

## HUMAN RIGHTS COMMITTEE

### Fuenzalida v. Ecuador

Communication No. 480/1991\*

12 July 1996

CCPR/C/57/D/480/1991\*

### VIEWS

*Submitted by: José Luis García Fuenzalida [represented by counsel]*

*Victim: The author*

*State party: Ecuador*

*Date of communication: 4 November 1991 [date of initial letter]*

*Date of decision on admissibility: 15 March 1995*

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

Meeting on 12 July 1996,

Having concluded its consideration of communication No. 480/1991, submitted to the Committee by Mr. José Luis García Fuenzalida 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, his counsel and the State party,

Adopts the following:

#### **Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is José Luis García Fuenzalida, a Chilean citizen, currently residing in Quito, Ecuador. At the time of submission of the communication, he was imprisoned at the Cárcel No. 2 in Quito. He claims to be a victim of violations by

Ecuador of articles 3, 7, 9 and 14 of the International Covenant on Civil and Political Rights. He is represented by the Ecumenical Human Rights Commission, a non-governmental organizations in Ecuador.

The facts as submitted by the author

2.1 The author is a hairdresser by profession. He was detained on 5 July 1989 and charged two days later with the rape, on 5 May 1989, of one D. K., a United States Peace Corps volunteer. He claims to be innocent and argues that he has never had sexual relations with any woman. The author was tried by the Tribunal Cuarto de Pichincha. On 11 April 1991, he was found guilty as charged and sentenced, on 30 April 1991, to eight years' imprisonment. On 2 May 1991, the author appealed to the Superior Court, demanding the nullity and cassation of the judgement. The request for nullity was rejected by the court and the appeal on cassation was not resolved within the period of 30 days established by law. After waiting for two years and six months for a decision by the Court of Cassation, the author withdrew his appeal on cassation in exchange for his release. He was released on parole in October 1994.

2.2 With regard to his arrest, the author states that on 5 July 1989, at approximately 7 p.m., he was detained by police officers, thrown on to the floor of a vehicle and blindfolded. From the submission it is not clear whether an arrest warrant had been issued. The author apparently did not know the reason for his arrest and initially supposed it was in connection with drugs. It was not until two days later that he learned about the alleged rape. He was interrogated regarding his whereabouts on the day of the rape. He claims to have been subjected to serious ill-treatment, including being left shackled to a bed overnight. It is also alleged that, in contravention of Ecuadorian law and practice, samples of his blood and hair were taken.

2.3 It is alleged that during the evening of 6 July 1989, the author was blindfolded and that a brine solution was poured into his eyes and nostrils. The author alleges that at some point of the interrogation the blindfold fell from his eyes and he was able to identify an officer who the author claims had a grudge against him from a prior detention on suspicion of murdering a homosexual friend.

2.4 That same evening, he was taken to the Criminal Investigation Department of Pichincha (SIC-P), where he was subjected to death threats until he consented to sign an incriminatory statement. However, it is clear from the judgement that the author, during his trial, denied both the charges and the voluntariness of the statement. The judgement reflects that the author made before the judge a long and detailed statement of the facts concerning his detention and confession under duress.

2.5 The author claims that he learned of the facts of the rape only when charges were read to him on 7 July 1989, just before he was put on an identification parade in which the victim identified him. The author further alleges that, before he was put on the identification parade, he was taken to his house to shower, shave and dress, as instructed by the police. The author also claims that the police took several pieces of underwear from his house, which were then

used as evidence against him, despite the testimony by a witness, MC. M.P., that they belonged to her.

2.6 Finally, the author alleges that on Saturday, 8 July 1989, he was shot in the leg by a police officer in what the police claimed was an attempt to escape and the author claims was a set-up. He was hospitalized with leg injuries, and the author claims that the psychological torture continued while he was in the hospital. An affidavit given during the trial by a member of the Ecuadorian Human Rights Commission who visited the author in the hospital states: "I was able to see that there were two wounds on one of his legs caused by a bullet. I also saw several cigarette burns on his chest and hand". This same person further states in the affidavit: "I talked to a patient who was in the bed next to Mr. García's and asked him whether it was true that a police officer had been harassing Mr. García. He replied that he had indeed heard that person (the police officer) threaten Mr. García".

