, on the Tobique Reserve. This fact persists after the entry into force of the Covenant, and its effects have to be examined, without regard to their original cause. Among the effects referred to on behalf of the author (see para. 9.9, above), the greater number, ((1) to (8)), relate to the Indian Act and other Canadian rules in fields which do not necessarily adversely affect the enjoyment of rights protected by the Covenant. In this respect the significant matter is her last claim, that “the major loss to a person ceasing to be an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity”.

13.2 Although a number of provisions of the Covenant have been invoked by Sandra Lovelace, the Committee considers that the one which is most directly applicable to this complaint is article 27, which reads as follows:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

It has to be considered whether Sandra Lovelace, because she is denied the legal right to reside on the Tobique Reserve, has by that fact been denied the right guaranteed by article 27 to persons belonging to minorities, to enjoy their own culture and to use their own language in community with other members of their group.

14. The rights under article 27 of the Covenant have to be secured to “persons belonging” to the minority. At present Sandra Lovelace does not qualify as an Indian under Canadian legislation. However, the Indian Act deals primarily with a number of privileges which, as stated above, do not as such come within the scope of the Covenant. Protection under the Indian Act and protection under article 27 of the Covenant therefore have to be distinguished. Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant. Since Sandra Lovelace is ethnically a Maliseet Indian and has only been absent from her home reserve for a few years during the existence of her marriage, she is, in the opinion of the Committee, entitled to be regarded as “belonging” to this minority and to claim the benefits of article 27 of the Covenant. The question whether these benefits have been denied to her, depends on how far they extend.

15. The right to live on a reserve is not as such guaranteed by article 27 of the Covenant. Moreover, the Indian Act does not interfere directly with the functions which are expressly mentioned in that article. However, in the opinion of the Committee the right of Sandra Lovelace to access to her native culture and language "in community with the other members" of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists. On the other hand, not every interference can be regarded as a denial of rights within the meaning of article 27. Restrictions on the right to residence, by way of national legislation, cannot be ruled out under article 27 of the Covenant. This also follows from the restrictions to article 12 (1) of the Covenant set out in article 12 (3). The Committee recognizes the need to define the category of persons entitled to live on a reserve, for such purposes as those explained by the Government regarding protection of its resources and preservation of the identity of its people. However, the obligations which the Government has since undertaken under the Covenant must also be taken into account.

16. In this respect, the Committee is of the view that statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole. Article 27 must be construed and applied in the light of the other provisions mentioned above, such as articles 12, 17 and 23 in so far as they may be relevant to the particular case, and also the provisions against discrimination, such as articles 2, 3 and 26, as the case may be. It is not necessary, however, to determine in any general manner which restrictions may be justified under the Covenant, in particular as a result of marriage, because the circumstances are special in the present case.

17. The case of Sandra Lovelace should be considered in the light of the fact that her marriage to a non-Indian has broken up. It is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her marriage her main cultural attachment again was to the Maliseet band. Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe. The Committee

therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to.

18. In view of this finding, the Committee does not consider it necessary to examine whether the same facts also show separate breaches of the other rights invoked. The specific rights most directly applicable to her situation are those under article 27 of the Covenant. The rights to choose one's residence (article 12), and the rights aimed at protecting family life and children (articles 17, 23 and 24) are only indirectly at stake in the present case. The facts of the case do not seem to require further examination under those articles. The Committee's finding of a lack of a reasonable justification for the interference with Sandra Lovelace's rights under article 27 of the Covenant also makes it unnecessary, as suggested above (para. 12), to examine the general provisions against discrimination (arts. 2, 3 and 26) in the context of the present case, and in particular to determine their bearing upon inequalities predating the coming into force of the Covenant for Canada.

19. Accordingly, the Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts of the present case, which establish that Sandra Lovelace has been denied the legal right to reside on the Tobique Reserve, disclose a breach by Canada of article 27 of the Covenant.

APPENDIX

Individual opinion submitted by a member of the Human Rights Committee under rule 94 (3) of the Committee's provisional rules of procedure

Communication No. 24/1977

Individual opinion appended to the Committee's views at the request of Mr. Nèjib Bouziri:

[Original: French]
[30 July 1981]

In the Lovelace case, not only article 27 but also articles 2 (para. 1), 3, 23 (paras. 1 and 4) and 26 of the Covenant have been breached, for some of the provisions of the Indian Act are discriminatory, particularly as between men and women. The Act is still in force and, even though the Lovelace case arose before the date on which the Covenant became applicable in Canada, Mrs. Lovelace is still suffering from the adverse discriminatory effects of the Act in matters other than that covered by article 27.

Submitted by: Delia Saldías de López on 6 June 1979
Alleged victim: Sergio Rubén López Burgos (author's husband)
State party: Uruguay
Date of adoption of views: 29 July 1981 (thirteenth session)

Arrest and abduction from another State—Jurisdiction of State party—UNHCR refugee status—Arbitrary arrest—Detention—Health of victim—Access to counsel—Torture—Confession under duress—Procedural delays—Trade union activities—Freedom of expression—Derogation from Covenant

Articles of Covenant: 2 (1), 4, 5 (1), 7, 9 (1) and (3), 12 (3), 14 (3), 19 and 22

Article of Optional Protocol: 1

Views under article 5 (4) of the Optional Protocol¹

1. The author of the communication is Delia Saldías de López, a political refugee of Uruguayan nationality residing in Austria. She submits the communication on behalf of her husband, Sergio Rubén López Burgos, a worker and trade-union leader in Uruguay.

2.1 The author states that mainly because of the alleged victim's active participation in the trade union movement, he was subjected to various forms of harassment by the authorities from the beginning of his trade union involvement. Thus, he was arrested in December 1974 and held without charges for four months. In May 1975, shortly after his release and while still subjected to harassment by the authorities, he moved to Argentina. In September 1975 he obtained recognition as a political refugee by the Office of the United Nations High Commissioner for Refugees.

2.2 The author claims that on 13 July 1976 her husband was kidnapped in Buenos Aires by members of the "Uruguayan security and intelligence forces" who were aided by Argentine para-military groups, and was secretly detained in Buenos Aires for about two weeks. On 26 July 1976 Mr. López Burgos, together with several other Uruguayan nationals, was illegally and clandestinely transported to Uruguay, where he was detained incommunicado by the special security forces at a secret prison for three months. During his detention of approximately four months both in Argentina and Uruguay, he was continuously subjected to physical and mental torture and other cruel, inhuman or degrading treatment.

2.3 The author asserts that her husband was subjected to torture and ill-treatment as a consequence of which he suffered a broken jawbone and perforation of the eardrums. In substantiation of her allegations the author furnishes detailed testimony submitted by six ex-detainees who were held, together with Mr. López Burgos, in some of the secret detention places in Argentina and Uruguay, and who were later released (Cecilia

Gayoso Jauregui, Alicia Cadenas, Mónica Soliño, Ariel Soto, Nelson Dean Bermudez, Enrique Rodríguez Larreta). Some of these witnesses describe the arrest of Mr. López Burgos and other Uruguayan refugees at a bar in Buenos Aires on 13 July 1976; on this occasion his lower jaw was allegedly broken by a blow with the butt of a revolver; he and the others were then taken to a house where he was interrogated, physically beaten and tortured. Some of the witnesses could identify several Uruguayan officers: Colonel Ramírez, Major Gavazzo (directly in charge of the torture sessions), Major Manuel Cordero, Major Mario Martínez and Captain Jorge Silveira. The witnesses assert that Mr. López Burgos was kept hanging for hours with his arms behind him, that he was given electric shocks, thrown on the floor, covered with chains that were connected with electric current, kept naked and wet; these tortures allegedly continued for ten days until López Burgos and several others were blindfolded and taken by truck to a military base adjacent to the Buenos Aires airport; they were then flown by an Uruguayan plane to the Base Aérea Militar No. 1, adjacent to the Uruguayan National Airport at Carrasco, near Montevideo. Interrogation continued, accompanied by beatings and electric shocks; one witness alleges that in the course of one of these interrogations the fractured jaw of Mr. López Burgos was injured further. The witnesses describe how Mr. López Burgos and 13 others were transported to a chalet on Shangrilá Beach and that all 14 were officially arrested there on 23 October 1976 and that the press was informed that "subversives" had been surprised at the chalet while conspiring. Four of the witnesses further assert that López Burgos and several others were forced under threats to sign false statements which were subsequently used in the legal proceedings against them and to refrain from seeking any legal counsel other than Colonel Mario Rodríguez. Another witness adds that all the arrested, including Mónica Soliño and Inés Quadros, whose parents are attorneys, were forced to name *ex officio* defence attorneys.

2.4 The author further states that her husband was transferred from the secret prison and held "at the disposition of military justice", first at a military hospital where for several months he had to undergo treatment because of the physical and mental effects of the torture applied to him prior to his "official" arrest, and subsequently at Libertad prison in San José. After a delay of 14 months his trial started in April 1978. At the time of writing, Mr. López Burgos was still waiting for final judgement to be passed by the military court. The author adds in this connection that her husband was also denied the right to have legal defence counsel of his own choice. A military *ex officio* counsel was appointed by the authorities.

¹ The text of an individual opinion submitted by a Committee member is appended to these views.

2.5 Mrs. Saldías de López states that the case has not been submitted to any other procedure of international investigation or settlement.

2.6 She also claims that the limited number of domestic remedies which can be invoked in Uruguay under the "prompt security measures" have been exhausted and she also refers in this connection to an unsuccessful resort to *amparo* by the mother of the victim in Argentina.

2.7 She has also furnished a copy of a letter from the Austrian Consulate in Montevideo, Uruguay, mentioning that the Austrian Government has granted a visa to Mr. López Burgos and that this information has been communicated to the Uruguay Ministry of Foreign Affairs.

2.8 She alleges that the following articles of the Covenant on Civil and Political Rights have been violated by the Uruguayan authorities in respect of her husband: articles 7, 9 and 12 (1) and article 14 (3).

3. By its decision of 7 August 1979 the Human Rights Committee:

(1) Decided that the author was justified in acting on behalf of the alleged victim;

(2) Transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication indicating that if the State party contended that domestic remedies had not been exhausted, it should give details of the effective remedies available to the alleged victim in the particular circumstances of his case.

4. The State party, in its response under rule 91 of the provisional rules of procedure, dated 14 December 1979, states "that the communication concerned is completely devoid of any grounds which would make it admissible by the Committee since, in the course of the proceedings taken against Mr. López Burgos he enjoyed all the guarantees afforded by the Uruguayan legal order". The State party refers in this connection to its previous submissions to the Committee in other cases citing the domestic remedies generally available at present in Uruguay. Furthermore the State party provides some factual evidence in the case as follows: Mr. López Burgos was arrested on 23 October 1976 for his connection with subversive activities and detained under prompt security measures; on 4 November 1976, the second military examining magistrate charged him with presumed commission of the offence of "subversive association" under section 60 (V) of the Military Penal Code; on 8 March 1979, the court of first instance sentenced him to seven years' imprisonment for the offences specified in section 60 (V) of the Military Penal Code, section 60 (I) (6) in association with 60 (XII) of the Military Penal Code and sections 7, 243 and 54 of the Ordinary Penal Code; subsequently, on 4 October 1979, the Supreme Military Court rendered final judgement, reducing his sentence to four years and six months. It is further stated that Mr. López Burgos' defence counsel was Colonel Mario Rodríguez and that

Mr. López Burgos is being held at Military Detention Establishment No. 1. The Government of Uruguay also brings to the attention of the Committee a report on a medical examination of Mr. López Burgos, stating in part as follows:

Medical history prior to imprisonment (Antecedentes personales anteriores a su "reclusión"): operated on for bilateral inguinal hernia at the age of 12; (2) history of unstable arterial hypertension; (3) fracture of lower left jaw.

Family medical history: (1) father a diabetic.

Medical record in prison (Antecedentes de "reclusión"): treated by the dental surgery service of the Armed Forces Central Hospital for the fracture of the jaw with which he entered the Establishment. Discharged from the Armed Forces Central Hospital on 7 May 1977 with the fracture knitted and progressing well; subsequently examined for polyps of larynx on left vocal cord; a biopsy conducted ...

5. In a further letter dated 4 March 1980 the author, Delia Saldías de López, refers to the Human Rights Committee's decision of 7 August 1979 and to the note of the Government of Uruguay dated 14 December 1979, and claims that the latter confirmed the author's previous statement concerning the exhaustion of all possible domestic remedies.

6. In the absence of any information contrary to the author's statement that the same matter had not been submitted to another procedure of international investigation or settlement and concluding, on the basis of the information before it, that there were no unexhausted domestic remedies which could or should have been pursued, the Committee decided on 24 March 1980:

(1) That the communication was admissible in so far as it relates to events which have allegedly continued or taken place after 23 March 1976 (the date of the entry into force of the Covenant and the Optional Protocol for Uruguay);

(2) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(3) That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must primarily relate to the substance of the matter under consideration, and in particular the specific violations of the Covenant alleged to have occurred. The State party is requested, in this connection, to give information as to the whereabouts of López Burgos between July and October 1976 and as to the circumstances in which he suffered a broken jaw and to enclose copies of any court orders or decisions of relevance to the matter under consideration.

7.1 In its submission under article 4 (2) of the Optional Protocol, dated 20 October 1980, the State party asserts that Mr. López Burgos had legal assistance at all times and that he lodged an appeal; the result of the appeal was a sentence at second instance that reduced the penalty of seven years to four years and six months of rigorous imprisonment. The State party also rejects the allegation that López Burgos was denied the right to

have defence counsel of his own choice, asserting that he was not prevented from having one.

7.2 As to the circumstances under which Mr. López Burgos' jaw was broken, the State party quotes from the "relevant medical report":

On 5 February 1977 he entered the Armed Forces Central Hospital with a fracture of the lower left jaw caused when he was engaged in athletic activities at the prison (Military Detention Establishment No. 1). He was treated by the dental surgery service of the hospital for the fracture of the jaw with which he entered the hospital. He was discharged on 7 May 1977 with the fracture knitted and progressing well.

7.3 Whereas the author claims that her husband was kidnapped by members of the Uruguayan security and intelligence forces on 13 July 1976, the State party asserts that Mr. López Burgos, was arrested on 23 October 1976 and claims that the whereabouts of Mr. López Burgos have been known since the date of his detention but no earlier information is available.

7.4 As to the right to have a defence counsel, the State party generally asserts that accused persons themselves and not the authorities choose from the list of court-appointed lawyers.

8.1 In her submission under rule 93 (3) dated 22 December 1980 the author indicates that since accused persons can only choose their lawyers from a list of military lawyers drawn up by the Uruguayan Government, her husband had no access to a civilian lawyer, unconnected with the Government, who might have provided "a genuine and impartial defence" and that he did not enjoy the proper safeguards of a fair trial.

8.2 With regard to the State party's explanations concerning the fractured jaw suffered by López Burgos, the author claims that they are contradictory. The transcript of the medical report in the State party's note of 14 December 1979 lists the fracture in the paragraph beginning "Medical history prior to '*reclusión*'" and goes on to the paragraph beginning "Medical record '*de reclusión*'" to state that López Burgos was "treated by the dental surgery service of the Armed Forces Central Hospital for the fracture of the jaw with which he entered the establishment". In other words, the fracture occurred prior to his imprisonment. However, the note of 20 October 1980 states that he entered the hospital with a fractured jaw caused "when he was engaged in athletic activities at the prison". She reiterates her allegation that the fracture occurred as a consequence of the tortures to which López Burgos was subjected between July and October 1976, when he was in the hands of the Uruguayan Special Security Forces.

9. The State party submitted additional comments under article 4 (2) of the Covenant in a note dated 5 May 1981, contending that there is no contradiction between the medical reports, because the State party used the term "*reclusión*" to mean "*internación en el establecimiento hospitalario*" (hospitalization), and reasserts that the fracture occurred in the course of athletic activities in the prison.

10.1 The Human Rights Committee has considered the present communication in the light of all informa-

tion made available to it by the parties, as provided in article 5 (1) of the Optional Protocol. The Committee bases its views *inter alia* on the following undisputed facts:

10.2 Sergio Rubén López Burgos was living in Argentina as a political refugee until his disappearance on 13 July 1976; he subsequently reappeared in Montevideo, Uruguay, not later than 23 October 1976, the date of his purported arrest by Uruguayan authorities, and was detained under "prompt security measures". On 4 November 1976 pre-trial proceedings commenced when the second military examining magistrate charged him with the offence of "subversive association", but the actual trial began in April 1978 before a military court of first instance, which sentenced him on 8 March 1979 to seven years' imprisonment; upon appeal the court of second instance reduced the sentence to four years six months. López Burgos was treated for a broken jaw in a military hospital from 5 February to 7 May 1977.

11.1 In formulating its views the Human Rights Committee also takes into account the following considerations:

11.2 As regards the whereabouts of López Burgos between July and October 1976 the Committee requested precise information from the State party on 24 March 1980. In its submission dated 20 October 1980 the State party claimed that it had no information. The Committee notes that the author has made precise allegations with respect to her husband's arrest and detention in Buenos Aires on 13 July 1976 by the Uruguayan security and intelligence forces and that witness testimony submitted by her indicates the involvement of several Uruguayan officers identified by name. The State party has neither refuted these allegations nor adduced any adequate evidence that they have been duly investigated.

11.3 As regards the allegations of ill-treatment and torture, the Committee notes that the author has submitted detailed testimony from six ex-detainees who were held, together with López Burgos, in some of the secret detention places in Argentina and Uruguay. The Committee notes further that the names of five Uruguayan officers allegedly responsible for or personally involved in the ill-treatment are given. The State party should have investigated the allegations in accordance with its laws and its obligations under the Covenant and the Optional Protocol. As regards the fracture of the jaw, the Committee notes that the witness testimony submitted by the author indicates that the fracture occurred upon the arrest of López Burgos on 13 July 1976 in Buenos Aires, when he was physically beaten. The State party's explanation that the jaw was broken in the course of athletic activities in the prison seems to contradict the State party's earlier statement that the injury occurred prior to his "*reclusión*". The State party's submission of 14 December 1979 uses "*reclusión*" initially to mean imprisonment, e.g. "*Establecimiento Militar de Reclusión*". The term reappears six lines later in the same document in connection with "*Antecedentes personales anteriores a su*

reclusión". The Committee is inclined to believe that "reclusión" in this context means imprisonment and not hospitalization as contended by the State party in its submission of 5 May 1981. At any rate, the State party's references to a medical report cannot be regarded as a sufficient refutation of the allegations of mistreatment and torture.

11.4 As to the nature of the judicial proceedings against López Burgos the Committee requested the State party on 24 March 1980 to furnish copies of any court orders or decisions of relevance to the matter under consideration. The Committee notes that the State party has not submitted any court orders or decisions.

11.5 The State party has also not specified in what "subversive activities" López Burgos was allegedly involved or clarified how or when he engaged in these activities. It would have been the duty of the State party to provide specific information in this regard, if it wanted to refute the allegations of the author that López Burgos has been persecuted because of his involvement in the trade-union movement. The State party has not refuted the author's allegations that López Burgos was forced to sign false testimony against himself and that this testimony was used in the trial against him. The State party has stated that López Burgos was not prevented from choosing his own legal counsel. It has not, however, refuted witness testimony indicating that López Burgos and others arrested with him, including Mónica Soliño and Inés Quadros, whose parents are attorneys, were forced to agree to *ex officio* legal counsel.

11.6 The Committee has considered whether acts and treatment, which are *prima facie* not in conformity with the Covenant, could for any reasons be justified under the Covenant in the circumstances of the case. The Government of Uruguay has referred to provisions, in Uruguayan law, of "prompt security measures". However, the Covenant (art. 4) does not allow national measures derogating from any of its provisions except in strictly defined circumstances, and the Government has not made any submissions of fact or law in relation thereto. Moreover, some of the facts referred to above raise issues under provisions from which the Covenant does not allow any derogation under any circumstances.

11.7 The Human Rights Committee notes that if the sentence of López Burgos ran from the purported date of arrest on 23 October 1976, it was due to be completed on 23 April 1981, on which date he should consequently have been released.

11.8 The Committee notes that the Austrian Government has granted López Burgos an entry visa. In this connection and pursuant to article 12 of the Covenant, the Committee observes that López Burgos should be allowed to leave Uruguay, if he so wishes, and travel to Austria to join his wife, the author of this communication.

12.1 The Human Rights Committee further observes that although the arrest and initial detention and mistreatment of López Burgos allegedly took place on foreign territory, the Committee is not barred either

by virtue of article 1 of the Optional Protocol ("... individuals subject to its jurisdiction ...") or by virtue of article 2 (1) of the Covenant ("... individuals within its territory and subject to its jurisdiction ...") from considering these allegations, together with the claim of subsequent abduction into Uruguayan territory, inasmuch as these acts were perpetrated by Uruguayan agents acting on foreign soil.

12.2 The reference in article 1 of the Optional Protocol to "individuals subject to its jurisdiction" does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.

12.3 Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. According to article 5 (1) of the Covenant:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.

13. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that the communication discloses violations of the Covenant, in particular of:

Article 7, because of the treatment (including torture) suffered by López Burgos at the hands of Uruguayan military officers in the period from July to October 1976 both in Argentina and Uruguay;

Article 9 (1), because the act of abduction into Uruguayan territory constituted an arbitrary arrest and detention;

Article 9 (3), because López Burgos was not brought to trial within a reasonable time;

Article 14 (3) (d), because López Burgos was forced to accept Colonel Mario Rodríguez as his legal counsel;

Article 14 (3) (g), because López Burgos was compelled to sign a statement incriminating himself;

Article 22 (1) in conjunction with article 19 (1) and (2), because López Burgos has suffered persecution for his trade union activities.

14. The Committee, accordingly, is of the view that the State party is under an obligation, pursuant to article 2 (3) of the Covenant, to provide effective remedies

to López Burgos, including immediate release, permission to leave Uruguay and compensation for the violations which he has suffered, and to take steps to ensure that similar violations do not occur in the future.

APPENDIX

Individual opinion submitted by a member of the Human Rights Committee under rule 94 (3) of the Committee's provisional rules of procedure

Communication No. 52/1979

Individual opinion appended to the Committee's views at the request of Mr. Christian Tomuschat:

I concur in the views expressed by the majority. None the less, the arguments set out in paragraph 12 for affirming the applicability of the Covenant also with regard to those events which have taken place outside Uruguay need to be clarified and expanded. Indeed, the first sentence in paragraph 12.3, according to which article 2 (1) of the Covenant does not imply that a State party "cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State", is too broadly framed and might therefore give rise to misleading conclusions. In principle, the scope of application of the Covenant is not susceptible to being extended by reference to article 5, a provision designed to cover instances where formally rules under the Covenant seem to legitimize actions which substantially run counter to its purposes and general spirit. Thus, Governments may never use the limitation clauses supplementing the protected rights and freedoms to

such an extent that the very substance of those rights and freedoms would be annihilated; individuals are legally barred from availing themselves of the same rights and freedoms with a view to overthrowing the régime of the rule of law which constitutes the basic philosophy of the Covenant. In the present case, however, the Covenant does not even provide the pretext for a "right" to perpetrate the criminal acts which, according to the Committee's conviction, have been perpetrated by the Uruguayan authorities.

To construe the words "within its territory" pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to utterly absurd results. The formula was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential. Instances of occupation of foreign territory offer another example of situations which the drafters of the Covenant had in mind when they confined the obligation of States parties to their own territory. All these factual patterns have in common, however, that they provide plausible grounds for denying the protection of the Covenant. It may be concluded, therefore, that it was the intention of the drafters, whose sovereign decision cannot be challenged, to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles. Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad. Consequently, despite the wording of article 2 (1), the events which took place outside Uruguay come within the purview of the Covenant.

Communication No. 56/1979

Submitted by: Lilian Celiberti de Casariego on 17 July 1979

Alleged victim: The author

State party: Uruguay

Date of adoption of views: 29 July 1981 (thirteenth session)

Submission to IACHR—Same matter—Habeas corpus—Arrest in and abduction from another State—Jurisdiction of State party—Arbitrary arrest—Detention incommunicado—Access to counsel—Procedural delays

Articles of Covenant: 2 (1), 5 (1), 9 (1), 10 (1) and 14 (3)

Articles of Optional Protocol: 1 and 5 (2) (b).

Views under articles 5 (4) of the Optional Protocol¹

1. The author of the communication (initial letter dated 17 July 1979 and further letters dated 5 and 20 March 1980), is Francesco Cavallaro, practising lawyer in Milan, Italy, acting on behalf of Lilian Celiberti de Casariego, who is imprisoned in Uruguay. The lawyer has submitted a duly authenticated copy of a General Power of Attorney to act on her behalf.

2.1 In his submission of 17 July 1979 the author of the communication alleges the following:

¹ The text of an individual opinion submitted by a Committee member is appended to these views.

2.2 Since 1974 Lilian Celiberti de Casariego, a Uruguayan citizen by birth and of Italian nationality based on *jus sanguinis*, had been living in Milan, Italy, with her husband and two children. Mrs. Celiberti had been authorized to leave Uruguay in 1974. While in Uruguay she had been an active member of the *Resistencia Obrero-Estudiantil* and in this connection she had been arrested for "security reasons", and subsequently released, several times. In 1978 Mrs. Celiberti, her two children (3 and 5 years of age) and Universindo Rodríguez Díaz, a Uruguayan exile living in Sweden, travelled to Porto Alegre (Brazil) purportedly to contact Uruguayan exiles living there. The author claims that, based on information gathered, *inter alia*, by representatives of private international organizations, the Lawyers' Association in Brazil, journalists, Brazilian parliamentarians and Italian authorities, Mrs. Celiberti was arrested on 12 November 1978 together with her two children and Universindo Rodríguez Díaz in their apartment, in Porto Alegre, by Uruguayan agents with the connivance of two Brazilian police officials (against whom relevant charges have been brought by Brazilian authorities in this connection). From 12 November probably to 19 November 1978, Mrs. Celiberti was de-

tained in her apartment in Porto Alegre. The children were separated from their mother and were kept for several days in the office of the Brazilian political police. The mother and the children were then driven together to the Uruguayan border where they were separated again. The children were brought to Montevideo (Uruguay) where they remained for 11 days in a place together with many other children before being handed over on 25 November 1978 by a judge to their maternal grandparents. Mrs. Celiberti was forcibly abducted into Uruguayan territory and kept in detention. On 25 November 1978 the *Fuerzas Conjuntas* of Uruguay publicly confirmed the arrest of Mrs. Celiberti, her two children and Mr. Universindo Rodríguez Díaz, alleging that they had tried to cross the Brazilian-Uruguayan border secretly with subversive material. Until 16 March 1979, Mrs. Celiberti was held incommunicado. At that time she was detained in Military Camp No. 13, but neither her relatives nor other persons, including representatives of the Italian Consulate, were allowed to visit her. On 23 March 1979, it was decided to charge her with "subversive association", "violation of the Constitution by conspiracy and preparatory acts thereto" and with other violations of the Military Penal Code in conjunction with the ordinary Penal Code. She was ordered to be tried by a Military Court. It was further decided to keep her in "preventive custody" and to assign an *ex officio* defence lawyer to her.

2.3 The author claims that the following provisions of the International Covenant on Civil and Political Rights have been violated by the Uruguayan authorities in respect of Lilian Celiberti de Casariego: articles 9, 10 and 14.

3. On 10 October 1979, the Human Rights Committee decided to transmit the communication to the State party, under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility.

4.1 By a note dated 14 December 1979 the State party objected to the admissibility of the communication on the ground that the same matter had been submitted to the Inter-American Commission on Human Rights and referred to case No. 4529, dated 15 August 1979.

4.2 In a further submission dated 5 March 1980, the author states that, as the legal representative of Lilian Celiberti de Casariego, he cannot rule out the possibility of her case having been submitted to the Inter-American Commission on Human Rights. He claims, however, that the Human Rights Committee's competence is not excluded for the following reasons: (a) the communication relating to Mrs. Celiberti was submitted to the Human Rights Committee on 17 July 1979, i.e., before the matter reached the Inter-American Commission on Human Rights; (b) if the case was submitted to the Inter-American Commission on Human Rights by a third party, this cannot prejudice the right of the legal representative of Mrs. Celiberti to choose the international body to protect her interests.

5. On 2 April 1980, the Human Rights Committee,

(a) Having ascertained from the secretariat of the Inter-American Commission on Human Rights that a case concerning Lilian Celiberti was submitted by an unrelated third party and opened on 2 August 1979 under No. 4529,

(b) Concluding that it is not prevented from considering the communication submitted to it by Mrs. Celiberti's legal representative on 17 July 1979 by reason of the subsequent opening of a case by an unrelated third party under the procedure of the Inter-American Commission on Human Rights,

(c) Being unable to conclude that, with regard to exhaustion of domestic remedies, on the basis of the information before it, there were any further remedies which the alleged victim should or could have pursued,

Therefore decided:

(a) That the communication was admissible;

(b) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it.

6. The time-limit for the State party's submission under article 4 (2) of the Optional Protocol expired on 29 October 1980. Up to date no such submission has been received from the State party.

7. The Human Rights Committee notes that it has been informed by the Government of Uruguay in another case (No. 9/1977, Edgardo D. Santullo Valcárcel v. Uruguay) that the remedy of *habeas corpus* is not applicable to persons detained under the "prompt security measures".

8. The Human Rights Committee, considering the present communication in the light of all information made available to it by the parties as provided in article 5 (1) of the Optional Protocol, hereby decides to base its views on the following facts as set out by the author in the absence of any comments thereupon by the State party.

9. On 12 November 1978 Lilian Celiberti de Casariego was arrested in Porto Alegre (Brazil) together with her two children and with Universindo Rodríguez Díaz. The arrest was carried out by Uruguayan agents with the connivance of two Brazilian police officials. From 12 to 19 November 1978, Mrs. Celiberti was detained in her apartment in Porto Alegre and then driven to the Uruguayan border. She was forcibly abducted into Uruguayan territory and kept in detention. On 25 November 1978 the *Fuerzas Conjuntas* of Uruguay publicly confirmed the arrest of Mrs. Celiberti, her two children and Mr. Universindo Rodríguez Díaz, alleging that they had tried to cross the Brazilian-Uruguayan border secretly with subversive material. Until 16 March 1979, Mrs. Celiberti was held incommunicado. On 23 March 1979, she was charged with "subversive association", "violation of the Constitution by conspiracy and preparatory acts thereto", and

with other violations of the Military Penal Code in conjunction with the ordinary Penal Code. She was ordered to be tried by a Military Court. She was ordered to be kept in "preventive custody" and assigned an *ex officio* defence lawyer.

10.1 The Human Rights Committee observes that although the arrest and initial detention of Lilian Celiberti de Casariego allegedly took place on foreign territory, the Committee is not barred either by virtue of article 1 of the Optional Protocol ("... individuals subject to its jurisdiction ...") or by virtue of article 2 (1) of the Covenant ("... individuals within its territory and subject to its jurisdiction ...") from considering these allegations, together with the claim of subsequent abduction into Uruguayan territory, inasmuch as these acts were perpetrated by Uruguayan agents acting on foreign soil.

10.2 The reference in article 1 of the Optional Protocol to "individuals subject to its jurisdiction" does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.

10.3 Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. According to article 5 (1) of the Covenant:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.

11. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that the facts as found by the Committee, disclose violations of the International Covenant on Civil and Political Rights, in particular of:

Article 9 (1), because the act of abduction into Uruguayan territory constituted an arbitrary arrest and detention;

Article 10 (1), because Lilian Celiberti de Casariego was kept incommunicado for four months;

Article 14 (3) (b), because she had no counsel of her own choosing;

Article 14 (3) (c), because she was not tried without undue delay.

12. The Committee, accordingly, is of the view that the State party is under an obligation, pursuant to article 2 (3) of the Covenant, to provide Lilian Celiberti de Casariego with effective remedies, including her immediate release, permission to leave the country and compensation for the violations which she has suffered, and to take steps to ensure that similar violations do not occur in the future.

APPENDIX

Individual opinion submitted by a member of the Human Rights Committee under rule 94 (3) of the Committee's provisional rules of procedure

Communication No. 56/1979

Individual opinion appended to the Committee's views at the request of Mr. Christian Tomuschat:

I concur in the views expressed by the majority. None the less, the arguments set out in paragraph 10 for affirming the applicability of the Covenant also with regard to those events which have taken place outside Uruguay need to be clarified and expanded. Indeed, the first sentence in paragraph 10.3, according to which article 2 (1) of the Covenant does not imply that a State party "cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State", is too broadly framed and might therefore give rise to misleading conclusions. In principle, the scope of application of the Covenant is not susceptible to being extended by reference to article 5, a provision designed to cover instances where formally rules under the Covenant seem to legitimize actions which substantially run counter to its purposes and general spirit. Thus, Governments may never use the limitation clauses supplementing the protected rights and freedoms to such an extent that the very substance of those rights and freedoms would be annihilated; individuals are legally barred from availing themselves of the same rights and freedoms with a view to overthrowing the régime of the rule of law which constitutes the basic philosophy of the Covenant. In the present case, however, the Covenant does not even provide the pretext for a "right" to perpetrate the criminal acts which, according to the Committee's conviction, have been perpetrated by the Uruguayan authorities.

To construe the words "within its territory" pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to utterly absurd results. The formula was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential. Instances of occupation of foreign territory offer another example of situations which the drafters of the Covenant had in mind when they confined the obligation of States parties to their own territory. All these factual patterns have in common, however, that they provide plausible grounds for denying the protection of the Covenant. It may be concluded, therefore, that it was the intention of the drafters, whose sovereign decision cannot be challenged, to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles. Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad. Consequently, despite the wording of article 2 (1), the events which took place outside Uruguay come within the purview of the Covenant.

FOURTEENTH SESSION

Communication No. 27/1978

Submitted by: Larry James Pinkney on 25 November 1977

Alleged victim: The author

State party: Canada

Date of adoption of views: 29 October 1981 (fourteenth session)

Procedural delays—Fair trial—Racial discrimination—Segregation of prisoners—Correspondence of prisoners

Articles of Covenant: 10 (1) and (2), 14 (1), (3) and (5) and 17 (1)

Views under article 5 (4) of the Optional Protocol

1. The author of the communication (initial letter dated 25 November 1977 and a further letter dated 7 April 1978 as well as numerous further letters received from the author during the course of the proceedings) is a citizen of the United States of America who is serving a prison sentence in Canada. He describes himself as a black political activist, having been involved in the activities of several political organizations since 1967 (Black Panther Party (1967-1968), Black National Draft Resistance League (Chairman) (1969-1970), San Francisco Black Caucus (Co-Chairman) (1970-1973), Minister of Interior for the Republic of New Africa (1970-1972) under the name of Makua Atana and, since 1974, Chairman of the Central Committee of the Black National Independence Party). He entered Canada as a visitor in September 1975. On 10 May 1976 he was arrested by police authorities in Vancouver, British Columbia, on charges under the Canadian Criminal Code and remanded to the Lower Mainland Regional Correction Centre at Oakalla British Columbia, pending his trial on certain criminal charges. Because of his arrest his continued presence in Canada came to the attention of immigration officials and, consequently during the period when he was incarcerated at the Correction Centre, proceedings were taken under the Immigration Act to determine whether he was lawfully in Canada. These proceedings took place during the period between 21 May 1976 and 10 November 1976 when an order of deportation was issued against him. On 9 December 1976 he was convicted by the County Court of British Columbia of the charge of extortion and on 7 January 1977 he was sentenced to a term of five years' imprisonment. On 8 February 1977, he sought leave to appeal against his conviction and sentence to the British Columbia Court of Appeal. He was transferred to the British Columbia Penitentiary on February 1977. On 6 December 1979 the Court of Appeal dismissed his appeal against conviction and adjourned his appeal against sentence *sine die*.

