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Communication No. 2395/2014

Views adopted by the Committee at its 114th session (29 June to 24 July 2015)

Submitted by:	J.N.G.P. (represented by Rosanna Gavazzo)
Alleged victim:	The author
State party:	Uruguay
Date of communication:	16 March 2012 (initial submission)
Document references:	Special Rapporteur's rule 92 and rule 97 decision, transmitted to the State party on 26 November 2010 (not issued in document form)
Date of adoption of Views:	23 July 2015
Subject matter:	Conduct of the trial in a criminal case
Substantive issues:	Right to life; prohibition of torture and cruel, inhuman or degrading treatment or punishment; arbitrary detention; unfair trial; *ne bis in idem*; non-discrimination and equality before the law
Procedural issues:	Incompatibility with the provisions of the Covenant; failure to substantiate allegations
Articles of the Covenant:	2, 3, 6, 7, 9, 14, 15 and 26
Article of the Optional Protocol:	2

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Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (114th session)

concerning

Communication No. 2395/2014*

Submitted by:	J.N.G.P. (represented by Rosanna Gavazzo)
Alleged victim:	The author
State party:	Uruguay
Date of communication:	16 March 2012 (initial submission)

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

Meeting on 23 July 2015,

Having concluded its consideration of communication No. 2395/2014 submitted to the Human Rights Committee by J.N.G.P. 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 the State party,

Adopts the following:

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

1. The author of the communication is J.N.G.P., a Uruguayan national, born in 1942. The author claims to be a victim of violations by the State party of his rights under articles 2, 3, 6, 7, 9, 14, 15 and 26 of the Covenant. The author is represented by counsel.[1]

The facts as submitted by the author

2.1 The author claims that, on 27 June 1973, in the context of an internal conflict, the President of the State party dissolved parliament with the support of the Armed Forces and instituted a civil-military regime that governed the country until 28 February 1985. In November 1975, various States in the region, including the State party, adopted a common defence strategy called “Operation Condor” for the purpose, according to the author, of combating guerrilla and terrorist movements. The author,

* The following members of the Committee participated in the consideration of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Sarah Cleveland, Mr. Olivier de Frouville, Mr. Yuji Iwasawa, Mr. Duncan Laki Muhumuza, Ms. Photini Pazartzis, Mr. Mauro Politi, Sir Nigel Rodley, Mr. Víctor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Mr. Dheerujlall Seetulsingh, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

[1] The Optional Protocol entered into force for the State party on 23 March 1976. The author submitted a complaint under article 3 of the Covenant on 5 March 2015, as part of his comments on the observations of the State party on the merits.

as a commander in the Navy, was responsible for implementing actions under this operation in the State party.

2.2 In 1984, in order to establish a democratic regime, the Armed Forces, the political parties and the Tupamaros National Liberation Movement reached an agreement called "the Club Naval Pact" which included the adoption of legal measures that were subsequently put in place with the adoption of the Amnesty Act (No. 15737) and the Expiry of the Punitive Powers of the State Act (No. 15848), on 8 March 1985 and 22 December 1986, respectively.

2.3 Act No. 15737 decreed "amnesty for all political offences, and ordinary and military offences related thereto, committed as from 1 January 1962". In addition, Act No. 15848 established that "the exercise of the punitive powers of the State in respect of crimes committed prior to 1 March 1985 by military and police personnel, for political reasons, or in the performance of their duties or on orders from commanding officers who served during the de facto period, [had] expired". Act No. 15848 authorized the executive branch to decide if a case fell within the scope of the Act and provided that, if it did, the judge was to close the case.

2.4 The author claims that, between 1985 and 2005, both laws were enforced, and that the Supreme Court consistently upheld the constitutionality of Act No. 15848. Moreover, in two referendums held on the Act in 1986 and 2009, a majority voted against repeal (1986) and against annulment (2009).

2.5 The author claims that, as from 2005, the executive branch was controlled by a political party made up of members of the groups that the regime in power from 1973 to 1985 had fought against and that since then, the executive authorities have made use of the powers granted them by the Act itself in order to investigate and prosecute the crimes committed by members of the Armed Forces and the police between 1973 and 1985; he points out that these crimes were not covered by Act No. 15848. The author states that the authorities of the State party have, on the other hand, enforced Act No. 15737, which, in his opinion, favours the members of the groups that fought against the civil-military regime.

2.6 Against this backdrop, criminal proceedings were brought against the author. On 11 September 2006, the author was charged, jointly with one other person, with the offence of deprivation of liberty and was placed in pretrial detention in Prison No. 8, Domingo Arena, by order of first-instance Criminal Trial Court (Nineteenth Rota) ("Court No. 19"). At trial, the Public Prosecution Service sought the author's conviction for the criminal offence of enforced disappearance in respect of 28 persons, allegedly committed in Argentina in 1976 as part of Operation Condor. The author's counsel maintained that the author was not criminally liable for the offences of deprivation of liberty or of enforced disappearance. As regards the latter charge, counsel argued that enforced disappearance was defined as an offence in the State party's legislation 30 years after the facts giving rise to the proceedings and that its application therefore violated certain principles of criminal law, such as legal certainty and non-retroactivity of criminal legislation. Counsel also argued that the statute of limitations should apply, since the acts at issue had occurred more than 30 years before, or 20 years, if the period up to 1 March 1985 was not counted. Counsel further maintained that, in calculating the limitation period, no extension on grounds of alleged dangerousness could be admitted, since the subject was a person who had retired in 1978, was performing no military functions and was 69 years of age. Counsel also objected to the position of the Public Prosecution Service and argued, among other things, that the witnesses contradicted one another, that the charges were not duly substantiated by evidence and that, in any case, criminal liability for the facts being tried should lie with those who had captured the alleged victims in Argentina.