2.7 The case for the prosecution was that, during the night of 5 May 1989, D. K. was abducted by an assailant and forced into a car. The victim was kept on the floor of the car and repeatedly sexually assaulted. Finally, the victim was thrown out of the car and left on the roadside. The victim reported the incident to the Consulate of the United States of America, which reported it to the police. During the trial the police claimed that they had found the victim's underwear in the author's house.

2.8 As to the exhaustion of domestic remedies in respect of the physical abuse to which the author was allegedly subjected, it is stated that a lawyer filed a complaint against the police officers on the author's behalf. There is no further information concerning the status of the investigation of the complaint.

### The complaint

3.1 The author claims to be the victim of a violation of article 3 in conjunction with article 26, owing to the difficulties he encountered in retaining a lawyer, allegedly because of his homosexuality.

3.2 The author also claims to have suffered repeated violations of article 7, because he was subjected to torture and ill-treatment following his arrest. This was corroborated during the trial by a member of the Ecuadorian Ecumenical Human Rights Commission.

3.3 The author further claims a violation of article 9, because he was subjected to arbitrary arrest and detention, since he claims that he was not involved in the rape.

3.4 The author further claims that his trial was unfair and in violation of article 14 of the Covenant. In this respect, counsel contends that the accused was convicted notwithstanding the contradictory evidence contained in the statement given by the victim herself, who described her assailant as being very tall and having a pock-marked face. The author, whom the victim identified, is short, measuring only 1.50 metres, and has no pock-marks on his face.

3.5 The author also claims that - in view of the submission by the victim of a laboratory report on samples (blood and semen) taken from her and samples of blood and hair taken from him against his will and showing the existence of an

enzyme which the author does not have in his blood - he requested the court to order an examination of his own blood and semen, a request which the court denied.

3.6 Moreover, the author complains about the delays in the judicial proceedings, in particular the fact that his appeal on cassation had not been dealt with in the period provided for by law, and that, after more than two and a half years of waiting for the decision of the Court of Cassation, he had finally had to abandon this recourse in order to obtain his release on parole.

#### The Committee's decision on admissibility

4. On 26 August 1992, the communication was transmitted to the State party, which was requested to submit to the Committee information and observations in respect of the question of admissibility of the communication. Despite two reminders sent on 10 May 1993 and 9 December 1994, no submission had been received from the State party.

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

5.2 The Committee ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter had not been examined under another procedure of international investigation or settlement.

5.3 The Committee noted with concern the absence of cooperation from the State party, despite the two reminders addressed to it. On the basis of the information before it, the Committee found that it was not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

5.4 The Committee considered that the author had not substantiated, for purposes of admissibility, that he had been unequally treated owing to his homosexuality and that this had been the cause of his difficulty in retaining a lawyer. This part of the communication was therefore declared inadmissible under article 2 of the Optional Protocol.

5.5 With respect to the author's complaint that he had been subjected to torture and ill-treatment, in violation of article 7 of the Covenant, as attested to by a member of the Ecuadorian Ecumenical Human Rights Commission during the trial, the Committee found that the facts as submitted by the author, which had not been contested by the State party, might raise issues under both articles 7 and 10 of the Covenant. In the absence of any cooperation from the State party, the Committee found that the author's claims were substantiated, for the purposes of admissibility.

5.6 With regard to the allegations that the author had been subjected to arbitrary detention in violation of article 9 of the Covenant, the Committee found that the facts as submitted were substantiated, for the purposes of

admissibility, and should accordingly be considered on their merits, especially with regard to the warrant of arrest and the moment at which the author was informed of the reasons for his arrest.