2. Mr. Pinkney claims (a) that he had been denied a fair hearing and review of his case in regard to the deportation order, which is due to come into effect on his release from prison, (b) that he is the victim of a mistrial in regard to the criminal charges brought

against him, and (c) that he has been subjected to wrongful treatment while in detention. He alleges that, in consequence, the State party has violated articles 10 (1) and (2) (a), 13, 14 (1) and (3) (b), 16 and 17 (1) of the International Covenant on Civil and Political Rights.

3. By its decision of 18 July 1978 the Human Rights Committee transmitted Mr. Pinkney's communication under rule 91 of the provisional rules of procedure to the State party concerned requesting information and observations relevant to the question of admissibility of the communication.

4. The Committee also communicated its decision to Mr. Pinkney.

5. The State party's submissions on the question of admissibility were contained in letters of 18 June 1979 and 10 January 1980 and further comments from Mr. Pinkney were contained in letters of 11 and 15 July 1979 and 21 and 22 February 1980.

6. On 2 April 1980 the Human Rights Committee decided:

(a) That the communication was inadmissible in so far as it related to the deportation proceedings and the deportation order issued against Mr. Pinkney;

(b) That the communication was admissible in so far as it related to Mr. Pinkney's trial and conviction on the charge of extortion;

(c) That the communication was admissible in so far as it related to Mr. Pinkney's treatment at the Lower Mainland Regional Correction Centre on or after 19 August 1976.

7. In its observations under article 4 (2) of the Optional Protocol, dated 21 October 1980, the State party submits that there is no merit to the author's allegations which were found admissible by the Committee and that they should therefore be dismissed. Further submissions regarding the admissibility and merits of the case were received in a note of 22 July 1980 from the State party and in letters of 10 and 22 December 1980 and 30 April, 24 June, 27 August and 18 September 1981 from the author of the communication and his lawyer.

(a) *The claims concerning the deportation order*

8. The Human Rights Committee, having examined the further submissions regarding the admissibility of the communication, has found no grounds to reconsider its decision of 2 April 1980.

(b) *The claims concerning the alleged mistrial*

9. Mr. Pinkney alleges that prior to his arrest in May 1976, he had spent over three months in Vancouver compiling specific information on alleged smuggling activities of certain East Indian Asian immigrants in Canada, involving smuggling out of Africa into Europe, Canada and the United States, with the complicity of Canadian Immigration officials. He maintains that he was doing this work on behalf of the Governing Central Committee of the Black National Independence Party (BNIP) with a view to putting an end to these illegal activities, which he contends were to the detriment of the economy of African countries. The author further indicates that, during the period prior to his arrest, he had managed to establish contact with a relative of the persons involved in the smuggling of diamonds and large sums of money from Kenya, Tanzania, Uganda and Zaire into Canada. He states that the relative revealed to him many details about these smuggling activities, that he recorded this information on tape, that he made copies of the letters showing dates and amounts of transactions, names of people involved and other details and that he placed this material in a brief-case kept in a 24-hour public locker. He asserts that in one of the letters which was copied reference was made to a gift in cash to certain Canadian immigration officers for their assistance and also to the necessity to pay more money to a BOAC airline pilot for his help. The author maintains that he periodically informed by telephone the Central Committee of the BNIP and a security official at the Kenyan Embassy in Washington of his investigation and that he recorded these conversations and placed the tapes in the brief-case. The author maintains that after he was arrested, in May 1976, the brief-case was discovered and confiscated by the police and that the material necessary for his defence mysteriously disappeared before his trial. He alleges that these facts were ignored by the trial court, that he was accused of having used the information in his possession with a view to obtaining money from the persons allegedly responsible for the smuggling, that evidence that he had no intention of committing extortion was deliberately withheld, and that he was convicted on the basis of evidence which had been tampered with and distorted but which was nevertheless presented by the police and crown attorney.

10. From the information submitted to the Committee it appears that Mr. Pinkney was convicted by the County Court of British Columbia on a charge of extortion on 9 December 1976. The sentence of five years' imprisonment was pronounced on 7 January 1977. On 8 February 1977, he sought leave to appeal against his conviction and his sentence to the British Columbia Court of Appeal. He argued that he had not been able to make full answer and defence to the charge of extortion before the trial court because of alleged inability of the authorities to produce the missing brief-case. His appeal, however, was not heard until 34 months later. This delay, which the Government of British Columbia described as "unusual and unsatisfactory", was due to the fact that the trial transcripts were not produced until June 1979. Mr. Pinkney alleges that the delay in the

hearing, due to the lack of the trial transcripts, was a deliberate attempt by the State party to block the exercise of his right of appeal. The State party rejects this allegation and submits that, notwithstanding the efforts of officials of the Ministry of the Attorney-General of British Columbia to hasten the production of the trial transcripts, they were not completed until June 1979, "because of various administrative mishaps in the Official Reporters' Office". On 6 December 1979, that is 34 months after leave to appeal was applied for, the British Columbia Court of Appeal heard the application, granted leave to appeal and on the same day, after hearing Mr. Pinkney's legal counsel (i) dismissed the appeal against conviction, and (ii) adjourned the appeal against sentence *sine die*, to be heard at a time convenient for Mr. Pinkney's counsel.

11. Mr. Pinkney claims violations of article 14 (1) and (3) (b) of the Covenant in that he was not given a fair hearing or adequate time and facilities for the preparation of his defence since he was denied the right to produce the documents and tapes allegedly proving his innocence. He also claims that the long delay in hearing his appeal has resulted in violations of article 14 (3) (c) and (5).

12. As to Mr. Pinkney's claim that he was denied a fair trial because evidence was withheld which would have proven that he had no intent to commit the crime of extortion, the State party in its observations of 21 October 1980 under article 4 (2) of the Optional Protocol makes the following submission:

Mr. Pinkney was charged under section 305 of the Criminal Code:

"305. (1) Everyone who, without reasonable justification or excuse and with intent to extort or gain anything by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done is guilty of an indictable offence and is liable to imprisonment for 14 years.

"(2) A threat to institute civil proceedings is not a threat for the purposes of this section."

In order to prove that he had committed this offence, the Crown had to prove beyond reasonable doubt:

- (1) That the accused used threats to induce the doing of something;
- (2) That he did so with intent to extort or gain something, and
- (3) That he did so without reasonable justification or excuse.

In the present case the Crown met this burden of proof. Using tape recordings (and transcripts thereof) of two telephone conversations between Mr. Pinkney and his intended victims, it showed that he threatened to turn over the content of a stolen file containing information on the smuggling of money from Kenya to Canada as well as an application requesting that family allowance payments be made to a person who was not entitled to receive them under Canadian law to Canadian and Kenyan authorities unless he was paid the sum of \$100,000, later reduced to \$50,000. His Honour Judge Mackinnon, of the County of Vancouver, who presided at Mr. Pinkney's trial, indicated that, in the absence of any explanation, this evidence (which, it should be noted, Mr. Pinkney agreed with) was sufficient to support a conviction. Although Mr. Pinkney contended that when he threatened his intended victims he had no intention to extort money from them, but merely wanted to substantiate the information found in the above-mentioned file in order to maintain his reputation as a reliable informer with the Kenyan Embassy in the United States, the trial judge, after a study of the evidence adduced by both the Crown and the accused, including testimony by the accused, concluded that the communicant did intend to extort money. The trial judge noted that in a written statement dated 7 May 1976 which he had made to the police

after his arrest, Mr. Pinkney made absolutely no mention of Kenya, smuggling activities or his attempt to verify information, but rather referred to the attempted extortions as a "business deal". The judge concluded that this "can only be interpreted in this context as an exchange of the file for money" and that he could "put no other rational interpretation on this statement written by Pinkney himself ...". Furthermore, he indicated that additional evidence of Mr. Pinkney's intention could be found in various papers found in his apartment and largely in his handwriting. On these papers were written specific ideas concerning threats, plans to pick up the money and other matters which Mr. Pinkney denied having considered.

At the communicant's trial, the Crown showed that he had intended to extort money. To this effect, the 7 May 1976 statement which Mr. Pinkney made to the police and the various papers found in his apartment were particularly decisive. In the face of such evidence, the defence of the accused failed. It is doubtful whether the alleged missing evidence would have been of any assistance to Mr. Pinkney. The trial judge was made aware, in the course of pleadings, of the smuggling activities of Mr. Pinkney's intended victims. He also accepted as a fact that Mr. Pinkney was in contact with a representative of the Kenyan Embassy in the United States and that he had sent and intended to continue sending information to the Embassy. Part, if not all of the evidence which the communicant alleges to be missing was, therefore, available at the trial. Quite evidently, part of this evidence was not pertinent: evidence of crimes which might have been committed by other individuals in Canada or abroad does not assist Mr. Pinkney in proving that he had no intention of committing an offence in Canada. The rest had some relevance to the accused defence but did not succeed in creating in the mind of the presiding judge a reasonable doubt as to the absence of criminal intent on the part of the accused. Considering the overwhelming proof of criminal intent adduced by the Crown, this is not surprising.

13. The State party also relies on the consideration of the case by the Court of Appeal in dismissing the appeal against conviction. The Court of Appeal had gone through the information and arguments about the allegedly missing evidence. It held in this respect that "if this matter had been as consequential as it is now suggested it was, much more strenuous efforts would have been taken at every stage of the proceedings of trial to endeavour to resolve the issue of the missing brief-case" and that the information put before it was "altogether too vague to support the submissions now advanced on behalf of the applicant". The Government adds: "In other words, Mr. Pinkney was unable to convince the Court (of Appeal) that the allegedly missing evidence existed, that it had been withheld by the Crown and was in any way relevant."

14. The Government's view is that the facts show:

(a) That in one form or another most if not all of the allegedly missing evidence was put before the trial judge and found not to be relevant or pertinent;

(b) That the communicant failed to exercise due diligence in order to obtain the allegedly missing evidence, evidence which he described as vital to his case;

(c) That he failed to exhaust all local remedies when he failed to ask the Supreme Court of Canada to grant him leave in order to ascertain whether in the present case there had occurred a breach of the rights to a full defence and to a fair hearing which are protected by the Criminal Code and the Canadian Bill of Rights.

15. Concerning the issue of the length of the proceedings before the Court of Appeal due to the delay in the production of the transcripts of the trial, the State

party denies any allegation of wrongdoing, negligence or carelessness on the part of the Ministry of the Attorney-General. It acknowledges that the delay was due to "administrative mishaps in the Official Reporter's Office", but submits that responsibility must nevertheless rest with Mr. Pinkney in that he failed to seek an order from the Court of Appeal requiring production of the transcripts, as he was entitled to do under the Criminal Code and the Rules of the British Columbia Supreme Court.

16. In his reply of 22 December 1980, Mr. Pinkney's lawyer submits the following:

(i) *Missing evidence*

The following is a summary of evidence presented at Mr. Pinkney's trial:

Mr. Pinkney was arrested by detectives and members of the Vancouver City Police at his apartment in the city of Vancouver on 7 May 1976. Just prior to that arrest, Vancouver police detectives conducted a search of that apartment and seized a large number of documents and other items. Subsequent to Mr. Pinkney's arrest, two black briefcases belonging to him were seized as well by police from a bus depot locker. Mr. Pinkney testified that he had been in possession of a grey briefcase in addition to the two black briefcases prior to his arrest. The briefcase that he alleges contained the materials vital to his defence was one of the black briefcases seized from the bus depot locker. He testified further that only the grey briefcase and one of the black briefcases had ever been returned to him. Detective Hope testified that he took two black briefcases to the police station in Vancouver, where the contents were cursorily examined. Detective Hope further testified that no list of the contents of those briefcases was ever made, and also testified that while he did not personally recall seeing any grey briefcase at the apartment of Mr. Pinkney and that he did not himself seize such a briefcase, other members of the police were present at that apartment and may have seized such a briefcase.

There was evidence led at trial that indicated that both of the black briefcases were at one point in time given into the custody of the Royal Canadian Mounted Police, that the contents were photocopied by the R.C.M.P., and that both briefcases were then returned to Vancouver City Police. There was as well testimony that other agencies had shown interest in the contents of those briefcases, including the United States Federal Bureau of Investigation, Canadian Immigration, and the Royal Canadian Mounted Police Subversive Section.

While Vancouver police records indicated that both black briefcases had been turned over to Mr. Pinkney's lawyer acting at that time, Ms. Patricia Connors, Ms. Connors herself gave evidence at trial indicating that she had recovered one grey briefcase and one black briefcase, and that when she signed the police record indicating that she had picked up two black briefcases, she had not carefully examined it and had signed it carelessly. Records from the Lower Mainland Regional Correctional Centre (Oakalla) the prison where Mr. Pinkney was detained pending his trial, indicated that one grey briefcase and one black briefcase were received by them for Mr. Pinkney.

Mr. Pinkney testified of extensive attempts made by himself and by others on his behalf to recover the remaining black briefcase from the police, all of which were unsuccessful. He testified that these attempts commenced shortly after his arrest and well before his trial, and included an attempt to obtain the briefcase by order of a provincial court judge at the time of Mr. Pinkney's preliminary hearing and an attempt to seek the assistance of the Federal Minister of Justice Basford via letter.

The foregoing summary of evidence led at Mr. Pinkney's trial is substantiated by the transcripts of those proceedings. Those transcripts are in the possession of ourselves as well as of representatives of the Province of British Columbia. They comprise some nine volumes, and can be made available to the Committee if requested.

This summary of evidence is submitted at this time in response to the rather minimal summary provided in the State party's submission at pages 7 and 8. In addition, it is clear that counsel for Mr. Pinkney at trial sought an adjournment of that trial *sine die* on the basis of the evidence adduced concerning the briefcases and their contents, on the

grounds that until the missing briefcase and contents were produced, Mr. Pinkney's right to make full answer and defence was impaired. The trial judge refused this application.

(a) The State party argues that "most if not all of the allegedly missing evidence was put before the trial judge and found not to be relevant or pertinent".

It is submitted on behalf of Mr. Pinkney that there is no basis for this submission. While mention of the contents of the missing briefcase was made at trial by Mr. Pinkney, this is hardly analogous to putting this evidence before the trial judge. The only issue at trial was whether Mr. Pinkney had the intent to extort money. His defence was that he was for political reasons testing the veracity of information he had obtained, and that his method was to request money in return for the information. Clearly, the political motivations of Mr. Pinkney were extremely relevant, and if further evidence corroborating his evidence of political activity could have been produced, that may have been crucial. It is impossible to determine at this juncture what effect the presentation of all of Mr. Pinkney's evidence might have had on the trial judge's finding of credibility.

(b) The State party further argues that Mr. Pinkney "failed to exercise due diligence in order to obtain the allegedly missing evidence".

It is respectfully submitted that this submission also is completely without merit and flies in the face of the evidence led at Mr. Pinkney's trial of the extensive efforts made by him to recover the missing evidence. It must as well be noted that Mr. Pinkney alleged that the missing briefcase was in the hands of the police, and that from the date of his arrest until his trial, he was being held in custody at the Oakalla prison on remand. It is submitted that it is remarkable that he managed to make the efforts that he did to recover the missing evidence, and further that the evidence of the attempts made corroborate his allegations as to the vital nature of the missing evidence. The evidence led at trial indicating that the Vancouver police turned the black briefcase in question over to the Royal Canadian Mounted Police for examination and indicating the interest shown by other agencies, including Canadian Immigration and the American F.B.I. further corroborates Mr. Pinkney's allegations concerning the nature of the evidence contained in the missing briefcase.

17. It is further submitted on Mr. Pinkney's behalf that the Government of British Columbia must be held responsible for delay resulting from mishaps in producing the trial transcripts and that the Court of Appeal itself, being aware of the delay, should also of its own motion have taken steps to expedite their production.

18. In its decision of 2 April 1980, the Human Rights Committee observed that allegations that a domestic court had committed errors of fact or law did not in themselves raise questions of violation of the Covenant unless it appeared that some of the requirements of article 14 might not have been complied with; Mr. Pinkney's complaints relating to his alleged difficulties in producing evidence in his defence and also the delay in producing the trial transcripts did appear to raise such issues.

19. The question now before the Committee is whether any facts have been shown which affected Mr. Pinkney's right to a fair hearing and a proper conduct of his defence. The Committee has carefully considered all the information before it in connection with his trial and subsequent appeal against conviction and sentence.

20. As regards the allegedly missing evidence, it has been established that the question whether it existed, and, if so, whether it would be relevant, was considered both by the trial judge and by the Court of Appeal. It is true that in the absence of the allegedly missing material

itself, the Court's findings depended on an assessment of the information before them. However, it is not the function of the Committee to examine whether this assessment by the Courts was based on errors of fact, or to review their application of Canadian law, but only to determine whether it was made in circumstances indicating that the provisions of the Covenant were not observed.

21. The Committee recalls that Mr. Pinkney was unable to convince the courts that such evidence would in any way have assisted his defence. Such a point is normally one on which the assessment of the domestic courts must be decisive. But in any event the Committee has not, in all the information before it, found any support for the allegation that material evidence was withheld by the Canadian authorities, depriving Mr. Pinkney of a fair hearing or adequate facilities for his defence.

22. As regards the next aspect, however, the Committee, having considered all the information relating to the delay of two and a half years in the production of the transcripts of the trial for the purposes of the appeal, considers that the authorities of British Columbia must be considered objectively responsible. Even in the particular circumstances this delay appears excessive and might have been prejudicial to the effectiveness of the right to appeal. At the same time, however, the Committee has to take note of the position of the Government that the Supreme Court of Canada would have been competent to examine these complaints. This remedy, nevertheless, does not seem likely to have been effective for the purpose of avoiding delay. The Committee observes on this point that the right under Article 14 (3) (c) to be tried without undue delay should be applied in conjunction with the right under Article 14 (5) to review by a higher tribunal, and that consequently there was in this case a violation of both of these provisions taken together.

(c) The claims concerning alleged wrongful treatment while in detention

23. Mr. Pinkney alleges that he has been subjected to continual racial insults and ill-treatment in prison. He claims, in particular, (i) that prison guards insulted him, humiliated him and physically ill-treated him because of his race, in violation of articles 10 (1) and 17 (1) of the Covenant, and (ii) that during his pre-trial detention he was not segregated from convicted persons, that his correspondence was arbitrarily interfered with and that his treatment as an unconvicted person was far worse than that given to convicted persons, in violation of articles 10 (1) and (2) (a) and 17 (1) of the Covenant.

24. The State party asserted that the Corrections Branch of the Department of the Attorney-General of British Columbia undertook two separate investigations of the allegations of racial insults and on both occasions found no apparent evidence to support Mr. Pinkney's claims. Moreover, the State party maintained that these allegations of the author appeared in the context of sweeping and numerous accusations of wrongdoing by

various federal and provincial government officials and by the courts in Canada. It therefore submitted that these allegations should be considered to be "an abuse of the right of submission" and declared inadmissible under article 3 of the Optional Protocol. In so far as the communication alleged that before conviction Mr. Pinkney was housed in the same wing of the Lower Mainland Regional Correction Centre as convicted persons and that his mail had been interfered with, the State party claimed that these allegations were not brought in writing to the attention of the appropriate authority, namely the Corrections Branch of the British Columbia Ministry of the Attorney-General, by or on behalf of Mr. Pinkney (though he made other complaints and therefore was aware of the procedure) until the Branch became aware of his letter of 7 April 1978 to the Human Rights Committee. The State party therefore submitted that Mr. Pinkney had failed in this respect to exhaust all available domestic remedies before submitting his claims to the Committee. Mr. Pinkney, however, pointed out that he was informed that an investigation had been made into his complaints by the Attorney-General's Office and that his charges were unsubstantiated.

25. The Human Rights Committee did not accept the State party's argument that the author's complaint concerning alleged racial insults should be declared inadmissible as an abuse of the right of submission. Moreover, the Committee was of the view that the author's complaints appeared to have been investigated by the appropriate authorities and dismissed and consequently it cannot be argued that domestic remedies had not been exhausted. The Committee therefore found that it was not barred, on any of the grounds set out in the Optional Protocol from considering these complaints on the merits, in so far as they related to events taking place on or after 19 August 1976 (the date on which the Covenant and the Optional Protocol entered into force for Canada).

26. According to the information submitted to the Committee by the State party, Mr. Pinkney's allegations that he was insulted, humiliated and physically ill-treated because of his race by prison guards while he was detained in the Lower Mainland Regional Correction Centre were the subject of inquiries on three occasions by the Inspection and Standards Division of the British Columbia Correction Service. The first of these was in February 1977 following a complaint by Mr. Pinkney to the British Columbia Human Rights Commission when an inspector of the Division interviewed him but concluded that Mr. Pinkney was unable to furnish sufficiently specific information to substantiate his complaints. The second and third were in 1978 following Mr. Pinkney's communication to the Human Rights Committee when he was not interviewed personally as he had by then left the Lower Mainland Regional Correction Centre but his lawyers were contacted and the Director of Inspection and Standards reported that, apart from one comment by a prison guard which was overheard by one of his lawyers and said to be "detrimental in nature or tone", the in-

vestigations he had ordered revealed no evidence to justify Mr. Pinkney's allegations.

27. Mr. Pinkney denies that he was ever interviewed personally about these complaints and objects that inquiries conducted by another department of the service complained against cannot be regarded as sufficiently independent. Mr. Pinkney has not, however, submitted to the Committee any contemporary written evidence of complaints of ill-treatment made by him and the Committee finds that it does not have before it any verifiable information to substantiate his allegations of violations of articles 10 (1) and 17 (1) of the Covenant in this respect. The Committee is not in a position to inquire further in this matter.

28. With regard to Mr. Pinkney's complaints that during his pre-trial detention he was not segregated from convicted prisoners and that his treatment as an unconvicted prisoner was worse than that given to convicted prisoners, the State party in its submission of 22 July 1981 has given the following explanations:

A. Services to remand prisoners:

In his 7 April 1978 letter to the Human Rights Committee, Mr. Pinkney alleges, without giving any specific example, that he was treated, as a remand prisoner, in a less favourable manner than was enjoyed by prisoners under sentence. It is inevitable that the treatment extended to remand prisoners will be regarded by them unfavourably when compared with that of sentenced prisoners, since the recreational, occupational and educational programmes offered to sentenced prisoners are not available to remand prisoners in the light of the nature and anticipated duration of their incarceration.

The fact that benefits identical to those available to convicted persons are not available to remand prisoners does not mean that they are not treated, as required under article 10, paragraph 1, of the International Covenant on Civil and Political Rights, with humanity and with respect for the inherent dignity of the human person. Like all prisoners, they can benefit from the physical and intellectual amenities offered by the Correctional Services, e.g. exercise, medical treatment, library services, religious counselling. It is true that they cannot avail themselves of certain programmes mostly destined to facilitate the social reinsertion of convicted persons. However, this does not, in the view of the Government of Canada, imply inhuman treatment or an attack on the dignity of remand prisoners. In fact, the contrary might be implied since these programmes aim to give effect to Canada's obligation to socially rehabilitate convicted individuals (Covenant, art. 10, para. 3).

B. Contact with convicted prisoners:

On page 3 of his letter of 7 April 1978 and on pages 2 and 3 of his letter of 10 December 1980 to the Committee, Mr. Pinkney alleges that he was incarcerated at the Lower Mainland Regional Correctional Centre in an area of that institution which held sentenced prisoners while he was on remand status. The practice at the L.M.R.C.C. is for some sentenced prisoners in protective custody to serve as food servers and cleaners in the remand area of the prison. This arrangement is designed to keep them away from other sentenced prisoners who might cause them harm. The sentenced prisoners in the remand unit are not allowed to mix with the prisoners on remand except to the extent it is inevitable from the nature of their duties. They are accommodated in separate tiers of cells from those occupied by remand prisoners.

The Government of Canada is of the view that lodging convicted prisoners in the same building as remand prisoners does not contravene article 10, paragraph 2, of the International Covenant on Civil and Political Rights. This was recognized in the annotations on the text of the draft international covenant on human rights prepared by the Secretary-General of the United Nations. In paragraph 42 of the said annotations, it was indicated that:

"Segregation in the routine of prison life and work could be achieved though all prisoners might be detained in the same

buildings. A proposal that accused persons should be placed 'in separate quarters' was considered to raise practical problems; if adopted, States parties might be obliged to construct new prisons."

Further, the Government of Canada does not consider that casual contact with convicted prisoners employed in the carrying out of menial duties in a correction centre results in a breach of the segregation provisions of the Covenant.

29. Mr. Pinkney claims that the contacts resulting from such employment of convicted prisoners were by no means "casual" but were "physical and regular" since they did in fact bring unconvicted and convicted prisoners together in physical proximity on a regular basis.

30. The Committee is of the opinion that the requirement of article 10 (2) (a) of the Covenant that "accused persons shall, save in exceptional circumstances, be segregated from convicted persons" means that they shall be kept in separate quarters (but not necessarily in separate buildings). The Committee would not regard the arrangements described by the State party whereby convicted persons work as food servers and cleaners in the remand area of the prison as being incompatible with article 10 (2) (a), provided that contacts between the two classes of prisoners are kept strictly to a minimum necessary for the performance of those tasks.

31. Mr. Pinkney also complains that while detained at the Lower Mainland Regional Correction Centre he was prevented from communicating with outside officials and was thereby subjected to arbitrary or unlawful interference with his correspondence contrary to article 17 (1) of the Covenant. In its submission of 22 July 1981 the State party gives the following explanation of the practice with regard to the control of prisoners' correspondence at the Correction Centre:

Mr. Pinkney, as a person awaiting trial, was entitled under section 1.21 (d) of the Gaol Rules and Regulations, 1961, British Columbia Regulations 73/61, in force at the time of his detention to the "provision of writing material for communicating by letter with (his) friends or for conducting correspondence or preparing notes in connexion with (his) defence". The Government of Canada does not deny that letters sent by Mr. Pinkney were subject to control and could even be censored. Section 2.40 (b) of the Gaol Rules and Regulations, 1961 is clear on that point:

"2.40 (b) Every letter to or from a prisoner shall (except as hereinafter provided in these regulations in the case of certain communications to or from a legal adviser) be read by the Warden or by a responsible officer deputed by him for the purpose, and it is within the discretion of the Warden to stop or censor any letter, or any part of a letter, on the ground that its contents are objectionable or that the letter is of excessive length."

Section 42 of the Correctional Centre Rules and Regulations, British Columbia Regulation 284/78, which came into force on 6 July 1978 provides that:

"42 (1) A director or a person authorized by the director may examine all correspondence other than privileged correspondence between an inmate and another person where he is of the opinion that the correspondence may threaten the management, operation, discipline or security of the correctional centre.

"(2) Where in the opinion of the director, or a person authorized by the director, correspondence contains matter that threatens the management, operation, discipline or security of the correctional centre, the director or person authorized by the director may censor that matter.

"(3) The director may withhold money, or drugs, weapons, or any other object which may threaten the management, operation, discipline, or security of a correctional centre, or an object in con-

travention of the rules established for the correctional centre by the director contained in correspondence, and where this is done the director shall

"(a) Advise the inmate,

"(b) In so far as the money or object is not held as evidence for the prosecution of an offence against an enactment of the province or of Canada, place the money or object in safe-keeping and give it to the inmate on his release from the correctional centre, and

"(c) Carry out his duties under this section in a manner that, in so far as is reasonable, respects the privacy of the inmate and person corresponding with the inmate.

"(4) An inmate may receive books or periodicals sent to him directly from the publisher.

"(5) Every inmate may send as many letters per week as he sees fit."

32. Although these rules were only enacted subsequent to Mr. Pinkney's departure from the Lower Mainland Regional Correction Centre, in practice they were being applied when he was detained in that institution. This means that privileged correspondence, defined in section 1 of the regulations as meaning "correspondence addressed by an inmate to a Member of Parliament, Members of the Legislative Assembly, barrister or solicitor, commissioner of corrections, regional director of corrections, chaplain, or the director of inspection and standards", were not examined or subject to any control or censorship. As for non-privileged correspondence, it was only subject to censorship if it contained matter that threatened the management, operation, discipline, or security of the correctional centre. At the time when Mr. Pinkney was detained therein, the procedure governing prisoners' correspondence did not allow for a general restriction on the right to communicate with government officials. Mr. Pinkney was not denied this right. To seek to restrict his communication with various government officials while at the same time allowing his access to his lawyers would seem a futile gesture since through his lawyers, he could put his case to the various government officials whom he was allegedly prevented from contacting.

33. In his letter of 27 August 1981 Mr. Pinkney comments as follows on these submissions of the State party:

Further, on page 5 of the Government of Canada's submission, it is alleged by the Government that my mail was not tampered with at Oakalla, when in point of fact, not only was my mail interfered with by prison authorities in the normal sense of the requirements affecting all prisoners, but in point of fact, as the Government well knows, in some instances my mail to members of Government (whose mail should indeed have been privileged mail) never even got to these people, for it never even left the prison, once I mailed it. To imply, as does the Government, that such actions would be "futile" for prison authorities to engage in, due to my having access to my lawyer at certain very definite times, is absolute nonsense.

34. No specific evidence has been submitted by Mr. Pinkney to establish that his correspondence was subjected to control or censorship which was not in accordance with the practice described by the State party. However, article 17 of the Covenant provides not only that "No one shall be subjected to arbitrary or unlawful interference with his correspondence" but also that "Everyone has the right to the protection of the law against such interference". At the time when

Mr. Pinkney was detained at the Lower Mainland Regional Correction Centre the only law in force governing the control and censorship of prisoners' correspondence appears to have been section 2.40 (b) of the Gaol Rules and Regulations, 1961. A legislative provision in the very general terms of this section did not, in the opinion of the Committee, in itself provide satisfactory legal safeguards against arbitrary application, though, as the Committee has already found, there is no evidence to establish that Mr. Pinkney was himself the victim of a violation of the Covenant as a result. The Committee also observes that section 42 of the Correc-

tional Centre Rules and Regulations that came into force on 6 July 1978 has now made the relevant law considerably more specific in its terms.

35. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the communication discloses a violation of article 14 (3) (c) and (5) of the Covenant because the delay in producing the transcripts of the trial for the purpose of the appeal was incompatible with the right to be tried without undue delay.

Communication No. 63/1979

Submitted by: Violeta Setelich on 28 November 1979

Alleged victim: Raúl Sendic Antonaccio

State party: Uruguay

Date of adoption of views: 28 October 1981 (fourteenth session)

Submission to IACHR—Exhaustion of domestic remedies—Access to counsel—Torture—Medical care in prison—Solitary confinement—Presence of accused at trial—Delay in proceedings—Fair trial—Witnesses for the defence—Right of prisoner to communicate directly with Committee—Competence of Committee—Obligation of State party under article 4 (2) of Optional Protocol

Articles of Covenant: 7, 9 (3), 10 (1) and 14 (3)

Articles of Optional Protocol: 4 (2) and 5 (2) (a) and (b)

Views under article 5 (4) of the Optional Protocol

1. The author of this communication (initial letter dated 28 November 1979 and further letters dated 28 and 31 May, 23 June, 7 July and 3 October 1980, 9 February, 27 May and 22 July 1981) is Violeta Setelich, a Uruguayan national residing in France. She submitted the communication on behalf of her husband, Raúl Sendic Antonaccio, a 54-year-old Uruguayan citizen, detained in Uruguay.

2.1 The author stated in her submission on 28 November 1979 that her husband had been the main founder of the Movimiento de Liberación Nacional (MLN-Tupamaros). She commented that the MLN(T) had been a political movement—not a terrorist one—aimed at establishing a better social system through the radical transformation of socio-economic structures and recourse to armed struggle. She further stated that, on 7 August 1970, after seven years of clandestine activity, her husband was arrested by the Uruguayan police; that on 6 September 1971 he escaped from Punta Carretas prison together with 105 other political detainees; that he was re-arrested on 1 September 1972 and taken, seriously wounded, to a military hospital; and that, after having been kidnapped by a military group, he finally appeared in Military Detention Establishment No. 1 (Libertad prison).

2.2 The author further stated that, between June and September 1973, eight women and nine men, including her husband, were transferred by the army to unknown places of detention, and that they were informed that they had become "hostages" and would be executed if their organization, MLN(T), took any action. She added that, in 1976, the eight women "hostages" were taken back to a military prison, but that the nine men continued to be held as "hostages". The author enclosed a statement, dated February 1979, from Elena Curbelo de Mirza, one of the eight women "hostages" who were released in March 1978. (In her statement, Mrs. Mirza confirmed that Raúl Sendic and eight other men detainees continued to be considered as "hostages". She listed the names of her fellow hostages; both the men and the women. She stated that a hostage lived in a tiny cell with only a mattress. The place was damp and cold and had no window. The door was always closed and the detainee was kept there alone 24 hours a day. On rare occasions he was taken out to the yard, blindfolded and with his arms tied. She further stated that hostages were often transferred to fresh prisons, that relatives had then to find where they were and that visits were authorized only at very irregular intervals.)

2.3 The author described five places of detention where her husband was kept between 1973 and 1976, and stated that in all of them he was subjected to mistreatment (solitary confinement, lack of food and harassment), while in one of them, as a result of a severe beating by the guards, he developed a hernia. She mentions that, in September 1976, he was transferred to the barracks of Ingenieros in the city of Paso de los Toros.

2.4 The author declared that, beginning in February 1978, her husband was once again subjected to inhuman treatment and torture: for three months, he was made to do the "plantón" (stand upright with his eyes blindfolded) throughout the day; he was only able to rest and

sleep for a few hours at a time; he was beaten and given insufficient food and he was not allowed to receive visits. In May 1978, he received his first visit after this three months' sanction and his state of health was alarming.

2.5 At the end of August 1978, the authorities officially stated that, because of the danger he represented, her husband was not detained in Libertad Prison, but at Paso de los Toros. The author maintained that the fact her husband was held as a hostage and the cruel and discriminatory treatment to which he was subjected constituted flagrant violations of both national and international law, particularly the Geneva Conventions of 1949.

2.6 The author stressed that her husband's situation had not changed with the coming into force of the International Covenant on Civil and Political Rights and the Optional Protocol on 23 March 1976. She requested the Human Rights Committee to take appropriate action with a view to securing her husband's right to submit a communication himself.

2.7 The author further alleged that her husband had needed an operation for his hernia since 1976; that, despite a medical order to perform such an operation, the military authorities had refused to take him to a hospital, and that his state of health continued to deteriorate. (Because of his hernia, he could take only liquids and was unable to walk without help; he also suffered from heart disease.) She feared for his life and even thought that it had been decided to kill him slowly, notwithstanding the official abolition of the death penalty in Uruguay in 1976. She therefore requested the Human Rights Committee to apply rule 86 of its provisional rules of procedure in order to avoid irreparable damage to his health.

2.8 The author stated that her husband had been denied all judicial guarantees. She further stated that, since December 1975, it had been compulsory for all cases relating to political offences to be heard by military courts and that her husband's trial, which was still pending, would, therefore, be before such a body.

2.9 She added that in July 1977, the Government issued *Acta Institucional No. 8*, which in effect subordinated the judicial power to the Executive, and that independent and impartial justice could not be expected from the military courts. She further alleged that domestic remedies such as *habeas corpus*, were not applicable, that civilians were deprived of the safeguards essential to a fair trial and of the right to appeal, that defence lawyers were systematically harassed by the military authorities and that her husband had not been allowed to choose his own counsel. She maintained that all domestic remedies had been exhausted.

