

HUMAN RIGHTS COMMITTEE

Borda et al. v. Colombia

Communication No. R.11/46

27 July 1982

VIEWS

Submitted By: Orlando Fals Borda and his wife, Maria Cristina Salazar de Fals Borda, Justo German Bermudez and Martha Isabel Valderrama Becerra, all represented by Pedro Pablo Camargo

State party concerned: Colombia

Date of communication: 6 February 1979 (Date of initial letter)

Date of Decision on admissibility: 27 July 1981

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

Meeting on 27 July 1982,

Having concluded its consideration of communication No. 11/46 submitted to the Committee by Pedro Pablo Camargo on behalf of Orlando Fals Borda and his wife, Maria Cristina Salazar de Fals Borda, Justo German Bermudez and Martha Isabel Valderrama Becerra 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 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, Maria Cristina Salazar de Fals Borda, Justo German Bermudez 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)' the Government of Colombia has violated articles 9 and 14 of the Covenant and he claims that the lout 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, Maria Christina Salazar de Fals Borda, were arrested by troops of the Brigada de Institutos Militates under the Statute of Security. Dr. Fals was detained incommunicado without judicial guarantees, such as legal assistance, at the Cuartel de Infanteria 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 or Justo German Bermudez 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 German Bermudez 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 De passed on the accused who have been declared guilty of the offends of 'rebellion' shall be those contained in article 2 of Decree No. 1923 of September 1978, known as the Statute of Security".

1.5 The author alleges that hy application of Decree No. 1923 Dr. Fals Borda and his wife were arbitrarily detained, that Mr. Bermudez and Miss Valderrama are subjected to arbitrary imprisonment, that Mr. Bermudez 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 nave 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 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 nave 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 German Bermudez and Miss Martha Isabel Valderrama, The State party claimed that the accused have benefitted 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 connexion ... 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 German Bermudez 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 German Bermudez 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 to the hearing of cases involving offences against the constitutional regime 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 Christina 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 to 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 German Bermudez Gross and Marina 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 German Bermudez 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 German Bermudez 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 German Bermudez 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 connexion, 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 victim 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' are not only not competent, independent and impartial (article 14 (1) of the Covenant), but they were not 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-seige 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 German Bermudez 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 German Bermudez 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 German Bermudez 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 German Bermudez 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 followings 'Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.' However, German Bermudez 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 regime 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. Maria Cristina Salazar de Fals Borda, Orlando Fals Borda, Justo German Bermudez 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 German Bermudez 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 judgement 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 German Bermudez 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 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 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, Maria Cristina Salazar de Pals Borda, were arrested by troops of the Brigade de Institutos Militares under Decree No. 1923. Mr. Fals was detained incommunicado at the Cuartel de Infanteria de Usaquin, 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 German Bermudez 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 14 of the Covenant. In its note of 18 July 1980 to the Secretary-General of the United Nations (reproduced in document CCRP/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 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.

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 arbitrary 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 German Bermudez and Martha Isabel raider rams 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 illfounded. Justo German Bermudez 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 German Bermudez 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 German Bermudez 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 Maria Cristina Salazar de Fals Borda's right to be tried or released within a reasonable time was not respected;

of article 9 (4), because Orlando Fals Bonds and Maria 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 Maria Christina Salazar de Fals Borda have suffered and that it should adjust its laws in order to give effect to the rights set forth in article 9 (4) of the Covenant.

* See the text of Legislative Decree No. 1923 in the appendix below.

APPENDIX X

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 regime, 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 or 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 (prison).

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 Bogota, 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, communiques 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 Rct 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 Bogota, D.E., on 6 September 1978

SECRETARY OF THE INTERIOR

(Signed) German Zea Hernandez

Acting Minister for Foreign Affairs,

(Signed) Carlos Borda Mendoza

Minister of Justice,

(Signed) Hugo Escobar Sierra

Minister of Finance ,

(Signed) Jaime Garcia Parra

Minister of Defence,

(Signed) Luis Carlos Camacho Leyva

Minister of Agriculture,

(Signed) German Bula Hoyos

Minister of Labour and Social security,

(signed) Rodrigo Marin Bernal

Minister of Health,

(Signed) Alfonso Jaramillo Salazar

Minister for Economic Development,

(Signed) Gilberto Echeverry Mejia

Minister for Mines and Energy,

(Signed) Alberto Vasquez Restrepo

Minister of Education,

(Signed) Rodrigo Lloreda Caycedo

Minister of Communications,

(Signed) Jose Manuel Arias Carrizosa

Minister of Public Works and Transport,

(Signed) Enrique Vargas Ramirez

Chief of the Administrative Department of the Office of the President of the Republic,

(Signed) Alvaro Perez Vives