5.7 In respect of the author's allegations that the evidence in his case was not properly evaluated by the Court, the Committee referred to its prior jurisprudence and reiterated that it was generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. Accordingly, this part of the communication was declared inadmissible as being incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

5.8 The author also submitted information concerning the procedures at the trial and the delays of over two and a half years encountered in the appeal on cassation, which, the Committee found, raised issues under article 14 of the Covenant to be examined on the merits.

6. On 15 March 1995, the Human Rights Committee decided that the communication was admissible and that the State party and the author should be requested to submit copies of the arrest warrant and of any relevant resolutions and judgements in the case, as well as medical reports and information about investigations into the alleged physical abuse of Mr. García.

#### Observations by the State party about the merits of the case and comments thereon by the author

7.1 The State party, on 18 October 1995, submitted to the Committee some documents relating to the case, without submitting a reply to the author's communication.

7.2 From the police report, it appears that the police give a version of the facts concerning torture and ill-treatment which differed from the author's version. The State party explains that it was unable to question the accused police officer because he is no longer in the police force and it has been impossible to locate him.

7.3 The judgement against the author reveals that the judge believed the police version and minimized the importance of the statement made by a nun who visited the author in the hospital, the content of which is referred to in paragraph 2.6 of these Views.

7.4 With regard to Mr. García's leg wound, the State party insists that the shot was fired in connection with an escape attempt:

"With regard to the wound suffered by the detainee, it is noted that during an investigation carried out on Saturday, 8 July, in Bosmediano street, where the other person involved

allegedly lived, he took advantage of the inattention of the officers guarding him to make a sudden and precipitate escape; the persons responsible for the detainee shouted after him and then fired shots, one of which hit him, causing a fracture of the left femur, as a result of which he was taken to the Eugenio Espejo hospital for medical treatment; the wound was never inflicted in the offices of the former criminal investigation service of Pichincha; it is also noted that there is a statement signed in the presence of Dr. Hilda María Argüello L., second prosecutor in the Pichincha criminal court, on this incident."

The documents submitted by the State party do not indicate that the court conducted any investigation whatsoever into the circumstances in which Mr. García was wounded, such as, for example, questioning the witnesses who, according to the police, saw the author attempt to escape.

7.5 The State party also submitted the text of report No. 4271-SICP of 8 July 1989, drawn up by Claudio Guerra; the report shows that Mr. García was arrested on Thursday, 6 July 1989, at 10 a.m. by police officers on the basis of previous investigations, and that the police confiscated a woman's undergarment, identified as belonging to Miss D. K., in Mr. García's home. A copy of a statement by Mr. García, dated 7 July 1989, admitting to having committed the rape and to having taken Miss K's undergarment, and of another statement dated 9 July 1989 admitting his attempt to escape, have been submitted, both statements having been made before Dr. Hilda Argüello, second prosecutor of the Pichincha criminal court. A copy of a note dated 8 July 1989 by officer 06 is also attached, describing the escape attempt and indicating that other witnesses can confirm the facts, in particular that shots had first been fired in the air before the fleeing defendant was wounded. A copy of the statement by Miss D. K., dated 7 July 1989, has been submitted regarding the identification parade organized on 6 July 1989 in which she immediately identified Mr. García among a group of 10 men, and was absolutely sure that the man in front of her was indeed the man who had raped her. A medical report on Mr. García's hospitalization is also included. Another attached police report states that, prior to the investigation, some photographs were sent to Miss K., but the photograph of Mr. García was first sent by facsimile, and Miss K. stated in a telephone conversation from the United States that "This looks the most like him of any of the photographs I have seen".

7.6 It is noted that Mr. García was released on parole on 5 October 1994 and was required to report to the prison centre every week. Mr. García has not done so, and it has not been possible to locate him, since he is not residing at his last address.

7.7 The State party submitted documents indicating that Mr. García was arrested on 6 July 1989 to be investigated for the crime of rape, committed against Miss D. K., a United States national, on 5 May 1989. The register of aliens shows that Mr. García was married to an Ecuadorian woman. The State party has not sent the texts of the arrest warrant for Mr. García or of the judgements.