2.10 She also stated that, at the time of writing (28 November 1979), she was unaware of her husband's whereabouts. She requested the Human Rights Committee to obtain information from the State party about his place of detention and conditions of imprisonment.

3. The author claimed that the following provisions of the International Covenant on Civil and Political

Rights had been violated by the Uruguayan authorities: articles 2, 6, 7, 10 and 14.

4. On 26 March 1980, the Human Rights Committee decided to transmit the communication to the State party, under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility of the communication. The Committee also requested the State party to furnish information on the state of health of Raúl Sendic Antonaccio, the medical treatment given to him and his precise place of detention.

5. By a note dated 16 June 1980, the State party contested the admissibility of the communication on the ground that the same matter had been submitted to the Inter-American Commission on Human Rights (IACHR) as case No. 2937. In this connection the Committee ascertained from the Secretariat of IACHR that the case referred to was submitted by a third party and opened before IACHR on 26 April 1978. The State party did not furnish any information concerning Raúl Sendic's state of health, the medical treatment given to him or his whereabouts.

6. In her submission dated 23 June 1980, the author, commenting on the State party's submission, stated that she had never submitted her husband's case to the IACHR. She further stated that it had become known, thanks to strong international pressure on the military authorities, that her husband was detained in the Regimiento "Pablo Galarza" in the department of Durazno. She alleged that the State party had refrained from giving any information on her husband's state of health because he was kept on an inadequate diet in an underground cell with no fresh air or sunlight and his contacts with the outside world were restricted to a monthly visit that lasted 30 minutes and took place in the presence of armed guards.

7. In a further submission dated 7 July 1980, Violeta Setelich identified the author of the communication to IACHR concerning its case No. 2937 and enclosed a copy of his letter, dated 8 June 1980, addressed to the Executive Secretary of IACHR, requesting that consideration of case No. 2937 concerning Raúl Sendic should be discontinued before that body, so as to remove any procedural uncertainties concerning the competence of the Human Rights Committee to consider the present communication under the Optional Protocol.

8. In the circumstances, the Committee found that it was not precluded by article 5 (2) (a) of the Optional Protocol from considering the communication. The Committee was unable to conclude from the information at its disposal that there had been remedies available to the victim of the alleged violations which had not been invoked. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (b) of the Optional Protocol.

9. On 25 July 1980, the Human Rights Committee therefore decided:

(a) That the communication was admissible;

(b) That, in accordance with article 4 (2) of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of the Committee's decision, written explanations or statements clarifying the matter and the measures, if any, that it had taken to remedy the situation;

(c) That the State party should be requested to furnish the Committee with information on the present state of health of Raúl Sendic Antonaccio, the medical treatment given to him and his exact whereabouts;

(d) That the State party should be informed that the written explanations or statement submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to discharge its responsibilities, it required specific responses to the allegations which had been made by the author of the communication, and the State party's explanations of its actions. The State party was requested, in that connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration.

10. In a letter dated 3 October 1980, the author argued that her husband had the right to be informed of the Committee's decision of 25 July 1980, declaring the communication admissible, and that he should be given copies of the relevant documents and afforded an opportunity to supplement them as he saw fit.

11. On 24 October 1980, the Human Rights Committee,

Noting that the author of the communication, in her submission of 28 November 1979, had expressed grave concern as to her husband's state of health and the fact that his whereabouts were kept secret by the Government of Uruguay,

Taking into account the fact that its previous requests for information about the present situation of Raúl Sendic Antonaccio had gone unheeded,

Noting further the letter dated 3 October 1980 from the author of the communication,

Decided:

1. That the State party should be reminded of the decisions of 26 March and 25 July 1980 in which the Human Rights Committee requested information about the state of health of Raúl Sendic Antonaccio, the medical treatment given to him and his exact whereabouts;

2. That the State party should be urged to provide the information sought without any further delay;

3. That, as requested by Violeta Setelich, the State party should be requested to transmit all written material pertaining to the proceedings (submissions of the parties, decisions of the Human Rights Committee) to Raúl Sendic Antonaccio, and that he should be given the opportunity himself to communicate directly with the Committee.

12.1 In further letters dated 9 February, 27 May and 22 July 1981, the author restated her deep concern

about her husband's state of health. She reiterated that after soldiers had struck him in the lower abdomen with gun butts at Colonial barracks in mid-1974, her husband had developed an inguinal hernia and that there was a risk that the hernia might become strangulated. She stated that Sendic's relatives had repeatedly requested that he should be operated on because of his extremely poor state of health, but to no avail.

12.2 She added that her husband's conditions of detention were slightly better at the Regimiento Pablo Galarza No. 2, since he was allowed to go out to the open air for one hour a day. She stressed, however, that he should be transferred to the Libertad Prison, where all other political prisoners were held.

12.3 Concerning her husband's legal situation, she added the following information:

(i) In July 1980, her husband was sentenced to the maximum penalty under the Uruguayan Penal Code: 30 years' imprisonment and 15 years of special security measures. He had not been informed of the charges against him before the trial, or allowed to present witnesses and the hearing had been held *in camera* and in his absence. He had been denied the right of defence as he had never been able to contact the lawyer assigned to him, Mr. Almicar Perrea.

(ii) In September 1980 and in April and May 1981, the authorities announced that her husband's sentence was to be reviewed by the Supreme Military Tribunal, but this had not yet occurred.

(iii) Though Sendic's relatives had appointed Maître Chéron to be his lawyer, Maître Chéron was denied in September 1980 and in January 1981 the right to examine Sendic's dossier and to visit him.

13. The time-limit for the State party's submission under article 4 (2) of the Optional Protocol expired on 27 February 1981. To date, no such submission has been received from the State party.

14. On 21 August 1981, the State party submitted the following comments on the Committee's decision of 24 October 1980 (see para. 11 above):

The Committee's decision of 24 October 1980 adopted at its eleventh session on the case in question exceeds its authority. The competence granted to the Committee on Human Rights by the Optional Protocol to the International Covenant on Civil and Political Rights is contained in article 5 (4) which states: "The Committee shall forward its views to the State party concerned and to the individual." The scope of this rule is quite clearly defined. The Committee has authority only to send its observations to the State party concerned.

On the contrary, in the present decision, the Committee had arrogated to itself competence which exceeds its powers.

The Human Rights Committee is applying a rule which does not exist in the text of the Covenant and the Protocol, whereas the function of the Committee is to fulfil and apply the provisions of those international instruments. It is inadmissible for a body such as the Committee to create rules flagrantly deviating from the texts emanating from the will of the ratifying States. Those were the circumstances in which the decision in question was taken. Paragraph 3 requests, with absolutely no legal basis, that a detainee under the jurisdiction of a State party—Uruguay—be given the opportunity to communicate directly with the Committee. The Government of Uruguay rejects that decision, since to accept it would be to create the dangerous precedent of

receiving a decision which violates international instruments such as the Covenant and its Protocol. Moreover, the Uruguayan Government considers that the provisions in those international instruments extend to State parties as subjects of international law. Thus these international norms, like any agreement of such nature, are applicable to States and not directly to individuals. Consequently, the Committee can hardly claim that this decision extends to any particular individual. For the reasons given, the Government of Uruguay rejects the present decision of the Committee, which violates elementary norms and principles and thus indicates that the Committee is undermining its commitments in respect of the cause of promoting and defending human rights.

15. The Human Rights Committee, having examined the present communication in the light of all the information made available to it by the parties as provided in article 5 (1) of the Optional Protocol, hereby decides, in the absence of comments by the State party, to base its views on the following facts as set out by the author:

16.1 *Events prior to the entry into force of the Covenant:* Raúl Sendic Antonaccio, a main founder of the Movimiento de Liberación Nacional (MLN)—Tupamaros, was arrested in Uruguay on 7 August 1970. On 6 September 1971, he escaped from prison, and on 1 September 1972 he was re-arrested after having been seriously wounded. Since 1973 he has been considered as a “hostage”, meaning that he is liable to be killed at the first sign of action by his organization, MLN (T). Between 1973 and 1976, he was held in five penal institutions and subjected in all of them to mistreatment (solitary confinement, lack of food and harassment). In one of them, in 1974, as a result of a severe beating by the guards, he developed a hernia.

16.2 *Events subsequent to the entry into force of the Covenant:* In September 1976, he was transferred to the barracks of Ingenieros in the city of Paso de los Toros. There, from February to May 1978, or for the space of three months, he was subjected to torture (“plantones”, beatings, lack of food). On 28 November 1979 (date of the author’s initial communication), his whereabouts were unknown. He is now detained in the Regimiento-Pablo Galarza No. 2, Department of Durazno, in an underground cell. His present state of health is very poor (because of his hernia, he can take only liquids and is unable to walk without help) and he is not being given the medical attention he requires. In July 1980, he was sentenced to 30 years’ imprisonment plus 15 years of special security measures. He was not informed of the charges brought against him. He was never able to contact the lawyer assigned to him, Mr. Almícar Perrea. His trial was held *in camera* and in his absence and he was not allowed to present witnesses in support of his case. In September 1980 and in April and May 1981, it was publicly announced that his sentence was to be reviewed by the Supreme Military Tribunal.

17. The Human Rights Committee observes that, when it took its decision on admissibility on 25 July 1980, it had no information about Raúl Sendic’s trial before a court of first instance. The Committee further observes that, although his sentence is to be reviewed by the Supreme Military Tribunal (there has as yet been no

indication that these final review proceedings have taken place), the Committee is not barred from considering the present communication, since the application of remedies has been unreasonably prolonged.

18. The Human Rights Committee cannot accept the State party’s contention that it exceeded its mandate when in its decision of 24 October 1980, it requested the State party to afford to Raúl Sendic Antonaccio the opportunity to communicate directly with the Committee. The Committee rejects the State party’s argument that a victim’s right to contact the Committee directly is invalid in the case of persons imprisoned in Uruguay. If Governments had the right to erect obstacles to contacts between victims and the Committee, the procedure established by the Optional Protocol would, in many instances, be rendered meaningless. It is a prerequisite for the effective application of the Optional Protocol that detainees should be able to communicate directly with the Committee. The contention that the International Covenant and the Protocol apply only to States, as subjects of international law, and that, in consequence, these instruments are not directly applicable to individuals is devoid of legal foundation in cases where a State has recognized the competence of the Committee to receive and consider communications from individuals under the Optional Protocol. That being so, denying individuals who are victims of an alleged violation their rights to bring the matter before the Committee is tantamount to denying the mandatory nature of the Optional Protocol.

19. The Human Rights Committee notes with deep concern that the State party has failed to fulfil its obligations under article 4 (2) of the Optional Protocol and has completely ignored the Committee’s repeated requests for information concerning Raúl Sendic’s state of health, the medical treatment given to him and his exact whereabouts. The Committee is unable to fulfil the task conferred upon it by the Optional Protocol if States parties do not provide it with all the information relevant to the formation of the views referred to in article 5 (4). Knowledge of the state of health of the person concerned is essential to the evaluation of an allegation of torture or ill-treatment.

20. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee, in so far as they continued or occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay), disclose violations of the International Covenant on Civil and Political Rights, particularly of:

Article 7 and article 10 (1), because Raúl Sendic is held in solitary confinement in an underground cell, was subjected to torture for three months in 1978 and is being denied the medical treatment his condition requires;

Article 9 (3), because his right to trial within reasonable time has not been respected;

Article 14 (3) (a), because he was not promptly informed of the charges against him;

Article 14 (3) (b), because he was unable either to choose his own counsel or communicate with his appointed counsel and was, therefore, unable to prepare his defence;

Article 14 (3) (c), because he was not tried without undue delay;

Article 14 (3) (d), because he was unable to attend the trial at first instance;

Article 14 (3) (e), because he was denied the opportunity to obtain the attendance and examination of witnesses on his behalf.

21. The Committee, accordingly, is of the view that the State party is under an obligation to take immediate steps to ensure strict observance of the provisions of the Covenant and to provide effective measures to the victim, and in particular to extend to Raúl Sendic treatment laid down for detained persons in articles 7 and 10 of the Covenant and to give him a fresh trial with all the procedural guarantees prescribed by article 14 of the Covenant. The State party must also ensure that Raúl Sendic receives promptly all necessary medical care.

FIFTEENTH SESSION

Communication No. 10/1977

Submitted by: Alice Altesor and Víctor Hugo Altesor on March 1977

Alleged victim: Alberto Altesor (authors' father)

State party: Uruguay

Date of adoption of views: 29 March 1982 (fifteenth session)

Submission to IACHR—Withdrawal of case from IACHR by authors—Resubmission by third party—Exhaustion of domestic remedies—Events prior to entry into force of Covenant and Optional Protocol—Interim measures—Detention incommunicado—Habeas corpus—Ill-treatment—Procedural delay—Fair trial—Defence witnesses—Medical care in prison—Copies of court orders and decisions—Deprivation of political rights

Articles of Covenant: 9 (3) and (4), 10 (1), 14 (1) and (3) and 25

Article of Optional Protocol: 5 (2) (a) and (b).

Views under article 5 (4) of the Optional Protocol

1. The authors of the communication (initial letter dated 10 March 1977 and further letters dated 1 August and 26 November 1977, 19 May 1978, 16 April 1979, 10 June 1980 and 28 January and 6 October 1981) are Uruguayan nationals, residing in Mexico. They submitted the communication on behalf of their father, Alberto Altesor González, a 68-year-old Uruguayan citizen, a former trade-union leader and member of the Uruguayan Chamber of Deputies, alleging that he is arbitrarily detained in Uruguay.

1.2 The authors of the communication state that their father was arrested in Montevideo on 21 October 1975 without any formal charges brought against him. Although the fact of his arrest and the place of his imprisonment were not made public, the writers claim that from information provided by eye-witnesses arrested at the same time and subsequently released, it can be affirmed that their father was first detained in a private house and afterwards at the Batallón de Infantería No. 3. There he was allegedly subjected to beatings and

electric shocks, forced to remain standing for a total of more than 400 hours, and strung up for long periods, although shortly before his arrest he had undergone a heart operation which saved his life but at the same time made it necessary for him to observe very strict rules regarding work, diet and medication. On 14 December 1975 he was transferred to the Batallón de Artillería No. 5, where he remained handcuffed, hooded and in absolute solitary confinement. He was later moved to the Libertad prison. He was detained under the "prompt security measures" and was not brought before a judge until over 16 months after his arrest, when he was ordered to be tried, allegedly on no other charge than that of his public and well-known trade union and political militancy. He has been deprived of his political rights under *Acta Institucional No. 4* of 1 September 1976.

1.3 The authors further contend that in practice internal recourses in Uruguay are totally ineffective and that the recourse of *habeas corpus* is denied by the authorities to persons detained under the "prompt security measures".

1.4 In a further submission, dated 1 August 1977, the authors allege that in view of their father's very poor state of health, interim measures should be taken, in accordance with rule 86 of the rules of procedure of the Committee, in order to avoid irreparable damage to their father's health and life. The authors claim that the following provisions of the International Covenant on Civil and Political Rights have been violated: articles 7 (1), 9 (3) and (4), 10 (2) (a) and (3), and 25 (a), (b) and (c).

2. By its decision of 26 August 1977, the Human Rights Committee transmitted the communication under rule 91 of the provisional rules to the State party

concerned requesting information and observations relevant to the question of admissibility of the communication, as well as information concerning the state of health of the alleged victim.

3. By a note dated 27 October 1977, the State party objected to the admissibility of the communication on two grounds: (a) that the same matter was already being examined by the Inter-American Commission on Human Rights (IACHR) as case No. 2112 and (b) that the alleged victim had not exhausted all available domestic remedies.

4. By a further decision of 26 January 1978 the Committee:

(a) Informed the authors of the communication of the State party's objection on the ground that a case concerning their father was already under examination by IACHR, as case No. 2112, and solicited their comments thereon;

(b) Informed the State party that, in the absence of more specific information concerning the domestic remedies said to be available to the author of this communication and the effectiveness of those remedies as enforced by the competent authorities in Uruguay, the Committee was unable to accept that he had failed to exhaust such remedies and the communication would therefore not be considered inadmissible in so far as exhaustion of domestic remedies was concerned, unless the State party gave details of the remedies which it submitted had been available to the author in the circumstances of his case, together with evidence that there would be a reasonable prospect that such remedies would be effective;

(c) Expressed concern over the fact that the State party had, so far, furnished no information on Alberto Altesor's state of health, urged the State party as a matter of urgency to arrange for him to be examined by a competent medical board and requested the State party to furnish it with a copy of the board's report.

5.1 By a note dated 14 April 1978, the State party reiterated that the same matter was before IACHR and it submitted information which consisted of a general description of the rights available to the accused persons in the military criminal tribunals and of the domestic remedies at their disposal as means of protecting and safeguarding their rights under the Uruguayan judicial system. The State party also stated the following concerning Alberto Altesor:

He was a member of the Executive Committee of the Communist Party and was responsible for the so-called fourth section of the prohibited Communist Party, i.e. the infiltration of the armed forces. He was arrested owing to his connection with the clandestine and subversive activity of the said unlawful organization on 21 October 1975 and placed in custody under the prompt security measures. Subsequently he was brought before the military examining judge of the first circuit; on 24 September 1976 the judge ordered him to be placed on trial, charged with the offence referred to in article 60 (V) of the Military Criminal Code concerning subversive associations.

5.2 Concerning the state of health of Alberto Altesor, the State party submitted that Alberto Altesor González underwent surgery on 26 December 1974 for a slight aortic stenosis, that he was entirely exempt from

any kind of task involving physical effort, that he was given a diet suitable for the disease and was under medical supervision, that the conditions under which Altesor was detained were governed by the rules of the prison establishment which are generally applicable to all ordinary offenders and which make adequate provision for recreation, visits, correspondence, etc.; that a panel of doctors had been asked to examine Alberto Altesor and that the opinion of this panel of doctors was going to be communicated to the Committee in due course. The medical report was received on 5 October 1979 and transmitted to the authors of the communication for information.

6. Further proceedings before the Human Rights Committee were considerably delayed owing, first, to the authors' repeated efforts to conceal the fact that they were indeed also the authors of case No. 2112 before IACHR and, thereafter, by their statements, which could not be confirmed, that they had withdrawn case No. 2112 from consideration by IACHR. Finally, on 10 June 1980, the authors furnished the Human Rights Committee with a copy of their withdrawal request by the secretariat of IACHR. The Committee has however ascertained that the case concerning Alberto Altesor continues to be pursued by IACHR, on the basis of a new complaint from an unrelated third party, submitted to IACHR in March 1979.

7.1 For the determination of admissibility of the communication which the Committee had before it, the following facts were established:

(a) Alice and Víctor Hugo Altesor submitted their father's case to IACHR in October 1976;

(b) They submitted their father's case to the Human Rights Committee on 10 March 1977;

(c) In March 1979, an unrelated third party complained to IACHR about the situation of Alberto Altesor;

(d) By letter of 6 May 1980, Alice and Víctor Hugo Altesor withdrew their submission from consideration by IACHR.

7.2 The Committee concluded that it was not prevented from considering the communication submitted to it by the authors on 10 March 1977 by reason of the subsequent complaint made by an unrelated third party under the procedures of IACHR. Accordingly the Committee found that the communication was not inadmissible under article 5 (2) (a) of the Optional Protocol.

7.3 With regard to the exhaustion of local remedies, the Committee was unable to conclude, on the basis of the information before it that there were remedies available to the alleged victim which he should have pursued. Accordingly, the Committee found that the communication was not inadmissible under article (5) (2) (b) of the Optional Protocol.

8. The Human Rights Committee therefore decided on 29 October 1980:

(1) That the communication was admissible, and that the authors were justified in acting on behalf of their father;

(2) That the authors should be requested to clarify without delay, and not later than six weeks from the date of the transmittal of the present decision to them, which of the events previously described by them were alleged to have occurred on or after 23 March 1976 (the date on which the International Covenant on Civil and Political Rights entered into force for Uruguay) and to provide the Committee with detailed information (including relevant dates) as to their present knowledge about their father's treatment and situation after 23 March 1976;

...

(4) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee within six months of the date of the transmittal to it of any submission received from the authors of the communication pursuant to operative paragraph 2 above, written explanations and statements clarifying the matter and the remedy, if any, that may have been taken by it;

(5) That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to perform its responsibilities, it required specific and detailed responses to each and every allegation made by the authors of the communication, and the State party's explanations of the actions taken by it. The State party was requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration;

...

(7) That, further to the requests set out in operative paragraphs 4 and 5 above, the State party be requested to furnish the Committee, as soon as possible, with information concerning the present state of health of Alberto Altesor, considering that the latest information from the State party on this point was dated 5 October 1979.

9.1 On 28 January 1981 the authors submitted further information and clarifications pursuant to paragraph 2 of the Committee's decision of 29 October 1980.

9.2 With regard to acts which allegedly occurred or continued or had effects which themselves constituted a violation of the Covenant after 23 March 1976, the authors maintain that all the alleged violations of the International Covenant on Civil and Political Rights occurred or continued to make their effects felt after that date. In particular the authors indicate that their father was kept in solitary confinement without being brought before a judge for 16 months, 11 of which were after the date on which the Covenant entered into force for Uruguay.

9.3 The authors further allege that violations of the Covenant occurred not only after its entry into force, but also after this communication was filed with the Committee, including specific violations of article 14, *inter alia*, that Alberto Altesor was not tried until 1977

(i.e. after undue delay), that he was tried by a military and not by a civilian court, that the judge was not competent, independent or impartial, that the accused was not promptly informed of the charges against him, that he was not allowed to defend himself in person, that there was no public hearing, and that the witnesses on his behalf were not allowed to be examined under the same conditions as the witnesses against him. The authors also allege procedural irregularities in the trial, including the sentencing of Alberto Altesor to eight years' imprisonment, although the prosecution had allegedly asked only for a sentence of six years. Although more than five years have elapsed since his arrest (at the time of writing in January 1981), his case is supposedly still in a court of second instance.

9.4 With regard to Alberto Altesor's state of health, the authors allege that he has been a patient at the Military Hospital since 29 December 1980; before that, at the Libertad prison, he had been found to be suffering from chest pains, fainting and loss of weight.

10.1 In its submission under article 4 (2) of the Optional Protocol, dated 21 August 1981, the State party rejects the authors' assertion in their submission of 28 January 1981 that article 14 of the Covenant was violated because Alberto Altesor was tried by a military and not by a civilian tribunal, referring to the Uruguayan law No. 14068 (State Security Act), which establishes the jurisdiction of military courts over offences against the State, including the offences of "subversive association" and "action to overthrow the Constitution" of which Mr. Altesor was accused. The State party further asserts that due procedural guarantees were observed during the trial, and that Alberto Altesor had court-appointed counsel.

10.2 With regard to the authors' assertion that the case is still pending in a court of second instance, the State party explains that this is incorrect and that the court of second instance confirmed the judgement of the court of first instance on 18 March 1980.

10.3 The State party also rejects the assertion that Alberto Altesor is being subjected to persecution because of his political ideas.

10.4 With regard to Alberto Altesor's state of health, the State party indicates that he underwent medical examination on 20 March 1981, without, however, specifying the result of the examination. The State party adds that it has communicated to the authors via the Uruguayan Embassy in Mexico that the Government of Uruguay is prepared to carry out any further medical examinations and treatment as may be required by Alberto Altesor's state of health.

11.1 In a further letter dated 6 October 1981 the authors refer to the State party's submission under article 4 (2), and claim that it does not answer their specific complaints of violations of guarantees embodied in the Covenant. The fact that their father was brought before the military courts because of the terms of a particular Uruguayan law cannot alter the essence of the matter: "that the procedure applied in this way is lacking in internationally established guarantees".

11.2 With respect to their allegation that the sentence against their father was politically motivated, they indicate that the State party still has not specifically stated which acts the detainee committed in order to warrant his present situation.

11.3 The authors also declare that they never received any information about their father's state of health through the Embassy of Uruguay in Mexico.

12.1 The Human Rights Committee has considered the present communication in the light of all information made available to it by the parties, as provided in article 5 (1) of the Optional Protocol. The Committee bases its views on the following facts:

12.2 Alberto Altesor was arrested in Montevideo on 21 October 1975 and placed in custody under the "prompt security measures". Recourse to *habeas corpus* was not available to him. On 24 September 1976 a military judge ordered him to be placed on trial, charged with the offence referred to in article 60 (V) of the Military Criminal Code concerning "subversive association". The court of first instance sentenced him to eight years' imprisonment (the Committee is not informed of the date of this decision). The court of second instance confirmed the judgement of the court of first instance on 18 March 1980.

13.1 In formulating its views the Human Rights Committee also takes into account the following considerations, which reflect a failure by both parties to furnish the information and clarifications necessary for the Committee to formulate final views on a number of important issues:

13.2 In operative paragraph 2 of its decision on admissibility of 29 October 1980, the Committee requested the authors to clarify which of the events previously described by them were alleged to have occurred on or after 23 March 1976 (the date on which the Covenant entered into force for Uruguay) and to provide detailed information as to their present knowledge about their father's treatment after this date. The Committee notes that the authors' reply on 28 January 1981 and their submission of 6 October 1981 do not furnish the Committee with any further precise information to enable it to establish with certainty what in fact occurred after 23 March 1976. The authors claim that, based on information provided by eye-witnesses arrested at the same time as Alberto Altesor and subsequently released, their father was subjected to torture following his arrest. No eye-witness testimonies have been furnished, nor a clear indication of the time-frame involved. The authors have however explained that the "mistreatment which he suffered earlier, to the point of having to be hospitalized, is not inflicted on him at present".

13.3 With respect to the date when Alberto Altesor was first brought before a judge, the authors claim that he was kept incommunicado and not brought before a judge for over 16 months after his arrest. The State party's explanations in its note of 14 April 1978 are ambiguous in this respect: "Fue detenido... el 21/10/75

e internado al amparo de las medidas prontas de seguridad. Con posterioridad fue sometido al juez militar de instrucción de 1er. turno quien con fecha 24 de Septiembre de 1976 dispuso su procesamiento ...". The Committee cannot determine whether "con posterioridad" (subsequently) means that Alberto Altesor was brought before a judge within a reasonable time; nor is it clear whether "fue sometido al juez militar" means that he was brought personally before the judge or whether his case was merely submitted to the judge in writing or in the presence of a legal representative. The State party should have clearly stated the precise date when Alberto Altesor was brought personally before a judge, since article 9 (3) of the Covenant requires that "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge." Without that statement, the State party has failed to rebut the authors' allegation that their father was not brought before a judge until after 16 months of detention. The fact that Alberto Altesor was committed for trial by a military judge on 24 September 1976 (i.e. over 11 months after his arrest), does not adequately clarify the matter.

13.4 The authors claim that their father was arrested because of his political activities. In reply, the State party stated that Alberto Altesor headed a section of the proscribed Communist Party believed to be engaged in the infiltration of the armed forces, and that he was arrested owing to his connection with the clandestine and subversive activity of the said unlawful organization. The State party has not furnished any court decision or other information as to the specific nature of the activities in which Alberto Altesor was alleged to have been engaged and which led to his detention.

13.5 In operative paragraph 5 of its decision of 29 October 1980 the Committee requested the State party to furnish specific and detailed responses to each and every allegation made by the authors. The Committee observes that the State party's submission under article 4 (2) of the Optional Protocol, dated 21 August 1981, does not constitute sufficient refutation with regard to various of the allegations made by the authors. The State party's general statements that "the trial was held with all due guarantees" and that Alberto Altesor had "counsel as required by law" are insufficient to rebut the allegations that the accused was not promptly informed of the charges against him, that he was not allowed to defend himself in person, that there was no public hearing, and that defence witnesses were not examined under the same conditions as witnesses against him. The State party has not responded to the Committee's request that it should be furnished with copies of any court orders or decisions relevant to the matter. The Committee is seriously concerned by this omission. Although similar requests have been made in a number of other cases, the Committee has never yet been furnished with the texts of any court decisions. In such circumstances, the Committee feels unable, on the basis of the information before it, to accept the State party's contention that Alberto Altesor had a fair trial.

14. As to the authors' allegation that the enactment of *Acta Institucional No. 4* of 1 September 1976,¹ which curtailed the political rights of various categories of citizens, made their father a victim of violations of article 25 of the Covenant, the Committee refers to the considerations reflected in its views on a number of other cases (e.g. in 28/1978, 32/1978, 34/1978 and 44/1979), concerning the compatibility of *Acta Institucional No. 4* with the provisions of article 25 of the Covenant, which proscribes "unreasonable restrictions" on the enjoyment of political rights. It has been the Committee's considered view that this enactment which deprives all citizens, who as members of certain political groups had been candidates in the elections of 1966 and 1971, of any political rights for a period as long as 15 years is an unreasonable restriction of the political rights protected by article 25 of the Covenant.

¹ The relevant part of the Act reads as follows:

"[...] The Executive Power, in exercise of the powers conferred on it by the institutionalization of the revolutionary process,

"DECREES:

"Art. 1. The following shall be prohibited, for a term of 15 years, from engaging in any of the activities of a political nature authorized by the Constitution of the Republic, including the vote:

"(a) All candidates for elective office on the lists for the 1966 and 1971 elections of the Marxist and pro-Marxist Political Parties or Groups declared illegal by the resolutions of the Executive Power No. 1788/67 of 12 December 1967 and No. 1026/73 of 26 November 1973; [...]"

15. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that these facts, in so far as they have occurred after 23 March 1976 (the date on which the Covenant entered into force in respect of Uruguay), disclose violations of the Covenant, in particular of:

Article 9 (3), because Alberto Altesor was not brought promptly before a judge or other officer authorized by law to exercise judicial power;

Article 9 (4), because recourse to *habeas corpus* was not available to him;

Article 10 (1), because he was held incommunicado for several months;

Article 14 (1) and (3), because he did not have a fair and public hearing;

Article 25, because he is barred from taking part in the conduct of public affairs and from voting in elections or from being elected for 15 years in accordance with *Acta Institucional No. 4* of 1 September 1976.

16. The Committee, accordingly, is of the view that the State party is under an obligation to provide the victim with effective remedies, including compensation, for the violations which he has suffered and to take steps to ensure that similar violations do not occur in the future. The State party should also ensure that Alberto Altesor receives all necessary medical care.

Communication No. 30/1978

Submitted by: Irene Bleier Lewenhoff and Rosa Valiño de Bleier on 23 May 1978

Alleged victim: Eduardo Bleier (authors' father and husband)

State party: Uruguay

Date of adoption of views: 29 March 1982 (fifteenth session)

Detention incommunicado—Torture—Disappeared person—Interim decision—Burden of proof—State's duty to investigate—Right to life

Articles of Covenant: 6, 7, 9 (1) and 10 (1)

Views under article 5 (4) of the Optional Protocol

1. The author of the original communication (initial letter dated 23 May 1978 and further letter dated 15 February 1979) is Irene Bleier Lewenhoff, a Uruguayan national residing in Israel. She is the daughter of the alleged victim. Her information was supplemented by further letters (dated 25 February, 20 June, 26 July and 31 October 1980 and 4 January and 10 December 1981) from Rosa Valiño de Bleier, a Uruguayan national residing in Hungary who is the alleged victim's wife.

2.1 In her letter of 23 May 1978, the author, Irene Bleier Lewenhoff, states the following:

2.2 Her father, Eduardo Bleier, was arrested without a court order in Montevideo, Uruguay, at the end of October 1975. The authorities did not acknowledge his arrest and he was held incommunicado at an unknown place of detention. Her father's detention was, however, indirectly confirmed because his name was on a list of prisoners read out once a week at an army unit in Montevideo where his family delivered clothing for him and received his dirty clothing. His name appeared on that list for several months until the middle of 1976. On 11 August 1976, "Communiqué No. 1334 of the Armed Forces Press Office" was printed in all the Montevideo newspapers requesting the general public to co-operate in the capture of 14 persons, among whom Eduardo Bleier was listed, "known to be associated with the banned Communist Party, who had not presented themselves when summoned before the military courts". The author also alleges that her father was subjected to particularly cruel treatment and torture because of his Jewish origin.

2.3 A number of detainees who were held, together with the author's father, and who were later allowed to communicate with their families or were released, gave independent but similar accounts of the cruel torture to which Eduardo Bleier was subjected. They generally agreed that he was singled out for especially cruel treatment because he was a Jew. Thus, on one occasion, the other prisoners were forced to bury him, covering his whole body with earth, and to walk over him. As a result of this treatment inflicted upon him, he was in a very bad state and towards December 1975 had to be interned in the Military Hospital.

2.4 At the time of the submission of the communication the author assumed that Eduardo Bleier was either detained incommunicado or had died as a result of torture. The author further states that since her father's arrest, owing to the uncertainty, there has been a complete disruption of family life. She also claims that the honour and reputation of her father were attacked in every possible way by the authorities, in particular by the publication of the above-quoted "communiqué".

2.5 The author maintains that in practice legal remedies do not exist in Uruguay. She claims that *habeas corpus* or other similar remedies cannot be invoked against arrest under the "prompt security measures". In the case of her father, all of the guarantees of *amparo* that could be invoked in penal proceedings were irrelevant, because he never appeared before any court; nor was he ever formally informed of the reasons for his arrest. The author claims that her father was arrested because of his political opinions.

2.6 She further states that the authorities never answered the numerous letters addressed to them by various personalities, institutions or organizations, asking for information about her father's situation. She adds that such silence might well indicate that her father died as a result of torture.

2.7 The author claims that the following provisions of the International Covenant on Civil and Political Rights have been violated by the Uruguayan authorities in respect of her father: articles 2; 3; 6; 7; 9 (1), (2), (3), (4) and (5); 10; 12 (2); 14; 15; 17; 18; 19; 25 and 26.

3. By its decision of 26 July 1978, the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication.

4. By a note dated 29 December 1978 the State party informed the Human Rights Committee that a warrant had been out for the arrest of Eduardo Bleier since 26 August 1976, as he was suspected of being connected with the subversive activities of the banned Communist Party and had gone into hiding ("wanted person No. 1,189").

5. In reply to the State party's submission of 29 December 1978, Irene Bleier Lewenhoff, by a letter dated 15 February 1979, stated that she had irrefutable proof of the arrest of her father and the treatment inflicted upon him during detention. She claims that she

has had the opportunity to talk in various parts of the world with persons formerly imprisoned in Uruguay and that many of them spoke of her father and the barbarous torture to which he had been subjected.

6. By a letter dated 25 February 1980, Rosa Valiño de Bleier, the wife of the alleged victim, requested the Human Rights Committee to accept her as co-author of communication No. 30/1978 concerning her husband, Eduardo Bleier. She further confirmed all the basic facts as outlined in Irene Bleier Lewenhoff's communication of 23 May 1978. In addition, she stated that she has received many unofficial statements, the latest in December 1978, indicating that her husband was still alive. She claims that some of the persons who were imprisoned with her husband and witnessed his tortures and who have explained to her the facts in detail, have now left Uruguay. She further stated that in 1976, she submitted an application for *habeas corpus* to the military court, as a result of which she received a report saying that her husband had been "wanted" since August of the same year.

7. On 24 March 1980, the Committee decided:

(a) That the authors were justified in acting on behalf of the alleged victim by reason of close family connection;

(b) That the communication was admissible in so far as it related to events which have allegedly continued or taken place after 23 March 1976 (the date of the entry into force of the Covenant and the Optional Protocol for Uruguay);

(c) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(d) That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to perform its responsibilities, it required specific responses to the allegation which had been made by the authors of the communication, and the State party's explanations of the actions taken by it;

...

(f) That the authors be requested to submit any additional detailed information available to them of Eduardo Bleier's arrest and treatment during detention, including statements from other prisoners who claim to have seen him in captivity in Uruguay.

