

HUMAN RIGHTS COMMITTEE

de Montejo v. Colombia

Communication No. R.15/64

24 March 1982

VIEWS

Submitted by: Consuelo Salgar de Montejo (represented by Pedro Pablo Camargo)

Alleged victim: Consuelo Salgar de Montejo

State party concerned: Colombia

Date of communication: 18 December 1979 (date of initial letter)

Date of decision on admissibility: 29 July 1980

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

Meeting on 24 March 1982,

Having concluded its consideration of communication No. R/15/64 submitted to the Committee by Pedro Pablo Camargo on behalf of Consuelo Salgar de Montejo, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and by the State party concerned,

Adopts the following:

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 Montejo, 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 Montejo, Director of the Colombia newspaper El Bogotano, was sentenced to one year or 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 reposicion, 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 or 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 contested, in particular, the allegation that Colombia was in breach of article 14 (5) of the Covenant. It argued 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 maintained that Mr. Salgar de Montejo was released after having served a term of detention for 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 recognized 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 regime 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 contravencion 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 added 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 submitted 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 argued 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 observed 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 observed 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 quoted 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 concluded that Consuelo Salgar de Montejó 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 at which 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 Montejó 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 argued 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 provisions such as the "Security Statute". She emphasized 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 fall to take account

of it without violating the Covenant and the universally recognized right to appeal against custodial sentences.

8.2 She reiterated 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 stated 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 continued 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 or Justice") or 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 stressed that the Constitution of Colombia in no case permits military courts to try civilians and, at the same time, she remarked that "an unfortunate interpretation of article 61 or 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 observed 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 alleged 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: Consuelo Salgar de Montejo, 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 1975, 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 or the legal regime 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.

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 on 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 "contravencion" 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.