8.1 In a letter of 29 December 1995 the Ecumenical Human Rights Commission, which is representing Mr. García, refers to a statement made by the author in the presence of the judge in 1989 in which he maintains that he is innocent, denies having tried to escape and

accuses officer 06 of having fired at him in an interrogation room, after first placing a handkerchief on his leg. He maintains that his confession was obtained by means of torture. This statement is found in the record of proceedings.

8.2 It is argued that if the police force itself is responsible for carrying out an investigation of a complaint like Mr. García's, the notorious esprit de corps of the force gives rise to lies, and the police are always vindicated in the end so as to avoid penalties.

### On the merits of the case

9.1. The Committee has considered the communication in the light of all the information, materials and legal documents submitted by the parties. The conclusions it has reached are based on the following considerations.

9.2 With regard to the arrest and imprisonment of Mr. García, the Committee has considered the documents submitted by the State party, which do not show that the arrest was illegal or arbitrary or that Mr. García had not been informed of the reasons for his arrest. Consequently, the Committee cannot make a determination on the alleged violation of article 9 of the Covenant.

9.3 With regard to the allegations of ill-treatment perpetrated by a police officer, the Committee observes that they were submitted by the author to the Cuarto de Pichincha criminal court, which rejected them, as is shown by the judgement of 30 April 1991. In principle, it is not for the Committee to question the evaluation of the evidence made by national courts, unless that evaluation was manifestly arbitrary or constituted a denial of justice. The materials made available to the Committee by the author do not demonstrate the existence of such shortcomings in the procedure followed before the courts.

9.4 The file does not, however, reveal any evidence that the incident in which the author suffered a bullet wound was investigated by the court. The accompanying medical report neither states nor suggests how the wound might have occurred. Given the information submitted by the author and the lack of investigation of the serious incident in which the author was wounded, the Committee concludes that there has been a violation of articles 7 and 10 of the Covenant.

9.5 With regard to the trial in the court of first instance, the Committee finds it regrettable that the State party has not submitted detailed observations about the author's allegations that the trial was not impartial. The Committee has considered the legal decisions and the text of the judgement dated 30 April 1991, especially the court's refusal to order expert testimony of crucial importance to the case, and concludes that this refusal constitutes a violation of article 14, paragraphs 3 (e) and 5, of the Covenant.

9.6 With regard to the information submitted by the author concerning delays in the judicial proceedings, in particular the fact that his appeal was not dealt with in the period provided for by law, and that, after waiting more than two and a half years for a decision on his appeal, he had to abandon this recourse in order to obtain conditional release, the Committee

notes that the State party has not offered any explanation or sent copies of the relevant decisions. Referring to its prior jurisprudence, the Committee reiterates that, in accordance with article 14, paragraph 3 (c), of the Covenant, the State party has to ensure that there is no undue delay in the proceedings. The State party has not submitted any information that would justify the delays. The Committee concludes that there has been a violation of article 14, paragraph 3 (c), as well as of article 14, paragraph 5, since the author was obliged to abandon his appeal in exchange for conditional release.

10. The Human Rights Committee, acting in accordance with the provisions of article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, considers that the facts before it reveal violations by Ecuador of articles 7, 10, paragraph 1, and 14, paragraphs 3 (c) and (e) and 5, of the Covenant.

11. In accordance with the provisions of article 2, paragraph 3 (a), of the Covenant, the State party has an obligation to provide an effective remedy to the author. In the Committee's view, this entails compensation, and the State party is under an obligation to ensure that there will be no such violations in future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within a period of 90 days, information on the measures taken to give effect to its Views.

[Done in English, French and Spanish, Spanish being the original version. Subsequently it will also be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

#### Footnotes

\* Made public by decision of the Human Rights Committee.

\*/ In accordance with rule 85 of the Committee's rules of procedure, Mr. Julio Prado Vallejo did not take part in the approval of the Committee's Views.