8.1 In reply to the Committee's request for additional detailed information on Mr. Bleier's arrest and treatment, Rosa Valiño de Bleier, in two letters dated 20 June and 26 July 1980, provided detailed information which she had obtained from other ex-prisoners who claimed to have seen her husband in captivity in Uruguay. She also included the text of testimonies on her husband's detention and ill-treatment. In one of the testimonies an eyewitness, Alcides Lanza Perdomo, a

Uruguayan citizen, at present resident in Sweden as a political refugee, declared, *inter alia*, the following:

I have known Mr. Eduardo Bleier personally since 1955; our acquaintance continued until 1975. Therefore my ability to identify him in person is beyond doubt. I was detained in Montevideo on 2 February 1976 and held until 1 July 1979 ... At the beginning of my imprisonment, on a date between 6 and 10 February 1976 which I cannot specify more exactly with any certainty, the events which I am about to relate took place. I was imprisoned in the barracks of Infantry Regiment No. 13, in Camino Casavalle, Montevideo, held completely incommunicado and tortured along with other prisoners. On two or three occasions I struggled violently with the torturers and, driven by pain and desperation, snatched off the hood which I had to wear all the time.

On those occasions I saw Eduardo Bleier, who was being subjected to savage torture by a group of men. I identified him quite clearly and positively, without the slightest doubt, and so confirmed my certainty that Mr. Bleier was there and was being tortured, because I had for a long time fully recognized his voice, both in its normal tone and in his heart-rending shrieks under torture.

What I was able to see and hear showed that Mr. Bleier was being subjected to particularly brutal torture and continually insulted at the same time.¹

8.2 The additional information submitted by Rosa Valiño de Bleier on 20 June and 26 July 1980 was transmitted to the State party on 23 June and 2 September 1980, respectively.

9. In its submission of 9 October 1980, the State party repeated what it had stated in its brief submission of 29 December 1978, namely, that a warrant was still out for the arrest of Eduardo Bleier, whose whereabouts were still unknown. No information, explanations or observations were offered with regard to the various submissions from the authors concerning Mr. Bleier's detention.

10.1 With reference to operative paragraph 6 of the Committee's decision of 24 March 1980, Mrs. Rosa Valiño de Bleier submitted on 31 October 1980 three further testimonies from persons who claim to have seen Eduardo Bleier in detention. One of them, Manuel Piñeiro Pena, a Spanish citizen, declared in Barcelona, Spain, on 24 September 1980:

I was arrested in my house by an intelligence squad of the Uruguayan army in the early morning of 27 October 1975 and taken hooded to a private house used by this squad for all kinds of torture ... In this place, three days after my arrest, I heard for the first time the voice and cries of Eduardo Bleier as he was being tortured. I heard them again in the early days of November of the same year when I was transferred to the barracks of the 13th Infantry Battalion in Calle Instrucciones, where I could also see him through a small gap in the blindfold which covered my eyes during the first eight months of my detention and also because, for some 15 days, we were lying on the floor side by side ... Then, one night in early December, I heard them calling him as always by his number, which was 52, and they took him to the interrogation room; for hours his cries were heard, and then there came a moment when his cries ceased and we heard the medical orderly being summoned urgently.

10.2 Another witness, Vilma Antúney de Muro, a Uruguayan citizen residing in Sweden, testified that she had been arrested on 3 November 1975 and taken to the barracks of the 13th Infantry Battalion, where she first saw Bleier on 7 November.

During the night of the same day we heard cries and saw Bleier falling down the stairs which led to the little room upstairs. When he reached the bottom, he sat up and said something to them for which he was beaten. On another day, between the cries of one of the worst torture sessions, I suddenly heard about six or seven people approaching, struggling with someone who clutched me for a moment and said, "They want to kill me". At that moment they trampled on one of my breasts and the pain forced me to sit up ... my blindfold slipped and I saw that some torturers were again taking Bleier upstairs.

10.3 These testimonies were transmitted to the State party on 17 February 1981. By note of 5 May 1981 the State party, referring to Mrs. Bleier's communications of 31 October 1980, reiterated its position that it did not know the whereabouts of Eduardo Bleier.

11.1 By an interim decision of 2 April 1981 the Human Rights Committee stated that before adopting final views in the matter,

the Committee considers that it is the clear duty of the Government of Uruguay to make a full and thorough inquiry (a) into the allegations concerning Mr. Bleier's arrest and his treatment while in detention prior to 26 August 1976, and (b) as to his apparent disappearance and the circumstances in which a warrant for his arrest was issued on 26 August 1976. The Committee urges that this should be done without further delay and that the Committee should be informed of the action taken by the Government of Uruguay and of the outcome of the inquiry.

11.2 The Committee based its interim decision on the following considerations:

11. As to the merits of the case, the Committee had before it (i) detailed information, including statements of family members and eyewitness testimonies of persons who had been detained in Uruguayan prisons together with Eduardo Bleier and who were later released, concerning his detention and severe mistreatment in prison and later "disappearance" and (ii) a brief categorical denial of Eduardo Bleier's detention by the Government of Uruguay, which, in the light of (i), is totally insufficient.

12. The Committee cannot but give appropriate weight to the overwhelming information submitted by the authors of the complaint. This information tends to corroborate the author's allegation that Eduardo Bleier was arrested at the end of October 1975 in Montevideo, Uruguay. His detention would appear to be confirmed at that time by the authorities because his name was on a list of prisoners read out once a week at an army unit in Montevideo; it also appears to be confirmed by several fellow prisoners and other persons who had seen and talked to him in several identified detention centres in Uruguay. Also, several eyewitnesses have reported that Eduardo Bleier was subjected to severe torture during detention.

13. The failure of the State party to address in substance the serious allegations brought against it and corroborated by unrefuted information, cannot but lead to the conclusion that Eduardo Bleier is either still detained, incommunicado, by the Uruguayan authorities or has died while in custody at the hands of the Uruguayan authorities.

12. By a note of 14 August 1981 the State party submitted the following observations on the Committee's interim decision of 2 April 1981:

the Government of Uruguay wishes to state that, in paragraph 13 of that document, the Committee displays not only an ignorance of legal rules relating to presumption of guilt, but a lack of ethics in carrying out the tasks entrusted to it, since it so rashly arrived at the serious conclusion that the Uruguayan authorities had put Eduardo Bleier to death. The Committee, whose purpose is to protect, promote and ensure respect for civil and political rights, should bear in mind that this task should always be carried out under the rule of law in accordance with its mandate and the universally accepted procedures concerning such matters as guilt and presumption of guilt.

¹ Alcides Lanza Perdomo was one of the authors and one of the victims mentioned in communication No. 8/1977 reported above, pp. 45 and seq.

13.1 The Human Rights Committee cannot accept the State party's criticism that it has displayed an ignorance of legal rules and a lack of ethics in carrying out the tasks entrusted to it or the insinuation that it has failed to carry out its task under the rule of law. On the contrary, in accordance with its mandate under article 5 (1) of the Optional Protocol, the Committee has considered the communication in the light of the information made available to it by the authors of the communication and by the State party concerned. In this connection the Committee has adhered strictly to the principle *audiatur et altera pars* and has given the State party every opportunity to furnish information to refute the evidence presented by the authors.

13.2 The Committee notes that the State party has ignored the Committee's repeated requests for a thorough inquiry into the authors' allegations.

13.3 With regard to the burden of proof, this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, especially when such allegations are corroborated by evidence submitted by the author of the communication, and to furnish to the Committee the information available to it. In cases where the author has submitted to the Committee allegations supported by substantial witness testimony, as in this case, and where further clarification of the case depends on information ex-

clusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party.

13.4 The Committee finds that the disappearance of Eduardo Bleier in October 1975 does not alone establish that he was arrested by Uruguayan authorities. But, the allegation that he was so arrested and detained is confirmed (i) by the information, unexplained and substantially unrefuted by the State party, that Eduardo Bleier's name was on a list of prisoners read out once a week at an army unit in Montevideo where his family delivered clothing for him and received his dirty clothing until the summer of 1976, and (ii) by the testimony of other prisoners that they saw him in Uruguayan detention centres. Also there are the reports of several eyewitnesses that Eduardo Bleier was subjected to severe torture while in detention.

14. It is therefore the Committee's view that the information before it reveals breaches of articles 7, 9 and 10 (1) of the International Covenant on Civil and Political Rights and that there are serious reasons to believe that the ultimate violation of article 6 has been perpetrated by the Uruguayan authorities.

15. As regards the latter point the Human Rights Committee urges the Uruguayan Government to reconsider its position in this case and to take effective steps (i) to establish what has happened to Eduardo Bleier since October 1975; to bring to justice any persons found to be responsible for his death, disappearance or ill-treatment; and to pay compensation to him or his family for any injury which he has suffered; and (ii) to ensure that similar violations do not occur in the future.

Communication No. 45/1979

Submitted by: Pedro Pablo Camargo on 5 February 1979 on behalf of the husband of María Fanny Suárez de Guerrero

Alleged victim: María Fanny Suárez de Guerrero

State party: Colombia

Date of adoption of views: 31 March 1982 (fifteenth session)

Exhaustion of domestic remedies—Right to life—Use of firearms by police—Death of victim—Derogation from Covenant—State of emergency

Articles of Covenant: 4 and 6

Article of Optional Protocol: 5 (2) (b)

Views under article 5 (4) of the Optional Protocol

1.1 The communication (initial letter dated 5 February 1979 and further letters dated 26 June 1979, 2 June, 3 and 31 October 1980 and 2 January 1981) was submitted by Pedro Pablo Camargo, Professor of International Law of the National University of Colombia, at present residing in Quito, Ecuador. He submitted the communication on behalf of the husband of María Fanny Suárez de Guerrero.

1.2 The author of the communication describes the relevant facts as follows: on 13 April 1978, the judge of the 77th Military Criminal Court of Investigation, himself a member of the police, ordered a raid to be carried out at the house at No. 136-67 Transversal 31 in the "Contador" district of Bogotá. The order for the raid was issued to Major Carlos Julio Castaño Roza, the SIPEC Chief of the F-2 Police, Bogotá Police Department. The raid was ordered in the belief that Miguel de German Ribon, former Ambassador of Colombia to France, who had been kidnapped some days earlier by a guerrilla organization, was being held prisoner in the house in question. Those taking part in the raid were Captains Jaime Patarroyo Barbosa and Jorge Noel Barreiro Rodriguez; Lieutenants Alvaro Mendoza Contreras and Manuel Antonio Bravo Sarmiento; Corporal First

Class Arturo Martin Moreno; Constables Joel de Jesus Alarcon Toro, Joaquin Leyton Dominguez, Efrain Morales Cárdenas, Gustavo Ospina Rios and Jaime Quiroga, and a driver, José de los Santos Baquero. In spite of the fact that Miguel de German Ribon was not found, the police patrol decided to hide in the house to await the arrival of the "suspected kidnappers". They were killed as they arrived. In this way, seven innocent human beings were shot dead: María Fanny Suárez de Guerrero, Alvaro Enrique Vallejo, Eduardo Sabino Lloredo, Blanca Florez Vanegas, Juan Bautista Ortiz Ruiz, Omar Florez and Jorge Enrique Salcedo. Although the police stated initially that the victims had died while resisting arrest, brandishing and even firing various weapons, the report of the Institute of Forensic Medicine (Report No. 8683, of 17 April 1978), together with the ballistics reports and the results of the paraffin test, showed that none of the victims had fired a shot and that they had all been killed at point-blank range, some of them shot in the back or in the head. It was also established that the victims were not all killed at the same time, but at intervals, as they arrived at the house, and that most of them had been shot while trying to save themselves from the unexpected attack. In the case of Mrs. María Fanny Suárez de Guerrero, the forensic report showed that she had been shot several times after she had already died from a heart attack.

1.3 The author adds that, according to witnesses, the victims were not given the opportunity to surrender. He mentions that the police stated that they were dealing with persons with criminal records but that subsequent investigation by the police did not prove that the victims were kidnappers.

1.4 The author alleges that seven persons—including María Fanny Suárez de Guerrero—were arbitrarily killed by the police, that the police action was unjustified and that it has been inadequately investigated by the Colombian authorities. He claims that, at the beginning, the case was shelved under Legislative Decree No. 0070 of 20 January 1978 because the Colombian authorities considered that the police had acted within the powers granted by that Decree. He further alleges that there have been other cases of arbitrary killings by the army and the police on the pretext that they were dealing with suspicious people and that it has later been proved that the victims were either innocent or persecuted for political reasons.

1.5 Legislative Decree No. 0070¹ "introducing measures for the restoration of public order" amended article 25 of the Colombian Penal Code by adding a new paragraph 4. The substantive part of the Decree reads as follows:

Article 1. For so long as public order remains disturbed and the national territory is in a state of siege, article 25 of the Penal Code shall read as follows:

Article 25. The [penal] act is justified if committed:

... (4) By the members of the police force in the course of operations planned with the object of preventing and curbing the offences of extortion and kidnapping, and the production and processing of and trafficking in narcotic drugs.

¹ See the text of Legislative Decree No. 0070 in the appendix below.

1.6 The author states that Legislative Decree No. 0070 of 1978 has established a new ground of defence against a criminal charge so as to justify crimes committed by members of the police force when they are taking part in operations to repress certain types of offences. In other words, the otherwise penal act is justified and does not give rise to penal responsibility when it is committed by members of the police force. He further argues that, if public authorities are allowed to kill an individual because he is suspected of having committed certain types of offences specified in Decree No. 0070, it means that they are allowed to commit arbitrary acts and, by doing so, to violate fundamental human rights, in particular the most fundamental one of all—the right to life. The author claims that Decree No. 0070 of 1978 violates articles 6, 7, 9 and 14 and 17 of the International Covenant on Civil and Political Rights because public authorities are allowed to violate the fundamental guarantees of security of person, of privacy, home and correspondence, individual liberty and integrity, and due process of law, in order to prevent and punish certain types of offences.

1.7 The author states that domestic remedies to declare Decree No. 0070 unconstitutional have been exhausted, since there is a decision of the Supreme Court of Colombia of 9 March 1980 upholding the Decree's constitutionality.

1.8 The author states that the case has not been submitted to any other procedure of international investigation or settlement.

2. On 9 August 1979, the Human Rights Committee decided to transmit the communications to the State party, under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility.

3.1 By letter dated 5 May 1980, the State party refuted the allegations made by the author of the communication that the enactment of Legislative Decree No. 0070 of 20 January 1978 constitutes a breach of articles 6, 7, 9, 14 and 17 of the Covenant.

3.2 The State party submitted that it cannot reasonably be claimed that this Decree establishes the death penalty or empowers the police to practise torture or cruel, inhuman or degrading treatment or that it infringes the rights or guarantees established by articles 9, 14 and 17 of the Covenant. It cited the ruling on the scope of the Decree given by the Supreme Court of Justice in its judgement of 9 March 1978, by which it held the Decree constitutional. The Court said in particular:

... as can be seen, the Decree, in article 1, paragraph 2 (4), introduces a temporary addition to the current text of article 25 of the Penal Code, for the purpose of creating a new defence to a criminal charge; the Decree provides that it is a good defence in answer to such a charge to show that the punishable act was "committed ... by the members of the police force in the course of operations planned with the object of preventing and curbing the offences of extortion and kidnapping and the production and processing of and trafficking in narcotic drugs". This amendment contemplates a legal situation different from those referred to in the first three subparagraphs of article 25, which formerly constituted the entire article and hence has special characteristics.

The sense in which the provision in question creates a different legal situation is that it does not deal with a case of obedience to mandatory order given by a competent authority, nor with self-defence, nor with a state of necessity affecting an individual.

The provision introduced by Decree No. 70 concerns another class of circumstances to justify action taken by the police with the object of preventing or curbing the offences of extortion, kidnapping and the production and processing of and trafficking in narcotic drugs.

On the one hand, the provision is broad in scope in that it does not limit the means of action, for under the provision both armed force and other means of coercion, persuasion or dissuasion may be used.

On the other hand, however, the provision limits the field of action to the objectives referred to therein, namely, preventing and curbing the offences of kidnapping, extortion and the production and processing of and trafficking in narcotic drugs ...

The Court observed that the Decree was obviously related to the fact that the national territory was in a state of siege and it further stated:

... this is a special measure that involves a right of social defence; for, on the one hand, it is legitimate that the members of the armed forces who are obliged to take part in operations like those described and whose purpose it is to prevent or curb offences which, by their nature, are violent and are committed by means of violence against persons or property, should be protected by a justification of the punishable acts that they are constrained to commit, and, on the other hand, both the Government, acting on behalf of society, and society itself, have an interest in the defence of society and in ensuring that it is adequately defended by the agencies to which the law has entrusted the weapons for its defence.

3.3 In considering the provisions of Decree No. 0070, the State party argued that it should be borne in mind that the new grounds do not establish a statutory presumption of justification of the act, for such a presumption must be expressed, as is required by article 232 of the Code of Criminal Procedure, which provides: "There is a statutory presumption if the law prescribes that an act shall constitute conclusive proof of another act". Accordingly, before the fourth ground in article 25 can be applied to a specific case, it is always necessary to weigh the circumstances of the act, in order to determine whether it is justifiable on that ground.

3.4 With regard to the specific incident involving the death of María Fanny Suárez de Guerrero, the State party stated that: (a) in the course of a police operation on 13 April 1978 in the "Contador" district of Bogotá the following persons died in the house at 136-67 Thirty-first Street: María Fanny Suárez de Guerrero, Alvaro Enrique Vallejo, Eduardo Sabino Lloredo, Blanca Florez Vanegas, Juan Bautista Ortiz Ruiz, Omar Florez and Jorge Enrique Salcedo; (b) the Office of the State Counsel for the national police instituted an administrative inquiry into the case and the judge of the 77th Criminal Military Court was ordered to hold a criminal investigation; (c) as a result of the criminal investigation, police captains Alvaro Mendoza Contreras and Jorge Noel Barrero Rodriguez, police lieutenant Manuel Bravo Sarmiento and officers Jesus Alarcon, Gustavo Ospina, Joaquin Dominguez, Arturo Moreno, Efrain Morales and Jose Sanchez were concerned in the criminal proceedings; (d) the trial had not yet been completed. Consequently, the State party submitted, domestic remedies of the local jurisdiction had not yet been exhausted.

4.1 In his comments dated 2 June 1980, the author stated that "the new ground included in Decree No. 0070 of 1978 does indeed establish 'a statutory presumption of justification of the act', because it is left to the police authorities themselves to determine what is justified, through the so-called 'military criminal judges' and the Higher Military Court, even if the victim or victims are civilians. Up to now all extrajudicial deaths caused by the police force have been justified by the police force itself, without any intervention of the ordinary courts".

4.2 As regards the events which took place in the "Contador" district of Bogotá on 13 April 1978, the author maintained that it was the police themselves who entrusted the criminal investigation to the judge of the 77th Military Criminal Court and he, after more than two years, had not summoned those involved to appear in court: "There is no question of genuine criminal proceedings for, contrary to the principle that no one may be judge in his own cause, it is the police who have carried out the investigation with respect to themselves, and the military criminal procedure does not permit the civilian victims to be represented. Ordinary criminal procedure provides both for a criminal action and for a civil action for damages." The author further maintained that the Government of Colombia had not permitted the institution of civil proceedings on behalf of the victims in the military criminal case against the accused and he claimed that the application of domestic remedies was unreasonably prolonged.

5. On 25 July 1980 the Human Rights Committee decided to request the State party to furnish detailed information as to:

(a) How, if at all, the state of siege proclaimed in Colombia affected the present case;

(b) Whether the institution of civil proceedings for damages had been permitted on behalf of the victims of the police operation on 13 April 1978 in the "Contador" district of Bogotá, and, if not, the reasons for any refusal to permit such proceedings;

(c) The reasons for the delay, for more than two years, in the adjudication of the Higher Military Court in the matter.

6.1 By letters dated 9 September and 1 October 1980 the State party submitted further information.

6.2 The State party maintained that the state of siege might affect this case if the following conditions were met:

(a) If those responsible for the violent death of various persons in the "Contador" district police operation invoke in justification of the act the new ground provided in Decree 0070 of 1978 promulgated in exercise of the powers conferred by article 121 of the National Constitution;

(b) If the Military Tribunal (Oral Proceedings) (*Consejo de Guerra Verbal*) which is to try those responsible for the acts in question agrees that the ground mentioned is applicable thereto. If it should consider that the ground is not applicable, no effect would derive from the state of siege. Only when the decision of the Military Tribunal is delivered will it be possible to establish whether, by virtue of Decree 0070 of 1978, the state of siege does in fact affect this case.

The State party added:

As regards the questions of trial formalities, jurisdiction and competence, the state of siege has no effect on either the criminal or the civil proceedings or the action under administrative law that could be brought if the injured parties claimed compensation for the damage suffered.

6.3 As regards the question whether the institution of civil proceedings for damages had been permitted on behalf of the victims of the police operation, the State party affirmed that the institution of a civil action in conjunction with military proceedings was restricted to proceedings dealing with ordinary offences and that, since the present case was a military offence, no civil action could be instituted in conjunction with the military proceedings. Military offences are "those covered by the Code of Military Criminal Justice, committed by soldiers on active service and in relation to their service". However, the State party submitted that persons who have suffered loss or injury may apply to an administrative tribunal to obtain the appropriate damages on the ground of the extracontractual responsibility of the State. Such a claim may be made independently of the outcome of the criminal trial and even if it has not begun or been concluded. This is because the State must bear responsibility for the abuses and negligence of its agents when they unjustifiably result in damage. Thus the institution of a civil action in conjunction with military criminal proceedings is completely unimportant for this purpose, since another remedy is available to those suffering loss or injury. In addition, the State party explained that the Code of Military Criminal Justice contains the following provisions on compensation:

Article 76. On any conviction for offences that result in loss or injury to any person, either natural or legal, those responsible shall be jointly sentenced to compensate for all such damage as has been caused.

6.4 As regards the reasons for the delay, for more than two years, in the adjudication of the Higher Military Court in the matter, the State party submitted that this was due to the heavy workload of all the judges and prosecutors. The Office of the State Counsel for the National Police, which is responsible for exercising judicial supervision over the system of military criminal justice with regard to proceedings against national police personnel (Decree-Law 521 of 1971) through general and special inspections (Decree-Law 2500 of 1970), found that the delay in handling the case concerning the events in the "Contador" district was justified, since it was due to the heavy workload and not to negligence, it having been established that the judges produce a high monthly average of decisions.

6.5 As regards the administrative inquiry instituted by the Office of the State Counsel for the national police into the incident in the "Contador" district, the State party in its letter of 1 October 1980 informed the Committee that this had been completed. The Office of the State Counsel had requested the dismissal of all the members of the patrol involved in the operation. This dismissal was ordered on 16 June 1980 and had been carried out.

6.6 Nevertheless, the State party reiterated that domestic remedies had not been exhausted.

7.1 In further letters dated 3 and 31 October 1980 the author submitted the following additional information: "... the investigation into the massacre on 13 April 1978 was conducted by the very police officer who had led the raid, namely Captain Carlos Julio Castaño Rozo, the SIPEC Chief of the Bogotá Police Department". He further stated in July 1980, the Inspector General of Police, General Fabio Arturo Londoño Cardenas, acting as judge of first instance, issued an order for all criminal proceedings against those charged with the massacre to be discontinued, on the basis of article 417 of the Code of Military Criminal Justice, which states:

Article 417. If, at any stage of the proceedings, it becomes fully established that the act for which charges have been laid or which is under investigation did not take place, or that it was not committed by the accused, or that the law does not consider it a criminal offence, or that there were no grounds for instituting or continuing the criminal proceedings, the judge of first instance or the investigating official shall, with the approval of the Public Prosecutor's department, issue an official ruling to that effect and shall order all proceedings against the accused to be discontinued.

The author alleged that the Inspector General of Police invoked the ground of justification of the criminal act provided for in article 1 of Decree No. 0070, of 20 January 1978. This ruling went to the Higher Military Court for *ex officio* review. The Higher Military Court, through its Fourth Chamber, annulled the decision of the Inspector General of Police. The dossier then remained in the hands of the judge of first instance and the author stated that up to the date of his letter (3 October 1980) no order had been issued convening a military court to try the accused (*Consejo de Guerra Verbal*).

7.2 However, in his letter of 2 January 1981, the author informed the Committee that on 30 December 1980 a military court acquitted the 11 members of the Police Department. He stated that Dr. Martinez Zapata, the lawyer for the "Contador" victims, was not allowed to attend the trial, submit appeals or make objections. He affirmed that the acquittal was based on Decree Law No. 0070 of 1978.

7.3 The author further stated that as a result of the acquittal no administrative suit for compensation could be filed and the police officers and agents, who were dismissed on the recommendation of the Deputy Procurator General for Police Affairs, would be reinstated in their functions. The author had earlier stated:

... in principle, an action for compensation may be brought before an administrative tribunal. However, if the accused are acquitted and the State turns out not to be responsible, how could such an action be brought before an administrative tribunal? It is quite clear, moreover, that the lawyers for the victims are not simply seeking compensation; above all they want justice to be done and a declaration that Legislative Decree No. 0070 of 1978 is manifestly a breach of articles 6, 7, 14 and 17 of the International Covenant on Civil and Political Rights.

7.4 The author claimed that this was a serious case of a denial of justice which definitively confirmed that murders of civilians by the police would go unpunished.

8.1 The Committee found, on the basis of the information before it, that it was not precluded by article 5 (2) (a) of the Optional Protocol from considering the communication since there was no indication that the same matter had been submitted under another procedure of international investigation or settlement.

8.2 As to the question of exhaustion of domestic remedies, the Committee, having been informed by the author of the communication that on 30 December 1980 the military tribunal acquitted the 11 members of the Police Department who were on trial and this information not having been refuted by the State party, understood that the military tribunal found the measures taken by the police which resulted in the death of María Fanny Suárez de Guerrero to have been justified. It appeared from the information before the Committee that there was no further possibility of an effective domestic remedy in regard to the matters complained of. The Committee was therefore unable to conclude on the basis of the information submitted by the State party and the author, that there were still effective remedies available which could be invoked on behalf of the alleged victim. Accordingly the Committee found that the communication was not inadmissible under article 5 (2) (b) of the Optional Protocol. The Committee stated, however, that this decision could be reviewed in the light of any further explanations which the State party might submit under article 4 (2) of the Optional Protocol.

9. On 9 April 1981, the Human Rights Committee therefore decided:

(a) That the communication was admissible;

(b) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it. These should include a copy of the judgement of the military tribunal acquitting the members of the Police Department who were on trial.

10. The time-limit for the State party's submission under article 4 (2) of the Optional Protocol expired on 26 November 1981. To date, no submission has been received from the State party in addition to those received prior to the decisions on admissibility.

11.1 The Human Rights Committee had considered the present communication in the light of all information made available to it by the parties, as provided in article 5 (1) of the Optional Protocol. The Committee bases its views on the following facts, which are not in dispute or which are unrefuted by the State party.

11.2 Legislative Decree No. 0070 of 20 January 1978 amended article 25 of the Penal Code "for so long as the public order remains disturbed and the national territory is in a state of siege" (see text of Decree in appendix below). The Decree established a new ground of defence that may be pleaded by members of the police force to exonerate them if an otherwise punishable act was committed "in the course of operations planned

with the object of preventing and curbing the offences of extortion and kidnapping, and the production and processing of and trafficking in narcotic drugs".

11.3 On 13 April 1978, the judge of the 77th Military Criminal Court of Investigation, himself a member of the police, ordered a raid to be carried out at the house at No. 136-67 Transversal 31 in the "Contador" district of Bogotá. The order for the raid was issued to Major Carlos Julios Castaño Rozo, the SIPEC Chief of the F-2 Police, Bogotá Police Department. The raid was ordered in the belief that Miguel de Germán Ribón, former Ambassador of Colombia to France, who had been kidnapped some days earlier by a guerrilla organization, was being held prisoner in the house in question.

11.4 In spite of the fact that Miguel de Germán Ribón was not found, the police patrol decided to hide in the house to await the arrival of the "suspected kidnappers". Seven persons who subsequently entered the house were shot by the police and died. These persons were: María Fanny Suárez de Guerrero, Alvaro Enrique Vallejo, Eduardo Sabino Lloredo, Blanca Florez Vanegas, Juan Bautista Ortiz Ruiz, Omar Florez and Jorge Enrique Salcedo.

11.5 Although the police initially stated that the victims had died while resisting arrest, brandishing and even firing various weapons, the report of the Institute of Forensic Medicine (Report No. 8683, of 17 April 1978), together with the ballistics reports and the results of the paraffin test, showed that none of the victims had fired a shot and that they had all been killed at point-blank range, some of them shot in the back or in the head. It was also established that the victims were not all killed at the same time, but at intervals, as they arrived at the house, and that most of them had been shot while trying to save themselves from the unexpected attack. In the case of Mrs. María Fanny Suárez de Guerrero, the forensic report showed that she had been shot several times after she already died from a heart attack.

11.6 The Office of the State Counsel for the national police instituted an administrative inquiry into the case. The administrative inquiry was completed and the Office of the State Counsel for the national police requested the dismissal of all the members of the patrol involved in the operation. This dismissal was ordered on 16 June 1980.

11.7 In addition, the judge of the 77th Military Criminal Court was ordered to hold a criminal investigation into the case. The preliminary investigation of the case was conducted by Major Carlos Julio Castaño Rozo. This investigation did not prove that the victims of the police action were kidnappers. In July 1980, the Inspector General of Police, acting as judge of first instance, issued an order for all criminal proceedings against those charged with the violent death of these seven persons during the police operation on 13 April 1978 in the "Contador" district of Bogotá to be discontinued. This order was grounded on article 1 of Decree No. 0070. A Higher Military Court as a result of an *ex officio* review, annulled the decision of the Inspector General of Police. On 31 December 1980 a military

tribunal (*Consejo de Guerra Verbal*), to which the case had been referred for retrial, again acquitted the 11 members of the Police Department who had been involved in the police operation. The acquittal was again based on Decree No. 0070 of 1978.

11.8 At no moment could a civil action for damages be instituted in conjunction with the military criminal proceedings. An action for compensation for the persons injured by the police operation in the "Contador" district depended first on determining the criminal liability of the accused. The accused having been acquitted, no civil or administrative suit could be filed to obtain compensation.

12.1 In formulating its views, the Human Rights Committee also takes into account the following considerations:

12.2 The Committee notes that Decree No. 0070 of 1978 refers to a situation of disturbed public order in Colombia. The Committee also notes that the Government of Colombia in its note of 18 July 1980 to the Secretary-General of the United Nations (reproduced in document CCPR/C/2/Add.4), which was designed to comply with the formal requirements laid down in article 4 (3) of the Covenant, made reference to the existence of a state of siege in all the national territory since 1976 and to the necessity to adopt extraordinary measures within the framework of the legal régime provided for in the National Constitution for such situations. With regard to the rights guaranteed by the Covenant, the Government of Colombia declared that "temporary measures have been adopted that have the effect of limiting the application of article 19, paragraph 2, and article 21 of that Covenant". The Committee observes that the present case is not concerned with article 19 and 21 of the Covenant. It further observes that according to article 4 (2) of the Covenant there are several rights recognized by the Covenant which cannot be derogated from by a State party. These include articles 6 and 7 which have been invoked in the present case.

13.1 Article 6 (1) of the Covenant provides:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

The right enshrined in this article is the supreme right of the human being. It follows that the deprivation of life by the authorities of the State is a matter of the utmost gravity. This follows from the article as a whole and in particular is the reason why paragraph 2 of the article lays down that the death penalty may be imposed only for the most serious crimes. The requirements that the right shall be protected by law and that no one shall be arbitrarily deprived of his life mean that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State.

13.2 In the present case it is evident from the fact that seven persons lost their lives as a result of the deliberate action of the police that the deprivation of life was intentional. Moreover, the police action was apparently taken without warning to the victims and

without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned. Moreover, the victims were no more than suspects of the kidnapping which had occurred some days earlier and their killing by the police deprived them of all the protections of due process of law laid down by the Covenant. In the case of Mrs. María Fanny Suárez de Guerrero, the forensic report showed that she had been shot several times after she had already died from a heart attack. There can be no reasonable doubt that her death was caused by the police patrol.

13.3 For these reasons it is the Committee's view that the action of the police resulting in the death of Mrs. María Fanny Suárez de Guerrero was disproportionate to the requirements of law enforcement in the circumstances of the case and that she was arbitrarily deprived of her life contrary to article 6 (1) of the International Covenant on Civil and Political Rights. Inasmuch as the police action was made justifiable as a matter of Colombian law by Legislative Decree No. 0070 of 20 January 1978, the right to life was not adequately protected by the law of Colombia as required by article 6 (1).

14. It is not necessary to consider further alleged violations, arising from the same facts, of other articles of the Covenant. Any such violations are subsumed under the even more serious violations of article 6.

15. The Committee is accordingly of the view that the State party should take the necessary measures to compensate the husband of Mrs. María Fanny Suárez de Guerrero for the death of his wife and to ensure that the right to life is duly protected by amending the law.

APPENDIX

Decree No. 0070 of 20 January 1978

introducing measures for the restoration of public order

The President of the Republic of Colombia

in the exercise of the authority vested in him by article 121 of the National Constitution, and

Considering:

That, by Decree No. 2131 of 1976, the public order was declared to be disturbed and a state of siege was proclaimed throughout the national territory;

That the disturbance of the public order has increased with the intensification of organized crime, particularly as a result of the commission of offences against individual freedom, against the life and integrity of the person and against the health and integrity of society;

That it is the duty of the Government to take whatever measures are conducive to the restoration of a normal situation;

DECREES:

Article 1. For so long as the public order remains disturbed and the national territory is in a state of siege, article 25 of the Penal Code shall read as follows:

"Article 25. The act is justified if committed:

"(1) Pursuant to a legislative provision or to a mandatory order given by a competent authority;

"(2) By a person who is constrained to defend himself or another against a direct or wrongful act of violence against the person, his honour or his property, provided that the defence is proportionate to the attack;

"The circumstances referred to in this subparagraph are presumed to exist in any case where a person during the night repels any person who climbs or forcibly enters the enclosure, walls, doors or windows of his dwelling or outbuildings, whatever the harm done to the attacker, or where a person finds a stranger in his dwelling, provided that in the latter case there is no justification for the stranger's presence in the premises and that the stranger offers resistance;

"(3) By a person who has to save himself or another from a serious and imminent danger to the person which cannot be avoided in any other way, which is not the result of his own action and to which he is not exposed in the course of the exercise of his profession or occupation;

"(4) By the members of the police force in the course of operations planned with the object of preventing and curbing the offences of extortion and kidnapping, and the production and processing of and trafficking in narcotic drugs".

Article 2. This decree shall enter into force on the date of its enactment and shall suspend any provisions inconsistent therewith.

For transmittal and enforcement.

Done in Bogotá, D.E., on 20 January 1978.

Communication No. 50/1979

Submitted by: Gordon C. Van Duzen on 18 May 1979

Alleged victim: The author

State party: Canada

Date of adoption of views: 7 April 1982 (fifteenth session)

Lighter penalty—Parole—Mandatory supervision—Retroactivity of penal laws—Autonomous meaning of Covenant terms and concepts

Articles of Covenant: 2 and 15

Views under article 5 (4) of the Optional Protocol

1. The author of this communication (initial letter dated 18 May 1979 and further letters of 17 April 1980, 2 June and 11 June 1981) is Gordon C. Van Duzen, a Canadian citizen, who is represented before the Committee by Professor H. R. S. Ryan.

2.1 The author alleges that he is the victim of a breach by Canada of article 15 (1) of the International Covenant on Civil and Political Rights. The relevant facts, which are not in dispute, are as follows:

2.2 On 17 November 1967 and 12 June 1968, respectively, the author was sentenced upon conviction of different offences to a three-year and a 10-year prison term. The latter term was to be served concurrently with the former, so that the combined terms were to expire on 11 June 1978. On 31 May 1971, the author was released on parole under the Parole Act 1970, then in force. On 13 December 1974, while still on parole, the author was convicted of the indictable offence of breaking and entering and, on 23 December 1974, sentenced to imprisonment for a term of three years. By application of section 17 of the Parole Act 1970, his parole was treated as forfeited on 13 December 1974. As a consequence, the author's combined terms have been calculated to expire on 4 January 1985.¹ In 1977 several sections of the Parole Act 1970, among them section 17,

were repealed. New provisions came into force on 15 October 1977 (Criminal Law Amendment Act 1977).

2.3 According to the author the combined effect of the new law was that forfeiture of parole was abolished and the penalty for committing an indictable offence while on parole was made lighter, provided the indictable offence was committed on or after 15 October 1977, because, *inter alia*, pursuant to the new provisions, time spent on parole after 15 October 1977 and before suspension of parole, was credited as time spent under sentence. Therefore, a parolee whose parole was revoked after that date was not required to spend an equivalent time in custody under the previous sentence.

2.4 The author alleges that, by not making the "lighter penalty" retroactively applicable to persons who have committed indictable offences while on parole before 15 October 1977, the Parliament of Canada has enacted a law which deprives him of the benefit of article 15 of the Covenant and thereby failed to perform its duty, under article 2 of the Covenant, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to take the necessary steps to adopt such legislative measures as may be necessary to give effect to those rights.

3.1 As regards the admissibility of the communication the author claimed that in the present state of the law in Canada the benefit of article 15 of the Covenant could only be afforded to him through the royal prerogative of mercy, exercised by the Governor-General of Canada on the advice of the Privy Council for Canada. A petition submitted by the author in this connection was rejected on 19 January 1979 denying the validity of the author's claim. It was explained that the relevant provisions in article 15 of the Covenant applied only where the penalty for an offence had been reduced by law, and since there was no suggestion that the

¹ This date appears from a correction submitted by the State party (19 February 1982), the date having earlier been given by the parties as 19 December 1984.

penalties attributable to the offences for which the author was incarcerated had been reduced, after he committed them, the said provision was not applicable in his case.

3.2 The author maintained that, as a result, domestic remedies had been exhausted. He also stated that he had not applied to any other international body. He requested the Committee to find that he was entitled to receive credit, as partial completion of his combined terms of imprisonment, for the time spent by him on parole, namely 1,292 days, between 31 May 1971 and 13 December 1974.

4. By its decision of 7 August 1979 the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication.

5. By a note dated 24 March 1980 the State party objected to the admissibility of the communication on the ground that the communication was incompatible with the provisions of the Covenant and as such inadmissible under article 3 of the Optional Protocol to the Covenant. The State party submitted, in particular, that the word "penalty" in article 15 of the Covenant referred to the punishment or sanction decreed by law for a particular offence at the time of its commission. Therefore, in respect of a particular criminal act, a breach of the right to a lesser penalty could only occur when there was a reduction of the punishment which could be imposed by a court. Parole was the authority granted by law for an inmate to be at liberty during his term of imprisonment; it did not reduce the punishment which, according to law, could be imposed for a given offence, but rather dealt with the way a sentence would be served. The State party further maintained that the relevant provisions of the Criminal Law Amendment Act 1977 did not reduce the penalty which the law decreed for any given criminal offence and that, therefore, the new provisions did not result in a "lighter penalty" within the meaning of article 15 of the Covenant.

6.1 On 17 April 1980, comments on behalf of the author of the communication were submitted in reply to the State party's submission of 24 March 1980. They refuted the State party's contention that the granting of parole did not come within the legal term of "penalty" and that the provisions of the Criminal Law Amendment Act 1977 did not result in a "lighter penalty". Discussing a wide range of meanings of the word "penalty", the submission referred to several laws enacted in Canada which, by way of legal interpretations and judicial decisions, did not permit the State party's conclusion that a punishment not imposed by a court is not a penalty. The author further claimed that, according to Canadian Court rulings in specific cases, it was not unjustifiable to conclude that automatic deprivation of "statutory remission" (application of forfeiture of parole) by operation of law, although without any court order, was a penalty and that

therefore the provisions of the Criminal Law Amendment Act 1977, if applied to his case, would result in a lighter penalty.

6.2 Discussing applicable principles of interpretation it was submitted that, in case of doubt, a presumption in favour of the liberty of the individual should be applied to article 15 (1). As a consequence, this provision—unlike the Canadian Interpretation Act, section 36—was said not to be limited to a penalty imposed or adjudged after the change in the law. In this connection it was argued that this meaning was assumed in reservations made by certain other States parties when they ratified the Covenant, and was also supported in the proceedings in the Third Committee of the General Assembly of the United Nations in 1960, in which Canada had participated.

7. By its decision of 25 July 1980 the Committee, after finding, *inter alia*, that the communication was not incompatible with the provisions of the Covenant, declared the communication admissible.

8.1 In its submission under article 4 (2) of the Optional Protocol, dated 18 February 1981, the State party sets out, *inter alia*, the law relating to the Canadian parole system and asserts that it is not in breach of its obligations under the International Covenant on Civil and Political Rights. It contends:

(a) That article 15 of the International Covenant on Civil and Political Rights deals only with criminal penalties imposed by a criminal court for a particular criminal offence, pursuant to criminal proceedings;

(b) That the forfeiture of parole is not a criminal penalty within the meaning of article 15 of the Covenant;

(c) That by replacing forfeiture of parole by revocation of parole it did not substitute a "lighter penalty" for the "commission of an indictable offence while on parole".

8.2 The State party further elaborates on the definition of the word "penalty" as used in article 15 (1) of the Covenant.

8.3 The State party submits that there are various kinds of penalties: these may be criminal, civil or administrative. This distinction between criminal penalties and administrative or disciplinary ones, the State party argues, is generally accepted. Criminal penalties, it further submits, are sometimes referred to as "formal punishment" while the administrative penalties are referred to as "informal punishment".

8.4 The State party adds that the setting or context of article 15 of the Covenant is criminal law. The words "guilty", "criminal offence" and "offender" are evidence that when the word "penalty" is used in the context of article 15, what is meant is "criminal penalty". The State party finds unacceptable Mr. Van Duzen's proposition, that the word "penalty" in article 15 of the Covenant must be given a wide construction which would mean that article 15 would apply to administrative or disciplinary sanctions imposed by law as a consequence of criminal convictions.

8.5 The State party furthermore refers to a series of Canadian court decisions on the nature and effects of parole, its suspension or revocation. It also argues, quoting various authorities, that the Canadian process of sentencing permits flexibility with respect to forfeiture of parole. It points out that the last sentence of three years (plus forfeiture of parole) when the statutory maximum is 14 years, makes it possible to argue, in view of Mr. Van Duzen's criminal record, that the judge did take into consideration his forfeiture of parole. Also the role of the National Parole Board is discussed in this context.

8.6 The State party agrees with the alleged principle of interpretation referred to in paragraph 6.2 above, but is unable to find any ambiguity in article 15 of the Covenant because it is clearly restricted, it submits, to the field of criminal law. Therefore, the State party submits, the author cannot benefit from the presumption in favour of liberty.

8.7 In the light of the above, the State party submits that the Human Rights Committee ought to dismiss Mr. Van Duzen's communication. Article 15, it submits, deals with criminal penalties, while the process of parole is purely administrative, and therefore the Criminal Law Amendment Act 1977 cannot be regarded as providing a lighter penalty within the ambit of article 15.

9.1 On 2 June 1981 the author through his representative submitted observations under rule 93 (3) of the Committee's provisional rules of procedure in response to the State party's submission of 18 February 1981 under article 4 (2) of the Optional Protocol.

9.2 The author observes that in article 15 (1) the word "criminal" is associated with "offence" and not with "penalty". The State party's attempt to narrow the meaning of "penalty" is not supported by the words of the article. It is submitted that if the offence is criminal within the meaning of the article, any penalty for the offence is a penalty within the meaning of the article. The State party admits that forfeiture and revocation of parole were penalties and that revocation continues to be a penalty, but tries to divide penalties into categories for which it has no authority in the words of the article, in precedent or in reason.

9.3 The author maintains in his submission that the word "penalty" is not confined to a "criminal penalty", as defined by the State party, and is consistent not only with the language of article 15 (1) but also with judicial and other usage in the English-speaking world.

9.4 The penalty of forfeiture or revocation of parole, he states, is an integral part of the penal process resulting from conviction and imposition of a sentence of imprisonment and enforced by the agencies executing that sentence. The Penitentiary Service, the National Parole Board and the National Parole Service are all under the jurisdiction of the Solicitor-General of Canada, and the Penitentiary Service and the National Parole Service are branches of the Correctional Service of Canada, under the jurisdiction and administrative

direction and control of the Commissioner of Corrections.

9.5 As the Government has emphasized, the author states, parole affects the mode of undergoing a sentence of imprisonment imposed for the offence. Forfeiture and revocation of parole were, before 15 October 1977, penalties for breach of conditions of parole. Revocation of parole continues to be such a penalty. The State party's argument is that a penalty within the meaning of article 15 (1) is only a so-called "criminal penalty" imposed by a criminal court for a particular criminal offence, pursuant to criminal proceedings. It must surely be agreed that a term of imprisonment is such a penalty. A penalty is not exhausted when it is pronounced. It continues in operation until it has been completely executed. Being at large on parole is therefore a mode of undergoing a criminal penalty. Forfeiture and revocation of parole and their consequences were penalties for breach of conditions of a mode of undergoing a criminal penalty. Even if the State party's definition of "penalty" within the meaning of article 15 (1) were correct, which is not admitted, forfeiture and revocation of parole would be criminal penalties within that interpretation of the article. The attempted distinction put forward by the Government between an administrative and a criminal penalty is without foundation in this context. In this connection, attention is drawn to the statement of Mr. Justice LeDain, in the Canadian Federal Court of Appeal, in his reasons for judgement in *Re Zong and Commissioner of Penitentiaries* (1976) 1 C.F. 657, at 679-80, cited in the reply, where he said that forfeiture of parole was a penalty for the act of committing an indictable offence while on parole.

9.6 The author further maintains that the distinction between formal punishment, which is administered through the courts, and informal punishment which is used extensively in a wide variety of interpersonal and institutional contexts, misses the point of this communication. The penalty here at issue clearly entails "punishment for crime". The distinction does not depend on the agency that administers or imposes the penalty. The nature of the penalty, its relation to the offence, and its consequences are the critical factors, not the agency that imposes it.

9.7 Forfeiture of parole, when in effect, was a lawful automatic consequence by operation of law of conviction of an indictable offence in certain circumstances, but this *per se* is not the subject of the complaint. The author states that he would have no complaint under article 15 (1) about the forfeiture of his parole or the consequence of forfeiture of parole, as they applied to him, if the amendments of 1977 had not made lighter the penalty for breach of conditions of parole without making the amendment retroactive.

9.8 Commenting on the State party's submissions as to the process of sentencing and the alleged flexibility both before and after the amendments of 1977, the author refers to statistics showing that despite the maximum fixed by law at 14 years, his last sentence, which was a prison term of three years, is close to the normal

upper end for such offences. He therefore considers the suggestion that the sentencing judge took his forfeiture of parole into account in reduction of his term to be without foundation. The author maintains that, although revocation of parole continues to be authorized not only on conviction for offences for which forfeiture would have automatically ensued before 15 October 1977, but also following conviction of other offences or for some other reason not constituting an offence, the consequences of revocation are less severe under the present law than they were before 15 October 1977.

9.9 Finally, the author's submission of 2 June 1981 provides information that on 1 May 1981 he was again released under the Parole Act, under mandatory supervision, which is substantially equivalent to parole. It is argued, however, that as a result of the conditions of his release, he is not a free man and may be re-imprisoned at any time until late in 1984.² He claims to be entitled to be completely free after 9 June 1981.

9.10 In additional observations, dated 11 June 1981, the author further maintains that he was indeed subjected to the jurisdiction of a judicial authority in connection with the forfeiture of his parole. He states that in accordance with the law in force, he was brought before a Provincial judge, on or about 13 January 1975 (at a time when he was already in custody following his conviction on 13 December 1974) who, in the exercise of his judicial functions, declared that the author's parole was forfeited and issued a warrant, pursuant to section 18 (2) of the Parole Act, for his recommitment to a penitentiary pursuant to section 21 of the Parole Act, then in force.

10.1 The Human Rights Committee notes that the main point raised and declared admissible in the present communication is whether the provision for the retroactivity of a "lighter penalty" in article 15 (1) of the Covenant is applicable in the circumstances of the present case. In this respect, the Committee recalls that the Canadian legislation removing the automatic forfeiture of parole for offences committed while on parole was made effective from 15 October 1977, at a time when the alleged victim was serving the sentence imposed on him under the earlier legislation. He now claims that

under article 15 (1) he should benefit from this subsequent change in the law.

10.2 The Committee further notes that its interpretation and application of the International Covenant on Civil and Political Rights has to be based on the principle that the terms and concepts of the Covenant are independent of any particular national system of law and of all dictionary definitions. Although the terms of the Covenant are derived from long traditions within many nations, the Committee must now regard them as having an autonomous meaning. The parties have made extensive submissions, in particular as regards the meaning of the word "penalty" and as regards relevant Canadian law and practice. The Committee appreciates their relevance for the light they shed on the nature of the issue in dispute. On the other hand, the meaning of the word "penalty" in Canadian law is not, as such, decisive. Whether the word "penalty" in article 15 (1) should be interpreted narrowly or widely, and whether it applies to different kinds of penalties, "criminal" and "administrative", under the Covenant, must depend on other factors. Apart from the text of article 15 (1), regard must be had, *inter alia*, to its object and purpose.

10.3 However, in the opinion of the Committee, it is not necessary for the purposes of the present case to go further into the very complex issues raised concerning the interpretation and application of article 15 (1). In this respect regard must be had to the fact that the author has subsequently been released, and that this happened even before the date when he claims he should be free. Whether or not this claim should be regarded as justified under the Covenant, the Committee considers that, although his release is subject to some conditions, for practical purposes and without prejudice to the correct interpretation of article 15 (1), he has in fact obtained the benefit he has claimed. It is true that he has maintained his complaint and that his status upon release is not identical in law to the one he has claimed. However, in the view of the Committee, since the potential risk of re-imprisonment depends upon his own behaviour, this risk cannot, in the circumstances, represent any actual violation of the right invoked by him.

10.4 For the reasons set out in paragraph 10.3, the Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that the present case does not disclose a violation of the Covenant.

² According to a correction submitted by the State party (19 February 1982), Mr. Van Duzen's combined terms have been calculated to expire on 5 January 1985.

Submitted by: Sophie Vidal Martins on 13 August 1979

Alleged victim: The author

State party: Uruguay

Date of adoption of views: 23 March 1982 (fifteenth session)

Journalist—Freedom of movement—Right to leave any country—Renewal of passport—Jurisdiction of State party—Competence of Committee

Articles of Covenant: 2 (1) and 12 (2)

Articles of Optional Protocol: 1

Views under article 5 (4) of the Optional Protocol

1. The author of this communication (initial letter dated 13 August 1979 and a further letter dated 7 March 1981) is Sophie Vidal Martins, a Uruguayan national residing in Mexico. She works as a journalist and submits the communication on her own behalf.

2.1 She states that she holds a Uruguayan passport which was issued by the Uruguayan consulate in Stockholm (Sweden) in 1971 with a 10 years' validity upon condition that its validity would be confirmed after five years, i.e. on 28 January 1976. The author alleges that, living in France at that time, she applied to the Uruguayan consulate in Paris in June 1975 for renewal of her passport (*renovación*). She claims that Uruguayan citizens living abroad could obtain a passport without any difficulties until August 1974, when a Government decree came into force which provided that the issuance of a passport was subject to the approval of the Ministry of Defence and the Ministry of the Interior. She further states that, not having received any reply to her first application for renewal of her passport which she had submitted in Paris in June 1975, upon her arrival in Mexico in October 1975 as correspondent of the French periodical *Témoignage chrétien*, she submitted an application to the Uruguayan consulate in Mexico on 16 November 1975. One month later she was informed orally that the consul had received a communication requesting him to "wait for instructions". He sent two cables in order to obtain these instructions in January and March 1977, but without result. In October 1978 the author applied to the Uruguayan consulate in Mexico for a new passport. Two months later she was informed orally that the Uruguayan Ministry of the Interior had refused to give its approval. She appealed against this decision on 13 December 1978 to the Minister of the Interior through the Uruguayan Embassy in Mexico. The Ambassador offered her a document which would have entitled her to travel to Uruguay but not to leave the country again. She did not accept this for reasons of personal security. On 28 February 1979 she received an official note from the Uruguayan Foreign Ministry refusing, without giving any reasons, to issue her a passport.

2.2 The author considers the Uruguayan authorities' refusal to issue a passport to her was a "punitive measure" taken against her because of her former

employment by the Uruguayan weekly *Marcha*, which, together with 30 other newspapers, was prohibited by the authorities and whose director was living as a political refugee in Mexico. She claims that this constitutes a violation of articles 12 (2) and 19 of the International Covenant on Civil and Political Rights. The author adds that, according to her knowledge, she was never charged with any offence, either in Uruguay or abroad, and that she has never belonged to any political party.

2.3 The author does not mention whether she has had recourse to any further domestic remedy.

3.1 By its decision of 10 October 1979 the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned requesting information and observations relevant to the question of admissibility. No such reply was received from the State party to this request.

3.2 The Human Rights Committee ascertained that the same matter had not been submitted to the Inter-American Commission on Human Rights.

3.3 Consequently the Committee found, on the basis of the information before it, that it was not precluded by article 5 (2) (a) of the Optional Protocol from considering the communication. The Committee was also unable to conclude that, in the circumstances of the case, there was any effective domestic remedy available to the alleged victim which she had failed to exhaust. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (b) of the Optional Protocol.

3.4 On 2 April 1980, the Human Rights Committee therefore decided:

(a) That the communication was admissible;

(b) That, in accordance with article 4 (2) of the Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(c) That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Protocol must primarily relate to the substance of the matter under consideration, and in particular the specific violations of the Covenant alleged to have occurred.

4. On 29 October 1980 the time-limit for the observations requested from the State party under article 4 (2) of the Optional Protocol expired. However, no submission has yet been received from the State party.

5.1 In a further letter dated 7 March 1981, the author of the communication notes the lack of a response from the Government of Uruguay and informs the Human Rights Committee that the numerous difficulties caused to her by the refusal of the Uruguayan authorities to extend the validity of her passport have considerably increased, thus seriously affecting not only herself but also other members of her family. The author claims in this connection that after the death of her mother, Iclea Martins de Vidal, which occurred on 12 December 1979 in Uruguay, she and her brother became the sole heirs to their mother's estate and that the legal formalities in this respect have been completed before the appointed judge. Not being able to travel to Uruguay herself, she instructed a Mexican notary to take a number of necessary steps in order to terminate the regime of community property existing between her brother and herself. For this purpose, she requested the Uruguayan consul in Mexico to certify the signature of the competent Mexican official, Mr. Luis del Valle Prieto, which the consul allegedly refused and still refuses to do, thus making it impossible for her and her brother to pursue the separation proceedings further. The author points out that her request is covered by national legislation (Act No. 14,534 of 24 June 1976), in conformity with a treaty between Uruguay and Mexico signed in Panama on 29 January 1975 and ratified by the Government Council of Uruguay. She concludes that despite the efforts and *démarches* made, including those by the Mexican consul in Montevideo, it has not so far been possible for her and her brother to change the situation, adding that her brother, who lives in Uruguay, is in no way involved in any activity that might be held against her.

5.2 A copy of the author's submission of 7 March 1981 has been forwarded to the State party. No comments have been received from the State party in this respect either.

6.1 The Committee has considered the present communication in the light of all information made available to it, as provided in article 5 (1) of the Optional Protocol. The Committee notes that no submissions have been received from the State party in this case, particularly as to the reasons for refusal for an ordinary passport or the reasons for the offer of only a restricted travel document.

6.2 The Committee decides to base its views on the following facts that can be deduced from the author's submissions which also include official documents issued by the Uruguayan authorities in the case: Sophie Vidal Martins, a Uruguayan citizen residing at present in Mexico, and holder of a passport issued in 1971 in Sweden with a 10 years' validity upon condition that its validity be confirmed after five years, was refused such confirmation by the Uruguayan authorities without explanation several times between 1975 and 1977. In 1978 the author then applied for a new passport at the Uruguayan consulate in Mexico. According to the author, issuance of a passport is subject to the approval of the Ministry of Defence and the Ministry of the In-

terior. Two months after her application, Sophie Vidal Martins was informed that the Ministry of the Interior had refused to approve the issue to her of a new passport. She then appealed against this decision which later was officially reconfirmed by the Uruguayan Foreign Ministry without any reasons given. The author was offered a document which would have entitled her to travel to Uruguay, but not to leave the country again. The author declined this offer for reasons of personal security.

6.3 After the death of her mother in Uruguay in December 1979 when the legal questions concerning an inheritance arose between the author and her brother who is a resident of Uruguay, Sophie Vidal Martins was unable in the circumstances described above to go to Uruguay to settle these questions herself, but authorized a Mexican notary, Luis del Valle Prieto, to act on her behalf. As is necessary in such cases, the signature of the notary had to be certified by the Uruguayan consul in Mexico. The consul, however, refused without reason to certify Mr. del Valle's signature, although Mrs. Martins requested him to do so in conformity with (i) Uruguayan legislation (Act No. 14,534 of 24 June 1976) and (ii) a treaty between Uruguay and Mexico which was ratified by the current Government Council of Uruguay. The inheritance settlement thus continues to remain unresolved, to the author's detriment and the detriment of her brother.

7. The Human Rights Committee has examined, *ex officio*, whether the fact that Sophie Vidal Martins resides abroad affects the competence of the Committee to receive and consider the communication under article 1 of the Optional Protocol, taking into account the provisions of article 2 (1) of the Covenant. Article 1 of the Optional Protocol applies to individuals subject to the jurisdiction of the State concerned who claim to be victims of a violation by that State of any of the Covenant rights. The issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is "subject to the jurisdiction" of Uruguay for that purpose. Moreover, a passport is a means of enabling him "to leave any country, including his own", as required by article 12 (2) of the Covenant. It therefore follows from the very nature of the right that, in the case of a citizen resident abroad it imposes obligations both on the State of residence and on the State of nationality. Consequently, article 2 (1) of the Covenant cannot be interpreted as limiting the obligations of Uruguay under article 12 (2) to citizens within its own territory.

8. As to the allegations made by the author with regard to a breach of article 19 of the Covenant, they are in such general terms and seem to be of such secondary nature in the case that the Committee makes no finding in regard to them.

9. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by it, in so far as they have

occurred after 23 March 1976 (the date on which the Covenant entered into force in respect of Uruguay), disclose a violation of article 12 (2) of the Covenant, because Sophie Vidal Martins was refused the issuance of a passport without any justification, thereby preventing her from leaving any country including her own.

10. Accordingly, the Committee is of the view that the State party is under an obligation pursuant to article 2 (3) of the Covenant to provide Sophie Vidal Martins with effective remedies which would give her the possibility of enjoying the rights under article 12 of the Covenant, including a passport valid for travel abroad.

Communication No. 61/1979

Submitted by: Leo R. Hertzberg, Ulf Mansson, Astrid Nikula and Marko and Tuovi Putkonen, represented by SETA, on 7 August 1979

Alleged victims: The authors

State party: Finland

Date of adoption of views: 2 April 1982 (fifteenth session)

Concept of victim—No in abstracto review of national legislation—Homosexuality—Freedom of expression and information (radio and television)—Protection of public morals—Margin of discretion

Article of Covenant: 19

Articles of Optional Protocol: 1 and 2

Views under article 5 (4) of the Optional Protocol¹

1. The authors of this communication (initial letter dated 7 August 1979) are five individuals, who are represented by a Finnish organization, SETA (Organization for Sexual Equality).

2.1 The facts of the five cases are essentially undisputed. The parties only disagree as to their evaluation. According to the contentions of the authors of the communication, Finnish authorities, including organs of the State-controlled Finnish Broadcasting Company (FBC), have interfered with their right of freedom of expression and information, as laid down in article 19 of the Covenant, by imposing sanctions against participants in, or censoring, radio and TV programmes dealing with homosexuality. At the heart of the dispute is paragraph 9 of chapter 20 of the Finnish Penal Code which sets forth the following:

If someone publicly engages in an act violating sexual morality, thereby giving offence, he shall be sentenced for publicly violating sexual morality to imprisonment for at most six months or to a fine.

Anyone who publicly encourages indecent behaviour between persons of the same sex shall be sentenced for encouragement to indecent behaviour between members of the same sex as decreed in subsection 1.

2.2 In September 1976, Leo Rafael Hertzberg, a lawyer, was interviewed for the purposes of a radio programme entitled "*Arbetsmarknadens uteslutna*" ("The Outcasts of the Labour Market"). In the interview, he asserted on the strength of his knowledge as an expert that there exists job discrimination in Finland on the ground of sexual orientation, in particular, to the detriment of homosexuals. Because of this programme

criminal charges were brought against the editor (not Mr. Hertzberg) before the Helsinki Municipal Court and, subsequently, before the Helsinki Court of Appeals. Although the editor was acquitted, Mr. Hertzberg claims that through those penal proceedings his right to seek, receive and impart information was curtailed. In his view, the Court of Appeals (decision No. 2825 of 27 February 1979) has exceeded the limits of reasonable interpretation by construing paragraph 9 (2) of chapter 20 of the Penal Code as implying that the mere "praising of homosexual relationships" constituted an offence under that provision.

2.3 Astrid Nikula prepared a radio programme conceived as part of a young listeners' series in December 1978. This programme included a review of the book, "*Pojkar skall inte grata*" ("Boys must not cry") and an interview with a homosexual about the identity of a young homosexual and about life as a homosexual in Finland. When it was ready for broadcasting, it was censored by the responsible director of FBC against the opposition of the editorial team of the series. The author claims that no remedy against the censorship decision was available to her.

2.4 Ulf Mansson participated in a discussion about the situation of the young homosexual depicted in Mrs. Nikula's production. The discussion was designed to form part of the broadcast. Like Mrs. Nikula, the author states that no remedy was available to him to challenge the censorship decision.

2.5 In 1978, Marko and Tuovi Putkonen, together with a third person, prepared a TV series on different marginal groups of society such as Jews, gypsies and homosexuals. Their main intention was to provide factual information and thereby to remove prejudices against those groups. The responsible programme director, however, ordered that all references to homosexuals be cut from the production, indicating that its transmission in full would entail legal action against FBC under paragraph 9 (2) of chapter 20 of the Penal Code.

2.6 The authors claim that their case is an illustration of the adverse effects of the wide interpretation given to that provision; which does not permit an objective description of homosexuality. According to their

¹ The text of an individual opinion submitted by a Committee member is appended to these views.

allegations, it is extremely difficult, if not impossible, for a journalist to start preparing a programme in which homosexuals are portrayed as anything else than sick, disturbed, criminal or wanting to change their sex. They contend that several of such programmes have been broadcast by FBC in the recent past.

2.7 The authors state that the same matter has not been submitted for examination under another procedure of international investigation or settlement.

3. By its decision of 28 March 1980, the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party, requesting information and observations relevant to the question of admissibility.

4. By a note dated 9 June 1980, the State party, while rejecting the allegation that the Government of Finland was in breach of article 19 of the Covenant, confirmed that there were no further domestic remedies available to the alleged victims in the sense of article 5 (2) (b) of the Optional Protocol. The State party argued that the authors of the communication appeared to give to the concept of freedom of speech, protected by article 19 of the Covenant, a content different from that generally used by maintaining that it would restrict the right of the owner of a means of communication to decide what material will be published. The State party expressed its expectation that the Committee would focus its attention on this issue when considering the question of admissibility of the communication in the light of the provisions of article 3 of the Optional Protocol.

5. By decision of 25 July 1980 and on the basis of the information before it, the Committee concluded:

(a) That the communication was admissible;

(b) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it.

6.1 In its submission under article 4 (2) of the Optional Protocol, dated 25 February 1981, the State party refutes the allegation that there has been a violation of the Covenant on Civil and Political Rights in Finland. It affirms that the Finnish legislation in force, including the Finnish Penal Code, was scrutinized in connection with the process of ratifying the Covenant and found to be in conformity with it. It stresses that the purpose of the prohibition of public encouragement to indecent behaviour between members of the same sex is to reflect the prevailing moral conceptions in Finland as interpreted by the Parliament and by large groups of the population. It further contends that discussion in the Parliament indicates that the word "encouragement" is to be interpreted in a narrow sense. Moreover, the Legislative Committee of the Parliament expressly provided that the law shall not hinder the presentation of factual information on homosexuality.

6.2 The State points out that there has not been any case where any person was convicted under paragraph 9 (2) of chapter 20 of the Penal Code and concludes that "the application of the paragraph in question shows no indication of an interpretation of the term in such a large sense that might be considered to unduly limit the freedom of expression."

6.3 While admitting that paragraph 9 (2) constitutes a certain restriction on freedom of expression, the State specifically refers to article 19 (3) of the Covenant, which states that the exercise of the rights provided for in article 19 (2) may be subject to certain restrictions, in so far as these are provided by law and are necessary for the protection of public order, or of public health or morals.

6.4 Yet, the State contends that the decision of the Finnish Broadcasting Company concerning the programmes referred to by the submitting organization did not involve the application of censorship but were based on "general considerations of programme policy in accordance with the internal rules of the Company".

7. On 7 May 1981, the authors presented an additional submission in which they discuss in general terms the impact of paragraph 9 (2) of chapter 20 of the Penal Code on journalistic freedom. They argue that article 19 in connection with article 2 (1) of the Covenant requires Finland "to ensure that FBC not only deals with the subject of homosexuality in its programmes but also that it affords a reasonable and, in so far as is possible, an impartial coverage of information and ideas on the subject, in accordance with its own programming regulations". On this basis they challenge, in particular, the relevant programme directive of FBC of 30 October 1975, still in force today, which states, *inter alia*, "All persons responsible for programmes are requested to observe maximum strictness and carefulness, even when factual information about homosexuality is given", drawing attention at the same time to the fact that on the same day a written warning had been issued to the head of the film service of FBC to reject any production which gave a "positive picture of homosexuality". In addition, they dispute the State party's contention that the decisions taken by the Finnish Broadcasting Company with respect to radio and television programmes dealing with homosexuality were based on general considerations of programme policy and did not constitute censorship measures taken in pursuance of paragraph 9 (2) of chapter 20 of the Penal Code.

8. The Committee, considering the present communication in the light of all information made available to it by the parties as provided for in article 5 (1) of the Optional Protocol, hereby decides to base its views on the facts as submitted by the parties, which are not in dispute.

9.1 In considering the merits of the communication, the Human Rights Committee starts from the premise that the State party is responsible for actions of the Finnish Broadcasting Company (FBC), in which the State holds a dominant stake (90 per cent) and which is placed under specific government control.

9.2 The Committee wishes further to point out that it is not called upon to review the interpretation of paragraph 9 (2) of chapter 20 of the Finnish Penal Code. The authors of the communication have advanced no valid argument which could indicate that the construction placed upon this provision by the Finnish tribunals was not made *bona fide*. Accordingly, the Committee's task is confined to clarifying whether the restrictions applied against the alleged victims, irrespective of the scope of penal prohibitions under Finnish penal law, disclose a breach of any of the rights under the Covenant.

9.3 In addition, the Committee wishes to stress that it has only been entrusted with the mandate of examining whether an individual has suffered an actual violation of his rights. It cannot review in the abstract whether national legislation contravenes the Covenant, although such legislation may, in particular circumstances, produce adverse effects which directly affect the individual, making him thus a victim in the sense contemplated by articles 1 and 2 of the Optional Protocol. The Committee refers in this connection to its earlier views on communication No. 35/1978 (S. Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius *supra*).

10.1 Concerning Leo Rafael Hertzberg, the Committee observes that he cannot validly claim to be a victim of a breach by the State party of his right under article 19 (2) of the Covenant. The programme in which he took part was actually broadcast in 1976. No sanctions were imposed against him. Nor has the author claimed that the programme restrictions as applied by FBC would in any way personally affect him. The sole fact that the author takes a personal interest in the dissemination of information about homosexuality does not make him a victim in the sense required by the Optional Protocol.

10.2 With regard to the two censored programmes of Mrs. Nikula and of Marko and Tuovi Putkonen, the Committee accepts the contention of the authors that their rights under article 19 (2) of the Covenant have been restricted. While not every individual can be deemed to hold a right to express himself through a medium like TV, whose available time is limited, the situation may be different when a programme has been produced for transmission within the framework of a broadcasting organization with the general approval of the responsible authorities. On the other hand, article 19 (3) permits certain restrictions on the exercise of the rights protected by article 19 (2), as are provided by law and are necessary for the protection of public order or of public health or morals. In the context of the present communication, the Finnish Government has specifically invoked public morals as justifying the actions complained of. The Committee has considered whether, in order to assess the necessity of those actions, it should invite the parties to submit the full text of the censored programmes. In fact, only on the basis of these texts could it be possible to determine whether the censored programmes were mainly or exclusively made up of factual information about issues related to homosexuality.

10.3 The Committee feels, however, that the information before it is sufficient to formulate its views on the communication. It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.

10.4 The Committee finds that it cannot question the decision of the responsible organs of the Finnish Broadcasting Corporation that radio and TV are not the appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging homosexual behaviour. According to article 19 (3), the exercise of the rights provided for in article 19 (2) carries with it special duties and responsibilities for those organs. As far as radio and TV programmes are concerned, the audience cannot be controlled. In particular, harmful effects on minors cannot be excluded.

11. Accordingly, the Human Rights Committee is of the view that there has been no violation of the rights of the authors of the communication under article 19 (2) of the Covenant.

APPENDIX

Individual opinion submitted by a member of the Human Rights Committee under rule 94 (3) of the Committee's provisional rules of procedure

Communication No. 61/1979

Individual opinion appended to the Committee's views at the request of Mr. Torkel Opsahl:

Although I agree with the conclusion of the Committee, I wish to clarify certain points.

This conclusion prejudices neither the right to be different and live accordingly, protected by article 17 of the Covenant, nor the right to have general freedom of expression in this respect, protected by article 19. Under article 19 (2) and subject to article 19 (3), everyone must in principle have the right to impart information and ideas—positive or negative—about homosexuality and discuss any problem relating to it freely, through any media of his choice and on his own responsibility.

Moreover, in my view the conception and contents of "public morals" referred to in article 19 (3) are relative and changing. State-imposed restrictions on freedom of expression must allow for this fact and should not be applied so as to perpetuate prejudice or promote intolerance. It is of special importance to protect freedom of expression as regards minority views, including those that offend, shock or disturb the majority. Therefore, even if such laws as paragraph 9 (2) of chapter 20 of the Finnish Penal Code may reflect prevailing moral conceptions, this is in itself not sufficient to justify it under article 19 (3). It must also be shown that the application of the restriction is "necessary".

However, as the Committee has noted, this law has not been directly applied to any of the alleged victims. The question remains whether they have been more indirectly affected by it in a way which can be said to interfere with their freedom of expression, and if so, whether the grounds were justifiable.

It is clear that nobody—and in particular no State—has any duty under the Covenant to promote publicity for information and ideas of all kinds. Access to media operated by others is always and necessarily more limited than the general freedom of expression. It follows that such access may be controlled on grounds which do not have to be justified under article 19 (3).

It is true that self-imposed restrictions on publishing, or the internal programme policy of the media, may threaten the spirit of freedom of expression. Nevertheless, it is a matter of common sense that such decisions either entirely escape control by the Committee or must be accepted to a larger extent than externally imposed restrictions such as enforcement of criminal law or official censorship, neither of which took place in the present case. Not even media controlled by the State can under the Covenant be under an obligation to publish all that may be published. It is not possible to apply the criteria of article 19 (3) to self-imposed restrictions. Quite apart from the "public morals" issue, one cannot require that they shall be only such as are "provided by law and are necessary" for

the particular purpose. Therefore I prefer not to express any opinion on the possible reasons for the decisions complained of in the present case.

The role of mass media in public debate depends on the relationship between journalists and their superiors who decide what to publish. I agree with the authors of the communication that the freedom of journalists is important, but the issues arising here can only partly be examined under article 19 of the Covenant.

The following members of the Committee associated themselves with the individual opinion submitted by Mr. Opsahl: Mr. Rajsoomer Lallah, Mr. Walter Surma Tarnopolsky.

Communication No. 64/1979

Submitted by: Consuelo Salgar de Montejó on 18 December 1979

Alleged victim: The author

State party: Colombia

Date of adoption of views: 24 March 1982

Right to review of conviction and sentence—Non bis in idem—Derogation from Covenant

Articles of Covenant: 4, 9 (1) and 14 (1) and (5)

Views under article 5 (4) of the Optional Protocol

1.1 The author of the communication (initial letter dated 18 December 1979 and further letters dated 18 June 1980 and 7 April 1981) is Consuelo Salgar de Montejó, a Colombian national. She submitted the communication on her own behalf through her legal representative.

1.2 The author alleges that by enacting Legislative Decree No. 1923 of 6 September 1978 (Statute of Security) the Government of Colombia has breached articles 9 and 14 of the Covenant.

1.3 She claims to be a victim of these violations and, through her legal representative, describes the relevant facts as follows:

1.4 Consuelo Salgar de Montejó, Director of the Colombian newspaper *El Bogotano*, was sentenced to one year of imprisonment by a military judge on 7 November 1979 on grounds of the alleged violation of article 10 of the Statute of Security for the alleged offence of having sold a gun. Through the only recourse procedure available, the *recurso de reposición*, her sentence was confirmed by the same judge on 14 November 1979.

1.5 She alleges that by application of the decree, she was denied the right to appeal to a higher tribunal in violation of article 14 (5) of the Covenant and that she was denied the guarantees laid down in article 14 (1) of the Covenant because military tribunals are, allegedly, not competent, independent and impartial. On the basis of these allegations, the author claims that she was arbitrarily detained and subjected to arbitrary imprisonment and, accordingly, that article 9 (1) of the Covenant was violated. She further alleges, without giving any specific details, that the principles of *non bis in idem* and of *res judicata* have been violated.

1.6 The author maintains that there are no further domestic remedies to exhaust and the present case has not been submitted for examination under any other procedure of international investigation or settlement.

2. On 18 March 1980, the Working Group of the Human Rights Committee decided to transmit the communication to the State party, under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility.

3.1 By letter dated 29 May 1980 the State party refuted the allegations made by the alleged victim.

3.2 The State party contests, in particular, the allegation that Colombia was in breach of article 14 (5) of the Covenant. It argues that in that provision, the phrase "according to the law" leaves it to national law to determine in which cases and circumstances application may be made to a court of higher instance and that if the meaning of this provision should be differently interpreted, it must be borne in mind that Colombia is experiencing a situation of disturbed public order, within the meaning of article 4 (1) of the Covenant, and that consequently the Government may take the measures therein referred to. The State party further maintains that Mrs. Salgar de Montejó was released after having served a term of detention of three months and 15 days and that she now enjoys full liberty without any restriction. With regard to the exhaustion of domestic remedies, the State party recognizes that in the case in question there are no further remedies.

4. Commenting on the State party's submission, the author argues, in her letter dated 18 June 1980, that the State party cannot invoke article 4 (1) of the Covenant because it has not so far fulfilled the requirements of the provisions of article 4 (3), and that she should be compensated for the violations of articles 9 and 14 of the Covenant which she has allegedly suffered. She again argues, without further explanation, that the principles of *non bis in idem* and *res judicata* have been violated.

5. The Committee found, on the basis of the information before it, that it was not precluded from considering the communication by article 5 (2) (a) of the Optional Protocol. As to the exhaustion of domestic remedies, the parties agreed that there were no further domestic remedies which the alleged victim could pursue. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (b) of the Optional Protocol.

6. On 29 July 1980, the Human Rights Committee therefore decided:

(a) That the communication was admissible;

(b) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it.

7.1 In its submission under article 4 (2) of the Optional Protocol, dated 17 February 1981, the State party reiterated that article 14 (5) of the Covenant establishes the general principle of review by a higher tribunal without making such a review mandatory in all possible cases involving a criminal offence since the phrase "according to the law" leaves it to national law to determine in which cases and circumstances application may be made to a higher court. It explained that under the legal régime in force in Colombia, criminal offences are divided into two categories, namely *delitos* and *contravenciones* and that convictions for all *delitos* and for almost all *contravenciones* are subject to review by a higher court. It added that Consuelo Salgar de Montejo committed a *contravención* which the applicable legal instrument, namely Decree No. 1923 of 1978, did not make subject to review by a higher court.

7.2 The State party submits that Decree No. 1923 of 6 September 1978 establishing rules for the protection of the life, honour and property of persons and guaranteeing the security of members of associations, known as the "Security Statute", has as its legal basis article 121 of the Colombian Constitution. The decree was issued because of the social situation created by the activities of subversive organizations which were disturbing public order with a view to undermining the democratic system in force in Colombia. The State party adds that this Decree does not affect people's normal peaceful activities; it does not restrict political rights, which in Colombia are exercised with total freedom; its objective is to punish offences and it does not differ in nature from any ordinary penal code.

7.3 The State party further submits that the extension of the jurisdiction of the military criminal courts to the trial of certain offences and of civilians who are not serving in the armed forces, in situations where public order is seriously disturbed, is not a novel feature of the Colombian legal order, and it cited several decrees to illustrate this point.

7.4 As to the allegation that article 7 of Decree No. 1923 of 1978, which establishes grounds for deprivation of liberty, violates the guarantee established in article 9 of the Covenant that "no one shall be deprived of his

liberty except on such grounds and in accordance with such procedure as are established by law", the State party argues that the grounds for deprivation of liberty and the procedure to be followed in such a case may be specified in Colombia not only by virtue of an ordinary law of the Congress but also by legislative decrees issued under powers granted by article 121 of the Constitution. These decrees are mandatory and prevail over any legislative provision inconsistent therewith for as long as the state of siege during which they were issued remains in effect. The State party further observes that Decree No. 1923 of 1978 was issued by the President of Colombia in exercise of the powers vested in him by article 121 of the Constitution, and that by its ruling of 30 October 1978 the Supreme Court of Justice declared the Decree to be enforceable, i.e., in conformity with the Constitution, with the exception of certain provisions which are consequently no longer in force (these provisions are not relevant to the present case).

7.5 The State party further observes that there are no grounds for claiming that the judicial powers provided for in articles 9, 11 and 12 of Decree No. 1923 impair the guarantee of a competent, independent and impartial tribunal. It quotes the Supreme Court of Justice of Colombia, which has ruled that "... under article 61 of the Constitution it is permissible, during a state of siege, to enlarge the military penal jurisdiction so that it may deal with ordinary offences connected with the disturbance of order or with the causes of the exceptional situation. As military tribunals, like ordinary courts, are established by the Constitution, the mere transfer of competence from the ordinary courts to the military tribunals for the hearing, under military judicial procedure, of certain ordinary offences in times of state of siege does not imply that *ad hoc* courts are established nor does it mean that the accused are subjected to new rules of procedure, as these rules are embodied in pre-existing law. The military tribunals' competence is extended by authority of the Constitution for the purpose of trying ordinary offences".

7.6 The State party concludes that Consuelo Salgar de Montejo was tried by the authority with exclusive competence in the matter under the legal rules in force, and no other judge or court could legally have tried her for the offence of which she was accused, in view of the time when the offence was committed and she was brought to trial. She was tried in accordance with legal provisions existing prior to the criminal offence she committed, by the competent authority and with full observance of the appropriate procedures for the action brought against her. The State party rejects as totally baseless the allegation that Consuelo Salgar de Montejo was tried twice for the same offence. It maintains that she was tried only once for the offence in question.

8.1 In her additional information and observations dated 7 April 1981 (submitted under rule 93 (3) of the Committee's provisional rules of procedure), the author argues that article 14 (5) of the Covenant provides for dual jurisdiction for judgements in criminal cases and, therefore, the Government of Colombia cannot restrict that guarantee, particularly not by means of emergency

legislation such as the "Security Statute". She emphasizes that the Colombian Code of Criminal Procedure provides for the guarantee of dual jurisdiction for judgements in criminal cases and the Government of Colombia cannot fail to take account of it without violating the Covenant and the universally recognized right to appeal against custodial sentences.

8.2 She reiterates that the Government of Colombia cannot, in the present case, invoke article 4 of the Covenant because it has not so far fulfilled the requirements of that provision in respect of states of emergency and derogations from its obligations under the Covenant. The author states that under article 121 of the Colombian Constitution a state of siege has, for all intents and purposes, been in effect in Colombia since the disturbances of 9 April 1948. She mentioned, in particular, that by Decree No. 2131 of 7 October 1976, the previous Government of Colombia declared "a disturbance of public order and a state of siege throughout the national territory" to put an end to the "unconstitutional stoppage" which was in progress at the Colombian Institute of Social Security and was, according to the Decree, affecting "its medical, paramedical and auxiliary services". She added that although the strike was broken within a few months, the state of siege has been extended *sine die*.

8.3 The author continues to maintain that the only competent, independent and impartial tribunals with criminal jurisdiction in Colombia are those of the judicial power, which were established previously under title XV ("Administration of Justice") of the Constitution, article 58 of which states that "justice is administered by the Supreme Court, higher district courts and such other tribunals and courts as may be established by law". The author stresses that the Constitution of Colombia in no case permits military courts to try civilians and, at the same time, she remarks that "an unfortunate interpretation of article 61 of the Constitution by the Supreme Court of Justice has, however, enabled the Government and the military to extend military criminal jurisdiction to civilians".

8.4 The author observes that although it is true that, in its ruling of 30 October 1978, the Supreme Court of Justice declared that Decree No. 1923 of 1978 was compatible with the Constitution, it is equally true that the Court did not rule on the compatibility or incompatibility of such Decree with the Covenant. She claims that it is ultimately for the Committee to rule on this matter.

8.5 Finally, the author alleges that she has [in effect] been tried twice for the same offence: in the first military trial for alleged illegal possession and purchase of weapons she was acquitted, but authorization was obtained to institute further criminal proceedings against her for selling a weapon, "obviously in retaliation for the opposition she had voiced in her newspaper, *El Bogotano*". She considers this to be a violation of the principles of *res judicata* and *non bis in idem*.

9.1 The Human Rights Committee bases its views on the following facts, which are not in dispute: Con-

suelo Salgar de Montejó, Director of the Colombian newspaper *El Bogotano*, was sentenced to one year of imprisonment by a military tribunal on 7 November 1979 for the offence of having sold a gun in violation of article 10 of Decree No. 1923 of 6 September 1978, also called Statute of Security. For this offence she was tried only once. Through the only recourse procedure available, the *recurso de reposición*, her sentence was confirmed by the same judge on 14 November 1979. She was convicted for an offence (*contravención*) which the applicable legal instrument, namely Decree No. 1925 of 1978, did not make subject to review by a higher court. She was released after having spent three months and 15 days in prison.

9.2 As to the allegations made by the author with regard to breaches of articles 9 (1) and 14 (1) of the Covenant, they are in such general terms that the Committee makes no finding in regard to them.

10.1 In formulating its views the Human Rights Committee also takes into account the following considerations:

10.2 The Committee notes that the Government of Colombia in its submission of 29 May 1980 made reference to a situation of disturbed public order in Colombia within the meaning of article 4, paragraph 1, of the Covenant. In its note of 18 July 1980 to the Secretary-General of the United Nations (reproduced in document CCPR/C/2/Add.4), which was designed to comply with the formal requirements laid down in article 4 (3) of the Covenant, the Government of Colombia has made reference to the existence of a state of siege in all the national territory since 1976 and to the necessity to adopt extraordinary measures within the framework of the legal régime provided for in the National Constitution for such situations. With regard to the rights guaranteed by the Covenant, the Government of Colombia declared that "temporary measures have been adopted that have the effect of limiting the application of article 19, paragraph 2, and article 21 of that Covenant". The present case, however, is not concerned with articles 19 and 21 of the Covenant.

10.3 In the specific context of the present communication there is no information to show that article 14 (5) was derogated from in accordance with article 4 of the Covenant; therefore the Committee is of the view that the State party, by merely invoking the existence of a state of siege, cannot evade the obligations which it has undertaken by ratifying the Covenant. Although the substantive right to take derogatory measures may not depend on a formal notification being made pursuant to article 4 (3) of the Covenant, the State party concerned is duty bound, when it invokes article 4 (1) of the Covenant in proceedings under the Optional Protocol, to give a sufficiently detailed account of the relevant facts to show that a situation of the kind described in article 4 (1) of the Covenant exists in the country concerned.

10.4 The Committee considers that the expression "according to law" in article 14 (5) of the Covenant is

not intended to leave the very existence of the right of review to the discretion of the States parties, since the rights are those recognized by the Covenant, and not merely those recognized by domestic law. Rather, what is to be determined "according to law" is the modalities by which the review by a higher tribunal is to be carried out. It is true that the Spanish text of article 14 (5), which provides for the right to review, refers only to "*un delito*", while the English text refers to a "crime" and the French text refers to "*une infraction*". Nevertheless the Committee is of the view that the sentence of imprisonment imposed on Mrs. Consuelo Salgar de Montejo, even though for an offence defined as "*contravención*" in domestic law, is serious enough, in all the circumstances, to require a review by a higher

tribunal as provided for in article 14 (5) of the Covenant.

11. The Committee, acting under article 5 (4) of the Optional Protocol, is therefore of the view that the facts as set out in paragraph 9 above, disclose a violation of article 14 (5) of the Covenant because Mrs. Consuelo Salgar de Montejo was denied the right to review of her conviction by a higher tribunal.

12. The Committee accordingly is of the view that the State party is under an obligation to provide adequate remedies for the violation which Mrs. Consuelo Salgar de Montejo has suffered and that it should adjust its laws in order to give effect to the right set forth in article 14 (5) of the Covenant.

Communication No. 70/1980

Submitted by: Elsa Cubas on 3 May 1980

Alleged victim: Mirta Cubas Simones

State party: Uruguay

Date of adoption of views: 1 April 1982 (fifteenth session)

Exhaustion of domestic remedies—Detention incommunicado—Access to counsel—Fair trial—Presence of accused at trial

Articles of Covenant: 10 (1) and 14 (1) and (3)

Article of Optional Protocol: 5 (2) (b)

Views under article 5 (4) of the Optional Protocol

1. The author of the communication (initial letter dated 3 May 1980 and further submissions dated 14 July and 22 December 1980) is a Uruguayan national at present living in Canada. She submitted the communication on behalf of her sister, Mirta Cubas Simones, a 37-year-old Uruguayan national, alleging that she is imprisoned in Uruguay without any justifiable reason.

2.1 The author states that Mirta Cubas Simones was arrested without a warrant in her home on 27 January 1976, that she was held incommunicado until April 1976 and that during this period her detention was denied by the authorities although her mother and a sister were present at the time of her arrest. The author further states that in July 1976 her sister was brought to trial and charged with the offence of "aiding a conspiracy to violate the law" (*Asistencia a la asociación para delinquir*) and that a three-year prison sentence was requested by the public prosecutor. Upon appeal to the Supreme Military Tribunal in August 1978, she was charged in addition with the offence of "subversion", and the public prosecutor asked for the sentence to be increased to six years. In November 1979 a plea was made on the sister's behalf that the sentence asked for be reduced, but the author states that this plea has been rejected by the Supreme Military Tribunal, and adds that no more domestic remedies are available to her

sister because all cases concerning political prisoners are under military jurisdiction. The author alleges that her sister had no fair and public hearing as the proceedings have taken place before a closed military tribunal and that she had no effective access to legal assistance as she had never been able to communicate with her court-appointed defence lawyer, Dr. Pereda. The author states that because of the absolute inaccessibility of the court records she is not in a position to provide more detailed information about the judicial proceedings concerning her sister. The author further alleges that since mid-1976 her sister has been subjected to severe and inhuman prison conditions, such as lack of food and solitary confinement in small cells over long periods of time, at Punta de Rieles, Montevideo.

2.2 The author declares that the same matter has not, to her knowledge, been submitted to another procedure of international investigation or settlement, and claims that her sister is a victim of violation of articles 7, 9, 10, 14, 15, 17 and 19 of the International Covenant on Civil and Political Rights.

3. By its decision of 11 July 1980, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned, requesting information and observations relevant to the admissibility of the communication.

4. By a note dated 17 October 1980, the State party objected to the admissibility of the communication on the ground that it did not fulfil the requirements of article 5, paragraph 2 (b), of the Optional Protocol to the International Covenant on Civil and Political Rights. In this connection, the State party asserts that "although the appeals procedure which culminated in the judgement of the second instance pronounced on 2 October

1979 has been completed, there still remain available the extraordinary remedies of annulment and review, as provided for in article 507 of the Code of Military Penal Procedure and Law 3,439 of 5 April 1909, which have not been invoked". The State party adds: "similarly, Law 14,997 of 25 March 1980 establishes procedures for requesting early and conditional release in cases under military jurisdiction ... the party concerned has not so far petitioned the Supreme Court of Military Justice to apply that law to her case, ... consequently, all domestic remedies have not been exhausted".

5. On 22 December 1980, the author forwarded her comments in reply to the State party's submission of 17 October 1980. She claims therein that the remedies provided for by the law and the various actions to be taken before the Supreme Court of Military Justice available under the law, referred to by the State party, even if they exist, have not been brought to her sister's attention by her military defence counsel, which indicates that the officially appointed defence counsel has failed in his duty. She points out that her sister does not have freedom of action, that she does not know the law governing her case and that she is tried under the military legal system to which the defence counsel belongs. The author further challenges the validity of the "remedies" referred to by the State party on the ground that the climate of terror, the harsh and inhuman treatment to which her sister is subjected in prison and the lack of support from her defence counsel make it impossible for her to take action in her own defence. The author therefore concludes that the proceedings in her sister's case cannot be assessed according to what is applicable in a normal case ("*no puede juzgarse con la formalidad de un caso normal*").

6.1 The Human Rights Committee noted the State party's assertion that there were further remedies available to Mirta Cubas Simones. The State party, however, did not adduce any grounds to show that the remedies which in other cases have been described as being exceptional in character, should be pursued in the present case. On the contrary, the Committee noted that the officially appointed defence counsel had not invoked them on behalf of Mirta Cubas Simones, although more than a year had passed since the Supreme Military Court rendered judgement against her. They could not therefore be regarded as having, in effect, been "available" within the meaning of article 5 (2) (b) of the Optional Protocol.

6.2 In the circumstances, the Committee was unable to conclude, on the basis of the information submitted by the State party, that the communication was inadmissible under article 5 (2) (b).

6.3 In its submission dated 17 October 1980 the State party did not contest the author's assertion that the same matter had not been submitted to any other international body.

6.4 Consequently, the Committee found that it was not precluded by article 5 (2) (a) of the Optional Protocol from considering the communication.

7. On 31 March 1981, the Human Rights Committee therefore decided:

(a) That the communication was admissible;

(b) That, in accordance with article 4 (2) of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(c) That the State party should be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that in order to perform its responsibilities, it required specific responses to the allegations which had been made by the author of the communication, and the State party's explanations of the actions taken by it. The State party was requested in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration.

8. By a note dated 15 October 1981, the State party submitted the following explanations under article 4 (2) of the Optional Protocol:

It (the Government of Uruguay) rejects the libellous assertions in the communication, regarding "the climate of terror" and "the harsh and inhuman treatment" to which Miss Mirta Cubas was said to be subjected; it is also incorrect to state that the case of the above-mentioned detainee "cannot be assessed according to what is applicable in a normal case" ("*no puede juzgarse con la formalidad de un caso normal*"). The proceedings were conducted with all the guarantees required in the relevant legislation. The reason why the application to the Supreme Court of Military Justice for a reduction of her sentence was rejected was simply the nature of the offences committed and the fact that they were duly proved.

The Government of Uruguay also wishes to state that, on 7 August 1981, an application for conditional release for Miss Mirta Cubas was submitted to the Supreme Court of Military Justice. The application is being considered by the Court.

9. The Human Rights Committee notes the State party's observation that an application for conditional release for Mirta Cubas Simones has been submitted to the Supreme Court of Military Justice. This is not, of course, a remedy within the meaning of article 5 (2) (b) of the Optional Protocol concerning exhaustion of domestic remedies in regard to the violations of the Covenant complained of. Nevertheless, her release would constitute an important step towards alleviating her situation.

10. The Committee has considered the present communication in the light of all information made available to it by the parties, as provided in article 5 (1) of the Optional Protocol.

11.1 The Committee decides to base its views on the following facts which have either been confirmed by the State party or are unconstested, except for denials of a general character offering no particular information or explanation:

11.2 Mirta Cubas Simones was arrested on 27 January 1976, without any warrant for her arrest, in her family's home, in the presence of her mother and her

sister. For the subsequent three months she was held incommunicado at an unknown place. During this time the Uruguayan authorities denied her detention. In July 1976, five months after her arrest, Mirta Cubas Simones was brought to trial and charged with the offence of "aiding a conspiracy to violate the law" (*asistencia a la asociación para delinquir*) and a three-year prison sentence was requested by the public prosecutor. Upon appeal to the Supreme Military Tribunal in August 1978, she was charged in addition with the offence of "subversion", and the public prosecutor asked for the sentence to be increased to six years. Judgement was pronounced on 2 October 1979. In November 1979 a plea was made on her behalf that the sentence be reduced. This plea was rejected by the Supreme Military Tribunal. Mirta Cubas Simones was tried *in camera*, the trial was conducted without her presence and the judgement was not rendered in public. She was assigned a court-appointed military defence counsel whom she was unable to consult. The Committee further notes that the State party did not comply with the Committee's request to enclose copies of any court order or decisions of relevance to the matter under consideration. For all these reasons the Committee is unable to accept that Mirta Cubas Simones had a fair trial. In addition, since 1976 Mirta Cubas Simones has been subjected to continuously harsh prison conditions.

12. Accordingly, the Human Rights Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts as found by it, in so far as they occurred after 23 March 1976 (the date on which the Covenant entered into force in respect of Uruguay), disclose the following violations of the Covenant, in particular of:

Article 10 (1), because Mirta Cubas Simones was held incommunicado for three months and during this period the authorities wrongfully denied that she was detained;

Article 14 (1), because she did not have a fair and public hearing;

Article 14 (3) (b), because she was unable to communicate with her court-appointed defence lawyer and therefore did not have adequate facilities for the preparation of her defence;

Article 14 (3) (d), because she was not tried in her presence.

13. The Committee, accordingly, is of the opinion that the State party is under an obligation to provide the victim with effective remedies, including compensation, for the violations she has suffered and to take steps to ensure that similar violations do not occur in the future.

Communication No. 73/1980

Submitted by: Ana María Teti Izquierdo on 7 July 1980

Alleged victim: Mario Alberto Teti Izquierdo (author's brother)

State party: Uruguay

Date of adoption of views: 1 April 1982 (fifteenth session)

Exhaustion of domestic remedies—Detention incommunicado—Ill-treatment—Confession under duress—State of health of prisoner—Access to counsel—Delay in proceedings

Articles of Covenant: 7, 9 (3), 10 (1) and 14 (3)

Article of Optional Protocol: 5 (2) (b)

Views under article 5 (4) of the Optional Protocol

1. The author of this communication (initial letter dated 7 July 1980 and further letters dated 26 December 1980 and 16 January, 8 June and 12 September 1981) is Ana María Teti, Uruguayan national residing in France. She submitted the communication on behalf of her brother, Mario Alberto Teti Izquierdo, 37 years old, holding dual nationality (Uruguayan and Italian), detained in Uruguay.

1.2 The author stated in her submission of 7 July 1980 that her brother, a medical student, was arrested in Uruguay, on 24 May 1972, allegedly for belonging to a youth movement opposed to the regime. She alleged that for two months after his arrest he was held incommunicado and tortured several times, that for this pur-

pose he was removed from the Libertad prison to an unknown place, and that as a result he suffered serious physical and psychological injury, which led him to attempt suicide in 1974. The author further stated that from the time of her brother's arrest in 1972 until October 1976 he had access to three lawyers, Dr. Wilmar Olivera, Dr. Alba Dell'Acqua and Dr. Mario Dell'Acqua, each one for a short period of time only, because they were harassed and persecuted and finally had to leave the country on account of their defence of political prisoners such as Mario Teti. Thereafter it was impossible for Mario Teti himself to appoint a lawyer to act in his defence and Colonel Barbé, a military defence counsel, was officially appointed by the court to act in the case. (The author added, in her further submission of 16 January 1981, that since October 1976, her brother had been deprived of the rights of an accused person to prepare his defence, to have adequate means to do so and to have a defence counsel of his choice.)

1.3 The author further claimed that her brother was brought to trial towards the end of 1972 and that he was sentenced, in a final judgement by the Supreme Military Tribunal in 1978, to 10 years' imprisonment. She men-

tioned that in May 1982 her brother will have served the whole of his sentence. She also mentioned that, on the ground of good conduct and because of his advanced studies in medicine, he was allowed to give medical treatment to his fellow prisoners, a task which he performed for several years and which earned him the recognition and esteem of the other prisoners.

1.4 With regard to her brother's more recent treatment, the author alleged that, in March 1980, Mario Teti was held responsible by Major Mauro Mauriño (a member of the Prison Administration who took part in the torture sessions during the two months following his arrest in 1972) for having instigated statements made by prisoners to the Red Cross mission which visited the prisoners in the Libertad prison in February/March 1980. In consequence, measures of reprisal consisting of threats of death and physical attacks were inflicted on a group of prisoners which included Mario Teti. In August 1980, he was moved to a punishment cell where he was deprived of any kind of physical exercise and held in total isolation from the other prisoners.

1.5 Concerning the allegations of ill-treatment, the author enclosed *inter alia* (i) a letter dispatched by a relative of a prisoner on 2 June 1980 and (ii) the testimony of a former detainee, Charles Serralta, released in April 1980. The latter states, *inter alia*, in his testimony:

I was arrested in July 1972 and expelled to France in April 1980. I spent six months in a barracks and the rest in Libertad Prison. It was there that I met Mario Teti. We spent several years together on the same floor. He provided the prisoners on that floor with medical attention.

It was towards the end of 1979 that Major Mauriño took over the post of Prison Director. He questioned Mario several times. The Major knew him already because he was the officer who had tortured him during the interrogations.

After the Red Cross delegation left, Mario was once again questioned by Major Mauriño. The latter accused Mario of being responsible for the complaints allegedly made by the prisoners to the Red Cross that he was a torturer. Until the day I left, Mario was constantly harassed and threatened.

1.6 The author stated that, on 26 September 1980, her brother was moved from the Libertad prison. In her letter of 16 January 1981 she complained that, after his removal from the Libertad prison, neither his relatives nor the international agencies nor the Italian Embassy in Uruguay had managed to see him or to obtain any definite information regarding his situation and place of detention; the information obtained from the Uruguayan military authorities was vague, contradictory and impossible to verify. She added that, on 11 November 1980, in response to a request by the International Red Cross for information, the military authorities said only that he had been moved so that he could be interrogated in connection with the review of his trial and that he would be returned to the Libertad prison on 20 November 1980. He was not, however, returned to the Libertad prison until towards the end of May 1981, that is, after being kept incommunicado for eight months. At that time (27 May 1981) his wife and his father were allowed to visit him.

1.7 The author alleged that in June 1980 her brother was forced to sign a statement in connection with new charges which were brought against him and which were to be added to the charges for which he had already been sentenced in 1978. She further alleged, in her submission dated 26 December 1980, that the new charges against her brother were revealed to the press by General Rafela (communiqué published on 28 November 1980 by the Uruguayan daily *El Día*). In this connection she stated:

On 27 November, General Julio César Rafela, Chief of No. 2 Regional Military Headquarters, denounced an alleged invasion plan, organized from Libertad Prison. Several charges were brought against Mario Teti in this connection which were said to justify a retrial; but no mention was made of his whereabouts nor was he allowed any contact with his defence lawyer or his relatives. It is no mere chance that, like Mario Teti who was due to be released in May 1982, other prisoners who were nearing the end of their full sentences were also charged by the military authorities. This was the case with Professor Raúl Martínez sentenced to nine and a half years of imprisonment, who was due to be released in April 1981, and also the psychologist Orlando Pereira, who was due to be released in August 1981 on completion of his nine-year sentence. It is no mere chance, either, that the statements in question were made only three days before the constitutional referendum. The obvious purpose was to sway public opinion so as to secure a vote in support of the draft constitution submitted by the military Government. The conditions at Libertad Prison, which is known to be one of the penal establishments with the most efficient security systems, totally belie the statements made by General Rafela.

The author also mentioned that, at the start of the new proceedings against her brother in June 1980, her relatives were informed that another lawyer, in addition to Colonel Barbé, would act in the case. This lawyer was Dr. Amílcar Perea.

1.8 In her letter of 16 January 1981, the author also alleged that, in the period prior to his move from the Libertad prison, Mario Teti was in a very poor physical and psychological state and she believed that this must have been due to the persecution and physical and psychological pressure to which he was subjected after the Red Cross mission left, as the medical report which the mission made at the time it interviewed him did not indicate any serious disturbance or disorder. In her letter of 8 June 1981 she said that she was extremely alarmed about her brother's health—when he was transferred from the Libertad prison he weighed 80 kilograms and after his return only 60 kilograms; she feared that, if he continued to be subjected to unsatisfactory conditions of imprisonment, his health might suffer even more to the point where his life might be in danger. In her letter of 12 September 1981, the author stated that as soon as her brother returned to Libertad, he was given an electrocardiogram, which revealed that the heart attack he had suffered in October 1980 had resulted in a blockage of the left artery. She pointed out that as her brother suffered from chronic asthma, treatment of his cardiac disease was very difficult and that, in addition, her brother was suffering from thrombophlebitis in both legs. She claimed that these facts confirmed the seriousness of her brother's situation.

1.9 The author claimed that her brother was a victim of violations of articles 7, 9 (2), (3) and (4) and 14

of the International Covenant on Civil and Political Rights. She asserted that no domestic remedies are applicable in her brother's present situation and added that the same matter has not, to her knowledge, been submitted to another procedure of international investigation or settlement.

2. On 24 October 1980, the Human Rights Committee decided to transmit the communication to the State party, under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility of the communication. The Committee also requested the State party to furnish without delay information concerning the whereabouts and state of health of Mario Alberto Teti Izquierdo.

3.1 By a note dated 10 December 1980, the State party objected to the admissibility of the communication on the ground that it did not fulfil the requirements of article 5, paragraph 2 (b), of the Optional Protocol, since domestic remedies had not been exhausted. The State party submitted that the Uruguayan Code of Military Penal Procedure, in articles 489 and 507 respectively, provided for the remedies of appeal for annulment and review in respect of final sentences and in addition that, since Mario Alberto Teti Izquierdo underwent two trials and the decision in one of them was submitted to the Supreme Military Tribunal on appeal only on 30 June 1980, it was evident that domestic remedies had not been exhausted.

3.2 In a further submission dated 3 March 1981, the State party provided additional information concerning the case of Mario Alberto Teti Izquierdo as follows:

The accused, Mario Alberto Teti Izquierdo, was arrested on 7 December 1970. He took part in the escape from the Punta Carretas prison and was also involved in the attack on the notary's office in Calle Treinta y Tres and in the attack on the Union Branch of the Pan de Azúcar Bank. On 11 December 1970, he was committed for trial by the first examining magistrate on a charge of having committed the offences of "conspiracy to commit an offence", "attempts to overthrow the Constitution" and "being in possession of explosives", contrary to articles 150, 152 (6) and 197 of the Ordinary Criminal Code. His defence counsel was Dr. Wilmar Olivera. On 3 May 1971, he was freed under the system of "provisional release" and left the country—making use of the option afforded by article 168 (17) of the Constitution—for Chile. On 1 October 1976, his case came up before the third military examining magistrate. On 24 May 1976,¹ he was arrested for alleged involvement in subversive activities. A second case was brought against him on 15 September 1972 and he was committed for trial by the third military examining magistrate on a charge involving a series of offences, namely, "attempts to overthrow the Constitution amounting to conspiracy followed by preparatory acts", "conspiracy to commit an offence" and "use of a fraudulent public document", contrary to article 132, subparagraph (vi), in conjunction with articles 137, 150 and 243 of the Ordinary Criminal Code. His defence counsel was Dr. Juan Barbé. In a judgement at first instance, he was sentenced to nine years' rigorous imprisonment less the time spent in preventive detention. On 12 May 1976, the case came up on appeal before the Supreme Court of Military Justice. On 3 November 1977, the judgement at first instance was set aside and the accused was instead sentenced, as a principal offender, to 10 years' rigorous imprisonment, less the time spent in preventive detention, for a combination of principal and secondary offences, namely "attempts to overthrow the Constitution amounting to conspiracy followed by

preparatory acts", "conspiracy to commit an offence", "use of a fraudulent public document", "accessory after the fact" and "escape from custody".

On 21 April 1980, in a judgement delivered in the first of the cases, he was sentenced at first instance to eight years' rigorous imprisonment for a series of offences ("conspiracy to commit an offence", with aggravating circumstances, "attempt to overthrow the Constitution amounting to conspiracy followed by preparatory acts", with aggravating circumstances, "use of explosive bombs" and "failure to disclose personal particulars" in which connection he was declared to be a habitual offender) and to two to four years' precautionary measures, without prejudice to such final combined sentence as might be deemed appropriate. On 30 June 1980, this case came up on appeal before the Supreme Court of Military Justice. The defence counsel magistrate is now Dr. Amílcar Perea. Subsequently, the fourth military examining magistrate ordered another inquiry to be made as further evidence had come to light that would warrant new proceedings. When the authorities learned of the so-called "six-point" plan that was being plotted outside the prison, they again investigated that establishment with the result that new ringleaders of the "Tupamaros" extremist movement were identified there, among them Mario Teti, who was responsible for conducting operations to reactivate the subversive organization in question. He was moved from Military Detention Establishment No. 1 to another detention establishment, with the agreement and knowledge of the competent court, for the purpose of the requisite investigation, interrogation and inquiries, and also for reasons of security, with a view to dismantling the said plan. His state of health is good.

3.3 In a further submission of 6 May 1981 the State party stated that:

After the authorities learned of the so-called "six-point" plan which was being devised by subversive elements outside Military Detention Establishment No. 1 with the participation of similar elements confined in the prison, a further investigation was carried out within the prison.

This investigation led to the identification of new ringleaders of the extremist "Tupamaros" movement who were operating there and among whom Mario Teti was found to be responsible for the conduct of operations aimed at reactivating the above-mentioned subversive organization.

The fourth Military Court of Investigation ordered that he should be further questioned because of this new evidence, which would appear to constitute grounds for holding another trial.

Mario Teti was moved from Military Detention Establishment No. 1 to another detention establishment with the agreement and knowledge of the competent court, for the purposes of the necessary investigation, questioning and inquiries, and for reasons of security in order to disrupt the above-mentioned subversive plan.

The prisoner's state of health is good.

4.1 The Human Rights Committee noted the assertion of the State party, in its first submission, that further remedies were available to Mario Teti Izquierdo. Nevertheless, in other cases the State party has described these remedies by way of appeal for annulment or review as being exceptional in character. No grounds had been adduced to show that these exceptional remedies were applicable in the present case. They could not, therefore, be regarded as, in effect, being "available" within the meaning of article 5 (2) (b) of the Optional Protocol. The Committee noted that an appeal against the judgement of 21 April 1980 came before the Supreme Court of Military Justice on 30 June 1980 and the Committee had not been informed of the conclusion of these proceedings. However, if no decision had yet been reached the Committee could not but conclude that, in so far as the appeal was relevant to the matters complained of, the proceedings in this case had been

¹ This would appear to be a typographical error; the correct date seems to be 24 May 1972.

unreasonably prolonged. The Committee was therefore of the view that there were no further domestic remedies which had to be exhausted before the communication was declared admissible.

4.2 With regard to article 5 (2) (a), the author's assertion that the same matter had not been submitted to any other procedure of international investigation or settlement had not been contested by the State party.

5. On July 1981, the Human Rights Committee therefore decided:

(a) That the communication was admissible;

(b) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of its decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it; the State party is requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration;

...

(d) That having regard to the concern expressed in Ana María Teti Izquierdo's letter of 8 June 1981, the State party be requested again to inform the Committee of Mario Teti's state of health and to ensure that he was given suitable medical treatment.

6. The time-limit for the State party's submission under article 4 (2) of the Optional Protocol expired on 19 February 1982. No submission has been received from the State party, in addition to those received by the Committee prior to the decision on the admissibility of the communication.

7.1 The Human Rights Committee has considered the present communication in the light of all information made available to it by the parties, as provided in article 5 (1) of the Optional Protocol. The Committee bases its views on the following facts which are not in dispute or which are unrepudiated or uncontested by the State party except for denials of a general character offering no particular information or explanation:

Events prior to the entry into force of the Covenant

7.2 *First case.* Mario Alberto Teti Izquierdo was arrested on 7 December 1970. On 11 December 1970 he was committed for trial by the first examining magistrate on charges of "conspiracy to commit an offence", "attempts to overthrow the Constitution" and "being in possession of explosives". On 3 May he was provisionally released.

7.3 *Second case.* On 24 May 1972 Mario Alberto Teti Izquierdo was rearrested for alleged involvement in subversive activities. He was kept incommunicado for two months and subjected to ill-treatment. On 15 September 1972 he was again committed for trial by the third military examining magistrate on charges involving a series of offences, namely "attempts to overthrow the Constitution amounting to conspiracy followed by preparatory acts", "conspiracy to commit an offence" and "use of a fraudulent public document". From 1972

to 1976 Mario Alberto Teti Izquierdo had access to three defence lawyers of his choice, Dr. Wilmar Olivera in 1972, Dr. Alba Dell'Acqua from January 1973 to December 1975 and Dr. Mario Dell'Acqua from January 1976 to October 1976. All these lawyers left Uruguay, allegedly because of harassment by the authorities.

Events subsequent to the entry into force of the Covenant

7.4 Concerning the *second case*. The military court of the first instance sentenced him to nine years' rigorous imprisonment less the time spent in preventive detention. On 12 May 1976 the case came up on appeal before the Supreme Court of Military Justice. In October 1976 Mario Alberto Teti Izquierdo was assigned a court-appointed military defence counsel, Dr. Juan Barbé. On 3 November 1977 Mario Alberto Teti Izquierdo was sentenced to 10 years' rigorous imprisonment less the time spent in preventive detention. It would appear that he would have served the whole of his sentence in May 1982.

7.5 Concerning the *first case*. On 21 April 1980 he was sentenced at first instance to eight years' rigorous imprisonment and to two to four years' precautionary measures. On 30 June 1980 this case came up on appeal before the Supreme Court of Military Justice.

7.6 In June 1980 Mario Alberto Teti Izquierdo was forced to sign a statement in connection with new charges which were brought against him.

7.7 Since October 1976 he has been unable to have the assistance of counsel of his own choice.

7.8 After a visit of the International Red Cross to Libertad prison in February/March 1980, Mario Alberto Teti Izquierdo was subjected to physical attacks and threats of death. In August 1980 he was moved to a punishment cell and held in solitary confinement. He was then in a very poor physical and psychological state of health.

7.9 On 26 September 1980 he was moved to another detention establishment for interrogation in connection with his alleged involvement, together with other detainees, in operations aimed at reactivating a subversive organization (the "Tupamaros" movement) from within the Libertad prison. In this connection Mario Alberto Teti Izquierdo faces new charges. His family was unable to obtain information about his whereabouts until May 1981, when he was brought back to Libertad. From September 1980 to May 1981 he was held incommunicado. When Mario Alberto Teti Izquierdo was transferred from Libertad he weighed 80 kilograms, and after his return only 60 kilograms.

8. As regards the allegations of ill-treatment made by the author, the State party has adduced no evidence that these allegations have been investigated.

9. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee, in so far as they continued or occurred after 23 March 1976 (the

date on which the Covenant and the Optional Protocol entered into force for Uruguay) disclose the following violations of the International Covenant on Civil and Political Rights in respect of:

Articles 7 and 10 (1), because of the ill-treatment to which Mario Alberto Teti Izquierdo has been subjected;

Articles 9 (3) and 14 (3) (c), because his right to trial within a reasonable time has not been respected;

Article 14 (3) (b) and (c), because he was unable to have the assistance of counsel of his own choice and because the conditions of his detention, from September 1980 to May 1981, effectively barred him from access to any legal assistance;

Article 14 (3) (g), because he was forced to sign a statement in connection with charges made against him.

10. The Committee, accordingly, is of the view that the State party is under an obligation to take immediate steps to ensure strict observance of the provisions of the Covenant and to provide effective remedies to the victim and, in particular, in view of the fact that Mario Alberto Teti Izquierdo is facing new charges, to give him all the procedural guarantees prescribed by article 14 of the Covenant. The State party should also ensure that Mario Alberto Teti Izquierdo receives promptly all necessary medical care.

SIXTEENTH SESSION

Communication No. 25/1978

Submitted by: Carmen Améndola Massiotti on 25 January 1978, later joined by Graciela Baritussio

Alleged victims: The authors

State party: Uruguay

Date of adoption of views: 26 July 1982 (sixteenth session)

Standing of author—Jurisdiction of State party—Admissibility ratione temporis—Prison conditions—Detention after serving sentence—Lack of effective remedy

Articles of Covenant: 2 (3), 7, 9 (1) and (4) and 10 (1)

Views under article 5 (4) of the Optional Protocol

1.1 The initial author of the communication, Carmen Améndola Massiotti (initial letter dated 25 January 1978) is a 32-year-old Uruguayan national residing in the Netherlands.

1.2 The author alleges that she herself was arrested in Montevideo on 8 March 1975, that she was kept incommunicado until 12 September of that year and subjected to severe torture (giving detailed description) in order to make her confess membership in political organizations which had been declared illegal by the military régime. She states that on 17 April 1975 she was brought before a military judge and that her family was only informed the following day about her detention which had been denied by the military authorities. On 12 September she was again brought before a military judge and tried for "assistance to illegal association" and "contempt for the armed forces". Until 1 August 1977 she served her sentence at the women's prison "Ex Escuela Naval Dr. Carlos Nery" which she describes as an old building where pieces of concrete kept falling off the ceiling and on the prisoners. During the rainy period the water was 5 to 10 cm deep on the floor of the cells. In three of the cells, each measuring 4 m by 5 m, 35 prisoners were kept. The prison had no open court-

yard and the prisoners were kept indoors under artificial light all day.

1.3 On 1 August the author was transferred to Punta de Rieles prison. There she was kept in a hut measuring 5 m by 10 m. The place was overcrowded with 100 prisoners and the sanitary conditions were insufficient (one wash-basin and four toilets). The prisoners were constantly subjected to interrogations, harassment and severe punishment. The officers in charge of S2—military intelligence inside the prison—Major Victorino Vázquez and Lieutenant Echeverría, themselves carried out the interrogations and also supervised torture. She also mentions that the prisoners were compelled to do hard labour which involved making roads inside the prison, putting up new prison buildings, mixing concrete, carrying heavy building materials, as well as gardening, cleaning and cooking for the detainees and the guards, i.e. a total of 800 persons, the last task being assigned to 10 women prisoners. The author points out that work was compulsory even for women who were ill or had physical infirmities. She adds that food was very poor (giving details).

1.4 The author further claims that, despite having served her sentence on 9 November 1977, she was kept in detention until 12 December 1977, when the choice was offered to her of either remaining in detention or of leaving the country. She opted for the latter and obtained political asylum in the Netherlands.

1.5 She alleges in this connection that in the Paso de los Toros prison there were 17 women whose release had been signed by the military courts, but who continued to

be imprisoned under the "prompt security measures". She mentions in particular the case of Graciela Baritussio de Lopez Mercado.

2.1 With respect to Graciela Baritussio, a 34-year-old Uruguayan national, the author states that she was informed by the alleged victim's former defence counsel that she approved the author's acting on her behalf. She claims that the alleged victim is not in a position to act on her own behalf since this was not possible for a person detained under the prompt security measures. She further claims that Graciela Baritussio had no defence counsel at the time of the submission of the communication.

2.2 The Committee subsequently ascertained that Graciela Baritussio had been released from prison and lived in Sweden. After being contacted she informed the Committee that she wished to join as a co-author of the communication submitted on her behalf by Carmen Améndola Massiotti. In addition, she furnished the following information (letter of 29 January 1981, enclosing a letter from her former defence lawyer, Mario Dell'Acqua): she was arrested on 3 September 1972, tried by a military judge on 5 February 1973 for "complicity in a subversive association" and brought in April 1973 to the Punta de Rieles prison where she served her two-year prison sentence. On 15 August 1974 she was brought to the same military court as before in order to sign the documents for her provisional release. She also mentions that she had qualified legal assistance from the time of her trial until 15 August 1974, her defence lawyer being Mario Dell'Acqua. The defence lawyer adds in his statement that the decision of 15 August 1974, granting her provisional release became enforceable and final in 1975. Graciela Baritussio continues that she was informed by the prison authorities on 3 October 1974 that she would be released, but instead she was brought without any explanations to another military detention centre. There she remained for another three years. On 6 October 1977 she was transferred to another military establishment in the interior of the country, which was being used as a prison for women detained under the security measures. On 8 August 1978 the governor of the establishment informed her that she was going to be released. Her release took place on 12 August 1978. She adds that she lived during these four years in a state of total insecurity in view of the fact that the military authorities could move her anywhere in the country without any possibility of a legal recourse against these measures. She also mentions the situation of the relatives of the detainees who could only obtain evasive replies from the military authorities.

3.1 With respect to domestic remedies, Carmen Améndola Massiotti claims that they do not exist in Uruguay for persons detained under the "prompt security measures" as they cannot act on their own behalf and lawyers cannot act without the risk of being themselves detained, as happened allegedly to one of Graciela Baritussio's lawyers. She further claims that copies of decisions of military tribunals are not made available to any person. This information was basically

confirmed in the statement by the defence lawyer Mario A. Dell'Acqua (enclosed with Graciela Baritussio's letter of 27 January 1981) who adds that once the document for Graciela Baritussio's provisional release had been signed and also after the judgement in that respect had been rendered final and enforceable in 1975, he made numerous representations to the responsible military judges. He was informed that if the prison authorities did not comply with the court's release order, the judges could do no more.

3.2 Carmen Améndola Massiotti does not specify which articles of the International Covenant on Civil and Political Rights she alleges to have been violated in her own case, but claims that most of them have been violated. Regarding Graciela Baritussio, she alleges that articles 2, 3, 6, 7, 8, 9, 10, 14 and 15 of the Covenant have been violated. She states that to her knowledge, the same matter has not been submitted under another procedure of international investigation or settlement.

4. By its decision of 26 July 1978, the Human Rights Committee, having decided that the author of the communication was also justified in acting on behalf of the second alleged victim, Graciela Baritussio, transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication.

5. By a note dated 8 January 1979, the State party objected to the admissibility of the communication on the following grounds: (a) that the date of arrest of Carmen Améndola Massiotti preceded the entry into force of the Covenant for Uruguay on 23 March 1976, (b) that she did not apply for any remedy, and (c) with respect to Graciela Baritussio that she did not avail herself of any of the remedies generally available to persons imprisoned in Uruguay.

6. On 24 April 1979, the Human Rights Committee decided:

(a) That the communication was admissible;

(b) That in accordance with article 4 (2) of the Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(c) That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Protocol must primarily relate to the substance of the matter under consideration, and in particular the specific violations of the Covenant alleged to have occurred. The State party was requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration.

7.1 In its submission under article 4 (2) of the Optional Protocol dated 9 October 1980, the State party informed the Committee, *inter alia*, that Carmen Améndola Massiotti had qualified legal assistance at all times, the defending counsel of her choice being Milton

Machado Mega; that, having served her sentence, she regained her full freedom and left for the Netherlands on 11 December 1977. With respect to Graciela Baritussio, the State party stated that she also received qualified legal assistance, the defending counsel of her choice being Mario Dell'Acqua, that on 15 August 1974 she was granted provisional release and left for Sweden on 10 July 1979. The State party further contended that there was no justification for the continued consideration of the case. The alleged victims were not under the jurisdiction of the State accused. To consider the communication further would therefore be incompatible with the purpose for which the Covenant and its Protocol were established, namely, to ensure the effective protection of human rights and to bring to an end any situation in which these rights were violated. The State party concluded that in this case no *de facto* situation existed to warrant findings by the Committee, and that consequently, by intervening, the Committee would not only be exceeding its competence but would also be departing from normally established legal procedures. By a note dated 23 July 1982, the State party reiterated its arguments with respect to Graciela Baritussio and stated that according to article 1 of the Optional Protocol, the Committee had competence to receive and consider communications from individuals only if these individuals were subject to the jurisdiction of the State party which allegedly committed the violation of human rights. Graciela Baritussio, however, had left Uruguay for Sweden and therefore did not fulfil this requirement.

7.2 With respect to the State party's submission under article 4 (2) of the Optional Protocol that consideration of the communication should be discontinued, the Committee notes that the victims were under the jurisdiction of Uruguay while the alleged violations took place. The Committee therefore rejects the contention of the State party that further consideration of the case would be beyond its competence or contrary to the purposes of the International Covenant on Civil and Political Rights and the Optional Protocol thereto.

8. No further submission was received from the author of the initial communication, Carmen Améndola Massiotti, after her second communication dated 5 May 1978.

9. The Human Rights Committee has considered the present communication in the light of all information made available to it by the parties, as provided in article 5 (1) of the Optional Protocol.

10. The Committee decides to base its views on the following facts which are not in dispute or which are unrepudiated or uncontested by the State party except for denials of a general character offering no particular information or explanation:

With respect to Carmen Améndola Massiotti

11. Carmen Améndola Massiotti was arrested in Montevideo on 8 March 1975, kept incommunicado until 12 September that year and subjected to severe torture. On 17 April 1975 she was brought before a military

judge. On 12 September she was again brought before a military judge and tried for "assistance to illegal association" and "contempt for the armed forces". Until 1 August 1977 she served her sentence at the women's prison "Ex Escuela Naval Dr. Carlos Nery". During the rainy period the water was 5 to 10 cm deep on the floors of the cells. In three of the cells, each measuring 4 m by 5 m, 35 prisoners were kept. The prison had no open courtyard and the prisoners were kept indoors under artificial light all day. On 1 August 1977 Carmen Améndola Massiotti was transferred to Punta de Rieles prison. There she was kept in a hut measuring 5 m by 10 m. The place was overcrowded with 100 prisoners and the sanitary conditions were insufficient. She was subjected to hard labour and the food was very poor. The prisoners were constantly subjected to interrogations, harassment and severe punishment. Despite having served her sentence on 9 November 1977, she was kept in detention until 11 or 12 December 1977 when the choice was offered to her of either remaining in detention or leaving the country. She opted for the latter and obtained political asylum in the Netherlands.

With respect to Graciela Baritussio

12. Graciela Baritussio was arrested in Uruguay on 3 September 1972, tried by a military judge on 5 February 1973 for "complicity in a subversive association" and brought in April 1973 to the Punta de Rieles prison where she served her two-year prison sentence. On 15 August 1974 she was brought to the same military court as before in order to sign the documents for her provisional release. The decision granting her provisional release became enforceable and final in 1975. Graciela Baritussio, however, remained in detention. On 6 October 1977 she was transferred to another military establishment in the interior of the country which was being used as a prison for women detained under the security measures. On 8 August 1978 the governor of the establishment informed her that she was going to be released. Her release took place on 12 August 1978. Once the document for Graciela Baritussio's provisional release had been signed and after the decision became final and enforceable in 1975, her defence lawyer had made numerous representations to the military judges responsible for her case. He was informed that, if the prison authorities did not comply with the court's release order, the judges could do no more.

13. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee, in so far as they continued or occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay) disclose the following violations of the International Covenant on Civil and Political Rights, in particular of:

In the case of Carmen Améndola Massiotti

Articles 7 and 10 (1), because the conditions of her imprisonment amounted to inhuman treatment;

Article 9 (1), because she continued to be detained after having served her prison sentence on 9 November 1977;

In the case of Graciela Baritussio

Article 9 (1), because she was subjected to arbitrary detention under the "prompt security measures" until 12 August 1978 after having signed on 15 August 1974 the document for her provisional release;

Article 9 (4) in conjunction with article 2 (3), because there was no competent court to which she could have appealed during her arbitrary detention.

14. The Committee, accordingly, is of the opinion that the State party is under an obligation to provide the victims with effective remedies, including compensation, for the violations they have suffered. The State party is also urged to investigate the allegations of torture made against named persons in the case.

Communication No. 46/1979

Submitted by: Orlando Fals Borda *et al.* on 6 February 1979, represented by Pedro Pablo Camargo

Alleged victims: Orlando Fals Borda and his wife, María Cristina Salazar, Justo Germán Bermúdez and Martha Isabel Valderrama

State party: Colombia

Date of adoption of views: 27 July 1982 (sixteenth session)

Derogation from Covenant—State of emergency—Constitutionality of Legislative Decree No. 1923 of 6 September 1978—Arbitrary arrest and detention—Habeas corpus—Fair trial—Delay in proceedings—Retroactivity of State's laws—Heavier penalty—Allegations introduced after communication declared admissible

Articles of Covenant: 4, 9 (1), (2), (3) and (4), 14 (1), (2), (3) and (5) and 15 (1)

Article of Optional Protocol: 5 (2) (b)

Views under article 5 (4) of the Optional Protocol

1.1 The communication (initial letter dated 6 February 1979 and further letters dated 26 June 1979, 2 June, 20 October and 31 October 1980, 30 September 1981 and 19 June 1982) was submitted by Pedro Pablo Camargo, Professor of International Law of the National University of Colombia, at present residing in Quito, Ecuador. He submitted the communication on behalf of Orlando Fals Borda and his wife, María Cristina Salazar de Fals Borda, Justo Germán Bermúdez and Martha Isabel Valderrama Becerra. They are all Colombian nationals.

1.2 The author alleges that by enacting Legislative Decree No. 1923 of 6 September 1978 (Statute of Security)¹ the Government of Colombia has violated articles 9 and 14 of the Covenant and he claims that the four persons he represents are victims of these violations.

1.3 Concerning the cases of Orlando Fals Borda and his wife, the author describes the relevant facts as follows: On 21 January 1979, Dr. Fals Borda, a Colombian sociologist and professor, and his wife, María Cristina Salazar de Fals Borda, were arrested by troops of the Brigada de Institutos Militares under the Statute

of Security. Dr. Fals was detained incommunicado without judicial guarantees, such as legal assistance, at the Cuartel de Infantería de Usaquin, from 21 January to 10 February 1979, when he was released without charges. His wife continued to be detained for over a year. A court martial then found that there was no justification for detaining Mrs. Fals Borda.

1.4 Concerning the cases of Justo Germán Bermúdez and Martha Isabel Valderrama Becerra, the author describes the relevant facts as follows: On 3 April 1979, the President of the Summary Court Martial (First Battalion of Military Police, Brigade of Military Institutions) found Justo Germán Bermúdez Gross guilty of the offence of rebellion (article 7 of the judgement) and sentenced him to a principal penalty of six years and eight months' rigorous imprisonment and interdiction of public rights and functions, as well as the accessory penalty of loss of *patria potestas* for the same period. In the same judgement it sentenced Martha Isabel Valderrama Becerra to six years' rigorous imprisonment and interdiction of public rights and functions for the offence of rebellion. The judgement states: "In conclusion, the sentences to be passed on the accused who have been declared guilty of the offence of 'rebellion' shall be those contained in article 2 of Decree No. 1923 of 6 September 1978, known as the Statute of Security".

1.5 The author alleges that by application of Decree No. 1923 Dr. Fals Borda and his wife were arbitrarily detained, that Mr. Bermúdez and Miss Valderrama are subjected to arbitrary imprisonment, that Mr. Bermúdez and Miss Valderrama's sentences were illegally increased, that is, their sentences are more severe than the maximum penalty stipulated by the Colombian Penal Code, and that they all have been victims of violations of article 14 (1), (2), (3) and (5) of the International Covenant on Civil and Political Rights because they have been brought before military tribunals which were not competent, independent and impartial, and

¹ See the text of Legislative Decree No. 1923 in the appendix below.

because they have allegedly been deprived of the procedural guarantees laid down in the Colombian Constitution and in the Covenant. He states that all domestic remedies have been exhausted with the decision of the Supreme Court of Justice upholding the constitutionality of the Decree and that the cases of the alleged victims have not been submitted to any other procedure of international investigation or settlement.

2. On 9 August 1979, the Human Rights Committee decided to transmit the communication to the State party, under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility.

3.1 By letters dated 30 April and 30 September 1980 the State party refuted the allegations made by the author.

3.2 The State party, in particular, rejected the allegation made by the author of the communication that the enactment of Legislative Decree No. 1923 of 6 September 1978 and consequently the arrest and detention of the four persons represented by the author were contrary to the Colombian Constitution and in violation of the International Covenant on Civil and Political Rights. The State party pointed out that the Decree was issued by the President of the Republic of Colombia in the exercise of the constitutional powers vested in him by article 121 of the Colombian Constitution after the declaration of a "state of siege" due to the disturbance of public order and that the Supreme Court of Justice in a judgement of 30 October 1978 had held the Decree to be constitutional. In this connection the State party recalled that Colombia is experiencing a situation of disturbed public order within the meaning of article 4, paragraph 1, of the Covenant.

3.3 The State party also rejected the allegations made by the complainant that articles 9, 11 and 12 of Decree No. 1923 contravene article 14, paragraph 1, of the Covenant. It quoted the ruling of the Supreme Court of Justice, in particular the following:

... Decree No. 1923 has done nothing other than apply the exception provided for in article 61 [of the Constitution] which authorizes in exceptional times the cumulative performance, and hence provisional transfer, of powers, and specifically jurisdictional powers, by and to bodies other than those normally exercising them, and which legitimates the introduction of military penal justice, and empowers the military and police authorities specified in the Decree, to deal with and to order penalties for certain offences.

The Decree does not establish *ad hoc* bodies nor does it change the origin or composition of existing bodies. It simply empowers certain authorities to perform simultaneously their own ordinary functions and those vested in them provisionally by virtue of the enabling provisions of article 61 of the Constitution. ...

The State party added that the ruling of the Supreme Court was quoted precisely in order to show that military tribunals are not *ad hoc* bodies but an integral part of the branch of the public power responsible for the administration of Justice in conformity with the National Constitution and cannot be dismissed as unqualified, as was done by the complainant, Dr. Camargo, who sought to deny their legality in order

to establish an alleged violation of the Covenant on that basis.

3.4 With regard to the specific case of Mr. and Mrs. Fals Borda, the State party confirmed their release, which was ordered when it was found during an investigation that their continued detention was not justified. The State party added that there is no ground for deducing directly from the fact that these orders were issued that arbitrary detention took place in either or both of these cases. It was further stated by the State party that, should Mr. and Mrs. Fals Borda consider that their detention was arbitrary (in the sense that the requisite legal formalities and rules had not been complied with), they may file a complaint with the competent authorities and institute the appropriate proceedings for the recovery of damages. To challenge their detention on the ground that the requisite legal formalities and rules had not been complied with, a criminal investigation could be initiated by the alleged victims, through the judicial police, the Attorney-General or the Judge Advocate General of the Armed Forces. To obtain compensation for damages and injuries resulting from an alleged arbitrary detention civil proceedings may then be instituted; if the violation of rights is the result of action by a public official the complainants may also appeal to the administrative courts. As none of the aforementioned procedures have been resorted to by Mr. and Mrs. Fals Borda the State party concluded that domestic remedies had not been exhausted in their case.

3.5 With regard to the case of Mr. Justo Germán Bermúdez and Miss Martha Isabel Valderrama, the State party claimed that the accused have benefited from all procedural guarantees accorded by the law and that the allegedly improper length of their prison terms, based on charges of rebellion, was justified by the provisions of Decree No. 1923, applicable under the present "state of siege" in Colombia. The State party stated that the appeal was still being heard in the Higher Military Tribunal and explained that "the time that has elapsed in this connection ... is due both to the nature of the case and to the large number of appeals and inquiries with which the Higher Military Tribunal has to deal". The State party concluded that domestic remedies had not been exhausted in this case either.

4. On 29 July 1980 the Human Rights Committee decided to request the State party to furnish detailed information as to:

(a) How, if at all, the state of siege proclaimed in Colombia affects the present case;

(b) Which are the competent authorities, before which Mr. and Mrs. Fals Borda may file a complaint and institute proceedings for the recovery of damages in the particular circumstances of their case, as well as the nature of such proceedings, based on the law in force;

(c) The status of the appeal of Germán Bermúdez Gross and Martha Isabel Valderrama before the Higher Military Tribunal, and, if not yet concluded, the reasons for the apparent delay and the anticipated time for the completion of those proceedings.

5.1 By a note dated 1 October 1980, the State party submitted further information.

5.2 The State party maintained that the state of siege affected the present case, so far as concerns the situation of Justo Germán Bermúdez and Martha Isabel Valderrama, by reason of the fact that Legislative Decree No. 1923 of 1978 increased the penalty for the crime of rebellion and also because both the aforesaid Decree and Legislative Decree No. 2260 of 1976 ascribed responsibility for the hearing of cases involving offences against the constitutional régime and against the security of the State to the military criminal courts. It added that with regard to the proceedings which Dr. Orlando Fals Borda and Mrs. Maria Cristina Salazar de Fals Borda could institute, the provisions enacted by virtue of the state of siege had no effect.

5.3 The State party reiterated the information submitted (see para. 3.4) concerning the competent authorities before which Dr. Fals Borda and his wife could file complaints with respect to an alleged arbitrary detention, and the proceedings they could institute for the recovery of damages. It added that a civil action to obtain compensation can be brought in the context of the military criminal proceedings for common-law offences. If the injured parties did not take part in the criminal proceedings and do not agree with the judgement so far as concerns compensation, they can bring an appropriate action before a civil court. They can also appeal to the administrative courts, on the ground of State liability, if in fact it is confirmed that arbitrary detention took place.

5.4 The State party informed the Committee that the case against Germán Bermúdez Gross and Martha Isabel Valderrama for the crime of rebellion was in the offices of Dr. Roberto Ramiraz Laserna, Judge of the Higher Military Tribunal, awaiting a decision by the court of second instance. The apparent delay in reaching a decision on the appeal was due to the heavy workload of the Tribunal, which has to deal with many cases.

6.1 Commenting on the State party's submission, the author claimed that as far as the specific cases of the arbitrary detention of Mr. and Mrs. Fals Borda were concerned, all domestic legal remedies had been exhausted, and no valid remedy existed for claiming damages on account of this arbitrary detention. The arguments were as follows:

(a) Without Legislative Decree No. 1923 of 1978 (Statute of Security), neither the arbitrary detention of Mr. and Mrs. Fals Borda, nor that of thousands of other victims, would ever have occurred. Mr. and Mrs. Fals Borda were deprived not only of the guarantee laid down in article 9, paragraph 3, of the Covenant, but also the remedy of *habeas corpus* guaranteed by article 9, paragraph 4 of the Covenant and by article 417 of the Code of Criminal Procedure of Colombia, which states: "Any person deprived of his freedom for more than 48 hours may, if he considers that a breach of the law has taken place, apply to a municipal, criminal or combined criminal/civil court judge for *habeas corpus* ...";

(b) With the decision of the Higher Military Tribunal, which is not open to appeal, domestic legal remedies have been exhausted. However, that decision states, not that a case of arbitrary detention had taken place, but that there was no justification for the continued

enforcement of the detention order issued by the military authorities without due process of law;

(c) It is not possible to bring an action for arbitrary arrest before an ordinary court against the military investigators who ordered the arrest of Mr. and Mrs. Fals Borda. The handling of such a charge would fall to the military authorities, as is made clear in article 309 of the Code of Military Criminal Justice: "As a general rule, accused persons shall be tried by members of the branch of the armed forces to which they belong." In other words, any complaint lodged against military personnel for abuse of authority or arbitrary detention falls within the direct jurisdiction of the military authorities or the military prosecutor, both of whom are under the orders of the Government of Colombia;

(d) In the unlikely event of military criminal proceedings being instituted against the officers responsible for the arbitrary detention of Mr. and Mrs. Fals Borda, it would not be possible to bring a civil suit for damages on behalf of the victims, since the offence in question is supposedly of an essentially military nature ...;

(e) Article 9, paragraph 5 of the Covenant states: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." No provision is made for such action in Colombian law;

(f) The Government of Colombia cites article 67 of the Administrative Code, which states: "In the event of violation of a right established or recognized by a civil or administrative regulation, the injured party may request not only that the act be annulled but also that his right be restored." In the case of Mr. and Mrs. Fals Borda, there has been no ruling to the effect that arbitrary detention took place or that, as a result of such an unlawful act, the State has a duty to compensate the victims. However, the time-limit for bringing such a hypothetical administrative action has expired, by virtue of the provisions of article 83 of the Code in question which states that an action (not a remedy) "intended to obtain compensation for infringement of individual rights shall, in the absence of any legal provision to the contrary, lapse four months after the date of publication, modification or execution of the act, or the occurrences or administrative procedure giving rise to the action."

6.2 In his submission of 20 October 1980 the author informed the Committee that in the case of Justo Germán Bermúdez and Martha Isabel Valderrama, sentenced to imprisonment on 3 April 1979 by the Summary Military Court, the sentences had been upheld by the Higher Military Court.

7.1 The Committee found, on the basis of the information before it, that it was not precluded by article 5 (2) (a) of the Optional Protocol from considering the communication since there was no indication that the same matter had been submitted under another procedure of international investigation or settlement.

7.2 As to the question of exhaustion of domestic remedies, in the case of Mr. and Mrs. Fals Borda, the Committee considered whether the communication should be declared inadmissible because of non-exhaustion of domestic remedies. However, the essence of this complaint was that Decree No. 1923 deprived them of safeguards guaranteed by articles 9 and 14 of the Covenant and that in these circumstances the domestic remedies for arbitrary arrest would have been of no avail. The Committee considered that this was a question which it could effectively examine only in the context of the application of the Decree generally to the case of Mr. and Mrs. Fals Borda.

7.3 In the case of Justo Germán Bermúdez and Martha Isabel Valderrama, the Committee, having been informed by the author on 20 October 1980 that the Higher Military Tribunal had upheld the sentences of

the court of first instance and, considering that this information had not been refuted by the State party, understood that domestic remedies had now been exhausted and that consequently the communication might be declared admissible in their case.

8. On 27 July 1981, the Human Rights Committee therefore decided:

(a) That the communication was admissible;

(b) That the author of the communication be requested to submit to the Committee not later than 10 October 1981 a statement, in respect of each relevant provision of the Covenant, of the grounds for claiming that the Covenant has been violated (a) in regard to Mr. and Mrs. Fals Borda and (b) in regard to Mr. Justo Germán Bermúdez and Miss Martha Isabel Valderrama;

(c) That a copy of any submission received from the author pursuant to paragraph 2 of this decision be transmitted to the State party as soon as possible to enable it to take it into account in the preparation of its submission under article 4 (2) of the Optional Protocol;

(d) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of any submission received from the author of the communication pursuant to operative paragraph 2 above, written explanations and statements clarifying the matter and the remedy, if any, that may have been taken by it. The State party was requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration.

9.1 In accordance with operative paragraph 2 of the decision adopted by the Human Rights Committee on 27 July 1981, the author submitted further information dated 30 September 1981.

9.2 He claimed that the detention of Mr. and Mrs. Fals Borda was arbitrary and violated articles 9 and 14 of the International Covenant on Civil and Political Rights for the following reasons:

1. Article 9 of the Covenant

Mr. and Mrs. Fals Borda were definitely subject to violation of their right to liberty and security of person, since they were detained arbitrarily. They were not detained for any of the reasons laid down in criminal law (the Penal Code), nor in accordance with the appropriate legal procedure, provided for in the Code of Penal Procedure (articles 426 to 471), but under a substantive and adjectival rule of emergency law, namely, Legislative Decree No. 1923 of 1978 (the "Statute of Security"), which violates the Colombian Constitution and the International Covenant on Civil and Political Rights.

Secondly, the right of Mr. and Mrs. Fals Borda to be tried "within a reasonable time" or be released, as provided for in article 9 (3) of the Covenant, was violated.

In its submission dated 30 September 1980, the Colombian Government recognized that, besides arbitrary detention, the requirement of reasonable time had not been observed, since it stated: "The orders under which Mr. and Mrs. Fals Borda were released were an outcome of the decision that there was no justification for their continued detention." It has been shown that Mrs. Fals Borda had been detained for over a year.

Thirdly, Mr. and Mrs. Fals Borda were victims of the violation of the *habeas corpus* safeguard, recognized both in article 417 of the Code of Penal Procedure and in article 9 (4) of the International Covenant on Civil and Political Rights.

By means of the emergency procedure laid down in the "Statute of Security", the military authorities prevented and denied the exercise of this right, thus permitting the arbitrary detention of Mr. and Mrs. Fals Borda.

2. Article 14 of the Covenant

The subjection of Mr. and Mrs. Fals Borda to military or emergency penal procedure, in implementation of the "Statute of Security" violated their rights under article 14 (1) of the Covenant.

In the first place, the military courts which judge civilians, as provided for in article 9 of the "Statute of Security", as well as the judicial powers granted to army, navy and air force commanders (article 11) and police chiefs (article 12), nullify the right to a competent, independent and impartial tribunal. Articles 9, 11 and 12 of Decree No. 1923 ignore not only the universally recognized principle *nemo iudex in sua causa* but also the right to a natural or judicial tribunal, provided for in article 26 of the Colombian Constitution: "No one may be tried except in conformity with the laws in force prior to the commission of the act with which he is charged, by a court having competent jurisdiction, and in accordance with all formalities proper to each case."

Accordingly, the only competent, independent and impartial tribunals are the courts of common jurisdiction or judiciary set up under title XV, "the Administration of Justice", of the Colombian Constitution and in accordance with title II, "Jurisdiction and Competence", of the Code of Penal Procedure (Decree No. 409 of 1971). This is on the basis not only of the constitutional principle of separation of powers, but also of article 58 of the Colombian Constitution: "Justice is administered by the Supreme Court, by superior district courts and by such other courts and tribunals as may be established by law."

The Colombian Constitution does not allow military or emergency penal justice for citizens or civilians. Article 170 of the Colombian Constitution provides for courts martial but only for "offences committed by military personnel on active service and in relation to that service".

Military courts or courts martial nevertheless operate in Colombia in breach of the country's constitution and laws and of the International Covenant on Civil and Political Rights, in particular to try political opponents, under Decree No. 1923 of 1978 (the "Statute of Security"); this is in violation of article 14 of the United Nations International Covenant on Civil and Political Rights.

Secondly, the military or emergency courts provided for in articles 9, 11 and 12 of Decree No. 1923, the "Statute of Security", in addition to not being competent, independent and impartial (article 14 (1) of the Covenant), were not set up under a proper law passed by Congress validly amending or repealing the Code of Penal Procedure (Decree No. 409 of 1971). The "Statute of Security" is a state-of-siege decree which violates the safeguard of legality provided in the Covenant, particularly since it is indefinite, as may be seen in article 1 of the Statute, which provides for sentences of 30 years which do not exist in the Penal Code.

In addition, Mr. and Mrs. Fals Borda were obviously deprived of the rights mentioned in paragraphs 2, 3 and 4 of article 14 of the Covenant.

9.3 Concerning Justo Germán Bermúdez and Martha Isabel Valderrama, the author claimed that they were victims of arbitrary arrest and imprisonment,

because they were deprived of their liberty on grounds not established by criminal law (the Penal Code) but under an emergency provision such as the "Statute of Security", in violation of the Colombian Constitution and the International Covenant on Civil and Political Rights. Likewise, they suffered arbitrary imprisonment because they were subject to a penal procedure that was not that of ordinary penal justice as laid down in the Code of Penal Procedure, but a military, governmental, emergency *ad hoc* procedure.

Furthermore, the military sentence pronounced against Germán Bermúdez Gross and Martha Isabel Valderrama deprived them of the rights provided for in paragraphs 2 and 3 of article 9 of the Covenant, as well as the *habeas corpus* safeguard contained in article 417 of the Code of Penal Procedure and article 9 (4) of the International Covenant on Civil and Political Rights.

9.4 In addition, the author claimed that Justo Germán Bermúdez and Martha Isabel Valderrama had been deprived of the procedural rights mentioned in paragraphs 1, 2, 3 and 5 of article 14 of the Covenant for the same reasons as those mentioned above in paragraph 9.2 concerning Mr. Fals Borda and his wife.

9.5 At this stage in the proceedings the author raised the claim that Justo Germán Bermúdez and Martha Isabel Valderrama are also victims of violations of article 15 of the Covenant. He argues as follows:

Article 15 of the Covenant lays down the following: "Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed." However, Germán Bermúdez Gross and Martha Isabel Valderrama received a heavier penalty under article 2 of Legislative Decree No. 1923 of 6 September 1978, which increased the penalty of ordinary imprisonment for the offence of rebellion to between 8 and 14 years, whereas in the Colombian Penal Code (Decree No. 2300 of 14 September 1936), in force at the time of the military judgement, the penalty was only six months to four years (art. 139).

In addition, article 125 of the new Colombian Penal Code, promulgated on 25 January 1980 and in force since 25 January 1981 (Decree-Law No. 100 of 1980) provides that "persons who use arms in attempting to overthrow the national government or to abolish or modify the existing constitutional or legal régime shall be liable to ordinary imprisonment for three to six years". However, neither the Colombian Government nor the Brigade of Military Institutions applied the principle of benefit of penal law, laid down not only in the Colombian Constitution, but also in article 15 (1) of the Covenant: "If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby".

10. In its submission under article 4 (2) of the Optional Protocol, dated 24 March 1982, the State party reiterated that:

The charges made by Mrs. María Cristina Salazar de Fals Borda, Orlando Fals Borda, Justo Germán Bermúdez and Martha Isabel Valderrama Becerra through their attorney, Dr. Pedro Pablo Camargo, that they were arbitrarily detained lack all legal basis since it is within the power of the Government to carry out investigations through the judiciary in respect of persons who are presumed to have committed an offence and, to ensure that they appear in court, they may be placed under preventive detention. However, if citizens consider that there has been a departure from the law, they may, in accordance with articles 272-275 of the Penal Code, make a complaint on the grounds of arbitrary detention.

It should be pointed out with respect to civil responsibility arising from a punishable act that there is a prescriptive period of 20 years if an action is brought independently of criminal proceedings and a prescriptive period equal to that for the relevant criminal proceedings if an action is brought as part of such proceedings in accordance with article 108 of the Criminal Code. Where the sentence may be one of deprivation of liberty, the prescriptive period for criminal proceedings is equal to the maximum sentence provided for by law, but in no case may it be less than five years or more than 20 years. In the case with which we are concerned (arbitrary detention), the period will be five years, that being the maximum sentence which may be imposed.

Concerning Justo Germán Bermúdez and Martha Isabel Valderrama, the law authorizes them, providing the period of prescription is still running, to submit an appeal for review or to vacate if they believe that the judgement of the Higher Military Court was not in accordance with the legal principles in force in our country. There is no period established by law within which an action for review must be submitted, although, according to the interpretation of articles 584-585 of the Code of Criminal Procedure, doctrine holds that this should be done while the person is serving the sentence.

The parties would have a period of 15 days from the date of notification of the sentence of the Higher Military Court to submit an appeal to vacate. After this period, the right to seek to vacate a judge-

ment by the Supreme Court of Justice, which is the highest body for the verification of trials, is lost, as stipulated in article 573 of the Code of Criminal Procedure, which also states that such appeals must be made on the specific grounds set forth in article 580 of the Code of Criminal Procedure.

11. In his additional information and observations dated 19 June 1982, the author reiterated that Mr. and Mrs. Fals Borda could not start civil or administrative proceedings or try to obtain compensation for reasons already mentioned (see para. 6.1 above) and because there has not been a judgement declaring that they had been arbitrarily arrested. He further argued that Justo Germán Bermúdez and Martha Isabel Valderrama cannot submit an appeal to vacate a judgement because of lapse of time or for review because there are no grounds to request such review.

12.1 The Human Rights Committee had considered the present communication in the light of all information made available to it by the parties, as provided in article 5 (1) of the Optional Protocol. The Committee bases its views on the following facts, which are not in dispute or which are unrefuted by the State party.

12.2 The Supreme Court of Justice of Colombia in a judgement of 30 October 1978 held Decree No. 1923 of 6 September 1978 to be constitutional. In this Decree it is recalled that "by Decree No. 2131 of 1976, public order was declared to be disturbed and the entire national territory in a state of siege". Article 9 of Decree No. 1923 reads as follows: "The military criminal courts, in addition to exercising the competence given them by the laws and regulations in force, shall try by court martial proceedings the offences [in particular of rebellion] referred to in articles 1, 2, 3, 4, 5 and 6, as well as those committed against the life and person of members of the Armed Forces, etc." In this Decree No. 1923 judicial powers are also granted to army, navy and air force commanders (art. 11) and police chiefs (art. 12).

12.3 On 21 January 1979, Mr. Fals Borda and his wife, María Cristina Salazar de Fals Borda, were arrested by troops of the Brigada de Institutos Militares under Decree No. 1923. Mr. Fals was detained incommunicado at the Cuartel de Infantería de Usaquín, from 21 January to 10 February 1979 when he was released without charges. Mrs. Fals continued to be detained for over one year. Mr. and Mrs. Fals Borda were released as a result of court decisions that there was no justification for their continued detention. They had not, however, had a possibility themselves to take proceedings before a court in order that that court might decide without delay on the lawfulness of their detention.

12.4 On 3 April 1979, the President of the Summary Court Martial (First Battalion of Military Police, Brigade of Military Institutions) found Justo Germán Bermúdez Gross guilty of the offence of rebellion (art. 7 of the judgement) and sentenced him to a principal penalty of six years and eight months' rigorous imprisonment and interdiction of public rights and functions, as well as the accessory penalty of loss of *patria potestas* for the same period. In the same judgement it

sentenced Martha Isabel Valderrama Becerra to six years' rigorous imprisonment and interdiction of public rights and functions for the offence of rebellion. The judgement states: "In conclusion, the sentences to be passed on the accused who have been declared guilty of the offence of 'rebellion' shall be those contained in article 2 of Decree No. 1923 of 6 September 1978, known as the Statute of Security". In October 1980, the Higher Military Tribunal upheld the sentences of the court of first instance.

13.1 In formulating its views, the Human Rights Committee also takes into account the following considerations:

13.2 The Committee notes that the Government of Colombia in its submission of 30 April 1980 made reference to a situation of disturbed public order in Colombia within the meaning of article 4, paragraph 1, of the Covenant. In its note of 18 July 1980 to the Secretary-General of the United Nations (reproduced in document CCPR/C/2/Add.4), which was designed to comply with the formal requirements laid down in article 4 (3) of the Covenant, the Government of Colombia has made reference to the existence of a state of siege in all the national territory since 1976 and to the necessity to adopt extraordinary measures within the framework of the legal régime provided for in the National Constitution for such situations. With regard to the rights guaranteed by the Covenant, the Government of Colombia declared that "temporary measures have been adopted that have the effect of limiting the application of article 19, paragraph 2, and article 21 of that Covenant". The present case, however, is not concerned with article 19 and article 21 of the Covenant.

13.3 The allegations as to breaches of the provisions of article 14 of the Covenant concerning judicial guarantees and fair trial, seem to be based on the premise that civilians may not be subject to military penal procedures and that when civilians are nevertheless subjected to such procedures, they are in effect deprived of basic judicial guarantees aimed at ensuring fair trial, which guarantees would be afforded to them under the normal court system, because military courts are neither competent, independent and impartial. The arguments of the author in substantiation of these allegations are set out in general terms and principally linked with the question of constitutionality of Decree No. 1923. He does not, however, cite any specific incidents or facts in support of his allegations of disregard for the judicial guarantees provided for by article 14 in the application of Decree No. 1923 in the cases in question. Since the Committee does not deal with questions of constitutionality, but with the question whether a law is in conformity with the Covenant, as applied in the circumstances of this case, the Committee cannot make any finding of breaches of article 14 of the Covenant.

13.4 As to the allegations of breaches of the provisions of article 9 of the Covenant, it has been established that the alleged victims did not have recourse to *habeas corpus*. Other issues are in dispute; in particular, whether the alleged victims were in fact subjected to ar-

bitrary arrest and detention. The author argues on the one hand that in the present state of law in Colombia it would be of no avail to pursue domestic remedies for compensation or damages for arbitrary arrest or detention under Decree No. 1923, since the Decree has been declared constitutional. On the other hand he argues that, notwithstanding this being the state of domestic law, Decree No. 1923 is nevertheless contrary to the rights set out in article 9 of the Covenant to such an extent that its application to an individual makes him a victim of arbitrary arrest and detention. The Committee, however, must limit its findings to an assessment as to whether the measures in question have denied the alleged victims the rights guaranteed by article 9 of the Covenant. In the case before it the Committee cannot conclude that the arrest and detention of the alleged victims were unlawful. It has therefore not been established that the application of Decree No. 1923 has led to arbitrary arrest and detention of the alleged victims, within the meaning of the provisions of article 9 of the Covenant.

13.5 The State party has not commented on the author's further allegations (introduced by him on 30 September 1981) that Justo Germán Bermúdez and Martha Isabel Valderrama are also victims of violations of the provisions of article 15 of the Covenant. The Committee holds that it was not the State party's duty to address these allegations, as they were only introduced after the communication had been declared admissible, in regard to alleged breaches of articles 9 and 14 of the Covenant. The silence of the State party cannot, therefore, be held against it. The Committee has, however, *ex officio*, considered these new allegations and finds them ill founded. Justo Germán Bermúdez and Martha Isabel Valderrama were tried and convicted for offences which were found by the judgement of 3 April 1979 to constitute a course of action which continued after Decree No. 1923 had entered into force. On the other hand, the author has not shown that those offences, which included assaults on banks, would have come within the scope of the new article 125 of the Colombian Penal Code. The Committee observes, furthermore, that the new law entered into force after Justo Germán Bermúdez and Martha Isabel Valderrama had been convicted and their appeal had been rejected.

13.6 The facts as reflected in the information before the Human Rights Committee do not reveal that Justo Germán Bermúdez and Martha Isabel Valderrama are victims of violations of rights protected by the Covenant.

14. The Committee, acting under article 5 (4) of the Optional Protocol, is therefore of the view that the facts as set out in paragraphs 12.2, 12.3 and 12.4 above disclose violations of the International Covenant on Civil and Political Rights, particularly of:

Article 9 (3), because María Cristina Salazar de Fals Borda's right to be tried or released within reasonable time was not respected;

Article 9 (4), because Orlando Fals Borda and María Cristina Salazar de Fals Borda could not themselves

take proceedings in order that a court might decide without delay on the lawfulness of their detention.

15. The Committee accordingly is of the view that the State party is under an obligation to provide adequate remedies for the violations which Orlando Fals Borda and María Cristina Salazar de Fals Borda have suffered and that it should adjust its laws in order to give effect to the right set forth in article 9 (4) of the Covenant.

APPENDIX

Republic of Colombia Ministry of Justice

Decree No. 1923 of 6 September 1978

*promulgating rules for the protection of the lives,
honour and property of persons
and guaranteeing the security of members of society*

The President of the Republic of Colombia in the exercise of his constitutional powers, and especially those conferred on him by article 121 of the National Constitution, and

Considering:

That, by Decree No. 2131 of 1976, the public order was declared to be disturbed and the entire national territory in a state of siege;

That it is the responsibility of the President of the Republic to ensure the prompt and full administration of justice throughout the Republic, and that he is required to provide the judicial authorities, in accordance with law, with such assistance as is needed in order to give effect to their decisions;

That it is also the responsibility of the President of the Republic to preserve public order throughout the territory of the Nation, to restore it where it has been disturbed, and to defend work, which is a social obligation deserving the special protection of the State;

That the causes of disturbance of public order have from time to time reappeared and have become more acute, creating a climate of general insecurity and degenerating into murder, abduction, sedition, riot or insurrection, or into terrorist practices designed to produce political effects leading to the undermining of the present republican régime, or into efforts to justify crime, acts which infringe the rights of citizens recognized by the Constitution and by the Laws and which are essential for the maintenance and preservation of public order;

That it is essential to enact security measures for the maintenance of social order and peace in the territory of the Republic, and

That, under article 16 of the Constitution, the authorities of the Republic are instituted to protect the lives, honour and property of all persons,

DECREES:

Article 1. Any person who, in order to obtain for himself or for another an unlawful advantage or benefit, or for purely political ends or for purposes of publicity, deprives another of his freedom, or plans, organizes or co-ordinates any such act shall incur a penalty of 8 to 10 years' imprisonment with compulsory labour (*presidio*).

Any person or persons who abduct others and, in order to commit the offence, or in the course of its execution or commission, cause them injuries or subject them to torture, or compel them to act against their will and demand money or lay down other conditions for their release, shall incur a penalty of 10 to 20 years' imprisonment with compulsory labour.

If, because or on the occasion of the abduction, the death of the abducted person or third parties occurs, the term of imprisonment with compulsory labour shall be from 20 to 30 years.

Persons accused or found guilty of the crime of abduction shall in no case be eligible for suspended preventive detention or a suspended sentence.

Article 2. Persons who foment, head or lead an armed rising to overthrow the legally constituted National Government, or wholly or partly to change or suspend the existing constitutional system, with respect to the formation, functioning or replacement of the public powers or organs of sovereignty, shall incur 8 to 14 years' imprisonment with compulsory labour and shall be debarred from exercising rights and holding public office for the same period.

Those who merely take part in the rebellion, being in its employ and having a military, political or judicial authority or jurisdiction, shall be liable to two thirds of the penalty provided for in the previous paragraph. Other persons involved in the rebellion shall incur one third of this penalty.

Article 3. Those who form armed bands, gangs or groups of three or more persons and invade or attack villages, estates, farms, roads or public highways, causing deaths, fires or damage to property, or who, using violence against persons or objects, commit other offences against the security and integrity of the community, or who by means of threats appropriate livestock, valuables or other movable objects belonging to others or force their proprietors, owners or administrators to surrender them, or who institute the payment of contributions on the pretext of guaranteeing, respecting or defending the lives or rights of persons, shall incur a term of imprisonment with compulsory labour of 10 to 15 years.

Article 4. Those who cause or take part in disturbances of public order in towns or other urban areas, who disturb the peaceful conduct of social activities or who cause fires, and in so doing bring about the death of persons, shall incur a penalty of 20 to 24 years' imprisonment with compulsory labour. If they merely cause bodily harm, the penalty shall be from 1 to 12 years.

If the acts referred to in this article are not committed with the aim of causing death or bodily injury, the penalty shall be from 1 to 5 years' ordinary imprisonment (*prisión*).

Article 5. Those who cause damage to property by the use of bombs, detonators, explosives, or chemical or inflammable substances shall incur a term of ordinary imprisonment of 2 to 6 years.

If the death of one or more persons occurs as a consequence of acts as described in the first paragraph of this article, the penalty shall be from 20 to 24 years' imprisonment with compulsory labour.

If the acts cause only bodily injury, the penalty shall be from 4 to 10 years.

The penalties referred to in this article shall be increased by one third if those who commit the acts conceal their identity by the use of disguises, masks, stockings or other devices intended to conceal their identity, or if they use firearms in these circumstances.

Article 6. Any person or persons who, by means of threats or violence, by falsely representing themselves as public officials or as acting on the orders of such officials, and, for the purposes of obtaining an unlawful advantage, for themselves or for a third party, force another person to surrender, dispatch, deposit or place at their disposal articles or money or documents capable of producing legal effects, shall incur 4 to 10 years' imprisonment with compulsory labour. Any person who by the same means forces another to sign or to destroy instruments of obligation or credit shall incur the same penalty.

Article 7. A term of up to one year's incommutable imprisonment (*arresto*) shall be incurred by any person or persons who:

(a) Temporarily occupy public places or places open to the public, or offices of public or private bodies, for the purpose of exerting pressure in order to secure a decision by lawful authorities, distributing subversive propaganda in such places, posting offensive or subversive writings or drawings in them, or exhorting the population to rebellion;

(b) Incite others to break the law or to disobey the authorities, or who disregard a legitimate order by a competent authority;

(c) Make improper use of disguises, stockings, masks or other devices for concealing identity or who alter, destroy or conceal the registration plates of vehicles;

(d) Fail, without just cause, to provide public services which they are required to furnish or assistance requested of them by the

authorities or assistance requested by any person whose life or property is threatened;

(e) Are in improper possession of articles which may be used to commit offences against the life and integrity of persons, such as firearms, daggers, knives, machetes, sticks, blowpipes, stones, bottles filled with petrol, fuses, or chemical or explosive substances;

(f) Print, store, carry, distribute or transport subversive propaganda;

(g) Demand money or goods for the conduct of unlawful activities, so as to permit the movements of persons, goods or vehicles, or who impede the free movement of other persons.

Article 8. So long as public order continues to be disturbed, the Mayor of the Special District of Bogotá, the Governors, Intendents and Superintendents of the capitals of the different departments and the Mayors of Municipalities may order a curfew, and prohibit or regulate public demonstrations, processions, meetings and the sale and consumption of intoxicating beverages.

The Mayors of Municipalities shall immediately advise the Governor, Intendent or Superintendent of such action.

Article 9. The military criminal courts, in addition to exercising the competence given them by the laws and regulations in force, shall try by court martial proceedings the offences referred to in articles 1, 2, 3, 4, 5 and 6, as well as those committed against the life and person of members of the Armed Forces, against civilians working for the Armed Forces and against members of the Administrative Department of Security (DAS), whether or not engaged in the performance of their duties, and against public officials, because of the position they hold or because of the exercise of their functions.

Article 10. Any person who, without the permission of the competent authority, manufactures, stores, distributes, sells, transports, supplies, acquires or carries firearms, ammunition or explosives shall incur a penalty of up to one year's imprisonment (*arresto*) and the confiscation of the articles concerned.

Should the firearm or ammunition be an article for the exclusive use of the Armed Forces, the term of imprisonment shall be from 1 to 3 years, without prejudice to the confiscation of the article concerned.

Article 11. The penalties referred to in article 7, paragraphs (a) and (b), and in article 10, shall be enforced by Army, Navy or Air Force Base Commanders, in accordance with the following procedure:

The accused shall answer the charge within 24 hours following the hearing of the facts. He must be assisted by a legal representative in these proceedings.

A period of four days, starting on the day following these proceedings, shall be allowed for the submission of any evidence which has been requested by the accused or his legal representative or called for by the official.

If within the 24 hours following the hearing of the facts it has not been possible to hear the plea of the accused because he has failed to appear, he shall be summoned to appear by an order which shall be

posted for two days in the adjutant's office of the appropriate Army, Navy or Air Force Base Command.

If the person accused of the offence has not appeared by the end of this period, he shall be declared absent and a lawyer shall be appointed by the court as his defence counsel, to act for him until the close of the investigation.

When the above periods have elapsed, the appropriate written decision, including a statement of reasons, shall be issued. This decision shall indicate, if the accused is found guilty, his name, the offence, the charge against him, the sentence passed on him and the place where he is required to serve it. If, being in custody, he is cleared of the charge, he shall be released forthwith.

The terms specified in this article may be increased by a maximum of 100 per cent if five or more persons committed the offence.

The decision referred to in the preceding provisions of this article shall be notified personally to the offender or to the defence counsel appointed by the court, as the case may be. Any appeal shall be against the decision only and shall be lodged within 24 hours following such notification and heard on the following day.

Article 12. The penalties referred to in article 7, paragraphs (c), (d), (e), (f) and (g), shall be imposed by police station commanders having the rank of Captain or above, who shall hear the case in accordance with the procedure laid down in the preceding article. In localities where there is no such commander, the Mayor or the Inspector of Police shall hear the case.

Article 13. So long as public order continues to be disturbed, radio stations and television channels shall not broadcast information, statements, communiqués or comments relating to public order, cessations of activities, work stoppages, illegal strikes or information which incites to crime or aims to justify it.

The Ministry of Communications shall, by a decision which includes a statement of reasons and against which only an application for reversal may be lodged, impose penalties for any infraction of this article, in conformity with the relevant provisions of Act No. 74 of 1966 and Decree No. 2085 of 1975.

Article 14. The Ministry of Communications is empowered, under article 5 of Decree No. 3418 of 1954 to take over, on behalf of the State, full control of some or all privately operated broadcasting frequencies or channels, where this is necessary in order to avert a disturbance of public order and to restore normal conditions.

Licences for broadcasting services which are taken over by the Colombian State shall be considered temporarily suspended.

Article 15. The penalties referred to in articles 209, 210, 211, 212 and 213 of Volume 2, Title V of the Penal Code relating to association for and instigation of infraction of the law shall consist of from 1 to 8 years' ordinary imprisonment.

Article 16. This Decree shall enter into force as soon as it is issued and shall suspend legal provisions which are contrary to it.

For transmittal and implementation.

Done at Bogotá, D.E., on 6 September 1978.

Annex I

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND OPTIONAL PROTOCOL

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966

Entry into force: 23 March 1976, in accordance with article 49.

PREAMBLE

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity,

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the

proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.
2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.
3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article

28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.
3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.
2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.
3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.
4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary-General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.
2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.
2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.
2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.
2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it

to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, *inter alia*, that:

(a) Twelve members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:

(a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies pending, or available in the matter.

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State.

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.

(d) The Committee shall hold closed meetings when examining communications under this article.

(e) Subject to the provisions of sub-paragraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant.

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in sub-paragraph (b), to supply any relevant information.

(g) The States Parties concerned, referred to in sub-paragraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing.

(h) The Committee shall, within twelve months after the date of receipt of notice under sub-paragraph (b), submit a report:

(i) If a solution within the terms of sub-paragraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of sub-paragraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declara-

tion has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1. (a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an *ad hoc* Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of sub-paragraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under sub-paragraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the *ad hoc* conciliation commissions which may be appointed under article 42, shall be en-

titled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 48;

(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

Optional Protocol to the International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966

Entry into force: 23 March 1976, in accordance with article 9.

The States Parties to the present Protocol,

Considering that in order further to achieve the purposes of the Covenant on Civil and Political Rights (hereinafter referred to as the Covenant) and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in part IV of the Covenant (hereinafter referred to as the Committee) to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

Have agreed as follows:

Article 1

A State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol.

Article 2

Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and

who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

Article 3

The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant.

Article 4

1. Subject to the provisions of article 3, the Committee shall bring any communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant.

2. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Article 5

1. The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.

2. The Committee shall not consider any communication from an individual unless it has ascertained that:

(a) The same matter is not being examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.

3. The Committee shall hold closed meetings when examining communications under the present Protocol.

4. The Committee shall forward its views to the State Party concerned and to the individual.

Article 6

The Committee shall include in its annual report under article 45 of the Covenant a summary of its activities under the present Protocol.

Article 7

Pending the achievement of the objectives of resolution 1514 (XV) adopted by the General Assembly of the United Nations on 14 December 1960 concerning the Declaration on the Granting of Independence to Colonial Countries and Peoples, the provisions of the present Protocol shall in no way limit the right of petition granted to these peoples by the Charter of the United Nations and other international conventions and instruments under the United Nations and its specialized agencies.

Article 8

1. The present Protocol is open for signature by any State which has signed the Covenant.

2. The present Protocol is subject to ratification by any State which has ratified or acceded to the Covenant. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State which has ratified or acceded to the Covenant.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 9

1. Subject to the entry into force of the Covenant, the present Protocol shall enter into force three months after the date of the

deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or instrument of accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or instrument of accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 10

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 11

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties

still being bound by the provisions of the present Protocol and any earlier amendment which they have accepted.

Article 12

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General.

2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 before the effective date of denunciation.

Article 13

Irrespective of the notifications made under article 8, paragraph 5, of the present Protocol, the Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph 1, of the Covenant of the following particulars:

(a) Signatures, ratifications and accessions under article 8;

(b) The date of the entry into force of the present Protocol under article 9 and the date of the entry into force of any amendments under article 11;

(c) Denunciations under article 12.

Article 14

1. The present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.

Annex II

PROVISIONAL RULES OF PROCEDURE FOR THE CONSIDERATION OF COMMUNICATIONS RECEIVED UNDER THE OPTIONAL PROTOCOL

XVII.A. Transmission of communications to the Committee

Rule 78

1. The Secretary-General shall bring to the attention of the Committee, in accordance with the present rules, communications which are or appear to be submitted for consideration by the Committee under article 1 of the Protocol.

2. The Secretary-General, when necessary, may request clarification from the author of a communication as to his wish to have his communication submitted to the Committee for consideration under the Protocol. In case there is still doubt as to the wish of the author, the Committee shall be seized of the communication.

3. No communication shall be received by the Committee or included in a list under rule 79 if it concerns a State which is not a party to the Protocol.

Rule 79

1. The Secretary-General shall prepare lists of the communications submitted to the Committee in accordance with rule 78 above, with a brief summary of their contents, and shall circulate such lists to the members of the Committee at regular intervals. The Secretary-General shall also maintain a permanent register of all such communications.

2. The full text of any communication brought to the attention of the Committee shall be made available to any member of the Committee upon his request.

Rule 80

1. The Secretary-General may request clarification from the author of a communication concerning the applicability of the Protocol to his communication, in particular regarding;

(a) The name, address, age and occupation of the author and the verification of his identity;

(b) The name of the State Party against which the communication is directed;

(c) The object of the communication;

(d) The provision or provisions of the Covenant alleged to have been violated;

(e) The facts of the claim;

(f) Steps taken by the author to exhaust domestic remedies;

(g) The extent to which the same matter is being examined under another procedure of international investigation or settlement.

2. When requesting clarification or information, the Secretary-General shall indicate an appropriate time-limit to the author of the communication with a view to avoiding undue delays in the procedure under the Protocol.

3. The Committee may approve a questionnaire for the purpose of requesting the above-mentioned information from the author of the communication.

4. The request for clarification referred to in paragraph 1 of the present rule shall not preclude the inclusion of the communication in the list provided for in rule 79, paragraph 1, above.

Rule 81

For each registered communication the Secretary-General shall as soon as possible prepare and circulate to the members of the Committee a summary of the relevant information obtained.

B. General provisions regarding the consideration of communications by the Committee or its subsidiary bodies

Rule 82

Meetings of the Committee or its subsidiary bodies during which communications under the Protocol will be examined shall be closed. Meetings during which the Committee may consider general issues such as procedures for the application of the Protocol may be public if the Committee so decides.

Rule 83

The Committee may issue communiqués, through the Secretary-General, for the use of the information media and the general public regarding the activities of the Committee at its closed meetings.

Rule 84

1. A member shall not take part in the examination of a communication by the Committee:

(a) If he has any personal interest in the case; or

(b) If he has participated in any capacity in the making of any decision on the case covered by the communication.

2. Any question which may arise under paragraph 1 above shall be decided by the Committee.

Rule 85

If, for any reason, a member considers that he should not take part or continue to take part in the examination of a communication, he shall inform the Chairman of his withdrawal.

Rule 86

The Committee may, prior to forwarding its final views on the communication to the State Party concerned, inform that State of its views whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State Party concerned that such expression of its views on interim measures does not imply a determination on the merits of the communication.

C. Procedures to determine admissibility

Rule 87

The Committee shall decide as soon as possible and in accordance with the following rules whether or not the communication is admissible under the Protocol.

Rule 88

1. The Committee shall deal with communications in the order in which they are received by the Secretariat, unless the Committee decides otherwise.

2. The Committee may, if it considers appropriate, decide to deal jointly with two or more communications.

Rule 89

1. The Committee may establish one or more Working Groups of no more than five of its members to make recommendations to the Committee regarding the fulfilment of the conditions of admissibility laid down in articles 1, 2, 3 and 5 (2) of the Protocol.

2. The rules of procedure of the Committee shall apply as far as possible to the meetings of the Working Group.

Rule 90

1. With a view to reaching a decision on the admissibility of a communication, the Committee shall ascertain:

(a) that the communication is not anonymous and that it emanates from an individual, or individuals, subject to the jurisdiction of a State party to the Protocol;

(b) that the individual claims to be a victim of a violation by that State party of any of the rights set forth in the Covenant. Normally, the communication should be submitted by the individual himself or by his representative; the Committee may, however, accept to consider a communication submitted on behalf of an alleged victim when it appears that he is unable to submit the communication himself;

(c) that the communication is not an abuse of the right to submit a communication under the Protocol;

(d) that the communication is not incompatible with the provisions of the Covenant;

(e) that the same matter is not being examined under another procedure of international investigation or settlement;

(f) that the individual has exhausted all available domestic remedies.

2. The Committee shall consider a communication, which is otherwise admissible, whenever the circumstances referred to in article 5 (2) of the Protocol apply.

Rule 91

1. The Committee or a Working Group established under rule 88 may, through the Secretary-General, request the State party concerned or the author of the communication to submit additional written information or observations relevant to the question of admissibility of the communication. The Committee or the Working Group shall indicate a time-limit for the submission of such information or observations with a view to avoiding undue delay.

2. A communication may not be declared admissible unless the State party concerned has received the text of the communication and has been given an opportunity to furnish information or observations as provided in paragraph 1 of this rule.

3. A request under paragraph 1 of this rule shall include a statement of the fact that such a request does not imply that any decision has been reached on the question of admissibility.

Rule 92

1. Where the Committee decides that a communication is inadmissible under the Protocol it shall as soon as possible communicate its decision, through the Secretary-General, to the author of the communication and, where the communication has been transmitted to a State party concerned, to that State party.

2. If the Committee has declared a communication inadmissible under article 5 (2) of the Protocol, this decision may be reviewed at a later date by the Committee upon a written request by or on behalf of the individual concerned containing information to the effect that the reasons for inadmissibility referred to in article 5 (2) no longer apply.

D. Procedures for the consideration of communications

*Rule 93**

1. As soon as possible after the Committee has taken a decision that a communication is admissible under the Protocol, that decision and the text of the relevant documents shall be submitted, through the Secretary-General, to the State party concerned. The author of the communication shall also be informed, through the Secretary-General, of the decision of the Committee.

2. Within six months, the State party concerned shall submit to the Committee written explanations or statements clarifying the matter under consideration and the remedy, if any, that may have been taken by that State.

3. Any explanations or statements submitted by a State party pursuant to this rule shall be communicated, through the Secretary-General, to the author of the communication who may submit any additional written information or observations within such time-limit as the Committee shall decide.

4. The Committee may review its decision that a communication is admissible in the light of any explanation or statements submitted by the State party pursuant to this rule.

*Rule 94**

1. If the communication is admissible, the Committee shall consider the communication in the light of all written information made available to it by the individual and by the State party concerned and shall formulate its view thereon. For this purpose the Committee may refer the communication to a Working Group of not more than five of its members to make recommendations to the Committee.

2. The views of the Committee shall be communicated, through the Secretary-General, to the individual and to the State party concerned.

3. Any member of the Committee may request that a summary of his individual opinion shall be appended to the views of the Committee when they are communicated to the individual and to the State party concerned.

* As amended by the Committee at its 72nd meeting (third session), on 2 February 1978.

Annex III

STATES PARTIES TO THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (As at 31 December 1984)

<i>State Party</i>	<i>Date of entry into force</i>	<i>State Party</i>	<i>Date of entry into force</i>
Barbados	23 March 1976	Mauritius	23 March 1976
Bolivia	12 November 1982	Netherlands	11 March 1979
Cameroon	27 September 1984	Nicaragua	12 June 1980
Canada	19 August 1976	Norway	23 March 1976
Central African Republic	8 August 1981	Panama	8 June 1977
Colombia	23 March 1976	Peru	3 January 1981
Congo	5 January 1984	Portugal	3 August 1983
Costa Rica	23 March 1976	Saint-Vincent and the Grenadines	9 February 1982
Denmark	23 March 1976	Senegal	13 May 1978
Dominican Republic	4 April 1978	Suriname	28 March 1977
Ecuador	23 March 1976	Sweden	23 March 1976
Finland	23 March 1976	Trinidad and Tobago	14 February 1981
France	17 May 1984	Uruguay	23 March 1976
Iceland	22 November 1979	Venezuela	10 August 1978
Italy	15 December 1978	Zaire	1 February 1977
Jamaica	23 March 1976	Zambia	10 July 1984
Luxembourg	18 November 1983		
Madagascar	23 March 1976		

Annex IV

STATISTICAL SURVEY OF STATUS OF COMMUNICATIONS REGISTERED AS AT 31 JULY 1982

(End of 16th session)

State Party (13)	Awaiting decision on admissibility	Declared inadmissible	Discontinued prior to decision on admissibility or withdrawn by author	Declared admissible			Total
				Discontinued after being declared admissible	Awaiting consideration on merits	Views adopted	
Canada.....	17	14			1	3	35
Colombia.....	1					3	4
Denmark		6	1				7
Finland.....	1	2				2	5
Iceland			1				1
Italy.....	1		1		1		3
Madagascar	1				1		2
Mauritius.....						1	1
Nicaragua		1					1
Norway		3					3
Sweden.....						1	1
Uruguay	11	1	6	1	15	21	55
Zaire.....	3	2			1		6
TOTAL	35	29	9	1	19	31	124

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	56/1979	92		37/1978	72		64/1979	127
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