2.7 On 26 March 2009, Court No. 19 sentenced the author to 25 years in prison for homicide against 28 persons under especially aggravated circumstances and in repeated offences. The Court found that the failure to locate the bodies of the victims and the fact that the details could not be accurately established were not impediments to a finding that the victims had been murdered and were dead. On the other hand, the charge of enforced disappearance of persons brought by the Public Prosecution Service could not succeed, since this offence had only just been defined under article 21 of Act No. 18026 of 25 September 2006 and that, under the principle of non-retroactivity of the criminal law, that Act could not apply to events that had occurred prior to its entry into force. However, the Court also noted that offences "committed during the de facto Government in a context of State terrorism, in a systematic, planned fashion and on a massive scale, such as enforced disappearance, killings [...] include practices deemed by international law to be crimes against humanity, which are not subject to the statute of limitations and whose prosecution is mandatory for all States"; and that, under international law, provisions on limitation that were intended to prevent the investigation, prosecution and punishment of those responsible for serious violations of human rights were inadmissible, and the State could therefore not invoke them in order to evade its obligation to prosecute and punish those responsible. Moreover, even on the basis of the State party's criminal law, the statute of limitations did not apply to the criminal offences being prosecuted, given that the period of limitation should have started to run on 1 March 1985, since in the years from 1973 to 1985 while the regime was in place, legal action of any kind in this regard was impossible; that the limitation period should have been extended by one third, in accordance with article 123 of the Criminal Code, owing to the dangerousness of the author, given the gravity of the facts under investigation and the nature of his motives; and that there was a prior case involving the author that interrupted the period of limitation. Lastly the Court concluded that there was sufficient evidence to establish the author's criminal liability.

2.8 The author appealed the judgement in the Criminal Appeal Court (Second Rota). The author reiterated his claims, arguing that the offences he was accused of had lapsed under Act No. 15848, just as the Supreme Court had found in another case in relation to other facts,[2] and that, accordingly, the power and duty of the State to prosecute certain criminal offences had been extinguished with effects identical to an amnesty law, and the case was therefore *res judicata*; that the offence of homicide was time-barred, whether the limitation period ran from 1976 or from 1985; that the application of article 123 of the Criminal Code in his case was unreasonable, if his age and state of health were taken into account; that the provisions regarding the non-applicability of the statute of limitations to certain crimes that were contained in international treaties ratified by the State party could not be applied to the offence of homicide; that all his actions during the period in question had been taken in compliance with superior orders in a military structure; that there was a procedural error in the weighing of evidence in respect of the offence of homicide; that the statements of witnesses contradicted one another; and that no causal relationship between the facts and his guilt had been proved.

2.9 The author claims that, on 19 October 2009, in other proceedings to which he was not a party, the Supreme Court for the first time declared articles 1, 3 and 4 of Act No. 15848 unconstitutional and found that they were not applicable in that case.[3] Since then, the Supreme Court has ruled both ways on the constitutionality of those articles. The author maintains that a Supreme Court finding of unconstitutionality in respect of a legal provision in a specific case does not have general effect.

[2] The author refers to Supreme Court judgement No. 332 of 2005 (*Gelman* case).

[3] The author refers to Supreme Court judgment No. 365 (*Sabalsagaray Curuchet Blanca Stela* case).

2.10 On 4 February 2010, the Appeal Court took detailed note of the evidence adduced in the trial and confirmed the author's criminal liability for the crime of homicide under especially aggravated circumstances in repeated offences. The Court noted that Act No. 15848 did not grant an amnesty but merely regulated the lapse of criminal action by the State, which did not apply ipso jure, but required a determination on the part of the executive branch. As to the calculation of the period of limitation for the offence of homicide, the Court found that 1 March 1985 should be taken as the start date, since before then the Public Prosecution Service, as the body authorized to bring criminal proceedings, had been unable to do so freely and, in practice, these facts could not have been investigated under the regime that governed the State party between 1973 and 1985. In this regard, the Court referred to the legal provisions introduced by that regime restricting the authority of the judiciary and, among other measures, declaring all judges ad interim and subject to removal by the executive branch. It also found that the extension of the period of limitation by one third was applicable under article 123 of the Criminal Code.

2.11 The author filed an appeal in cassation with the Supreme Court and repeated his claims. On 6 May 2011, the Supreme Court dismissed the appeal in cassation. The author submits that domestic remedies have thereby been exhausted.

2.12 On 27 October 2011, the Senate and the Chamber of Representatives adopted Act No. 18831, restoring the State's full punitive powers "in respect of criminal offences committed in the context of State terrorism up to 1 March 1985 and covered by article 1 of Act No. 15848". It also established that "no procedural period of limitation or expiry shall apply between 22 December 1986 and the entry into force of the Act, in respect of offences covered by article 1 of the Act", and that these offences constituted "crimes against humanity in accordance with international treaties" to which the State was a party.

2.13 In addition, the author attempted several remedies and appeals, asking to serve the sentence imposed by Court No. 19 in the form of house arrest, in accordance with articles 131 and 326 of the Code of Criminal Procedure, owing to his advanced age and frail health. The author claimed that he was at risk of sudden death and that conditions in prison were poor and medical attention could not be provided in a prompt and timely manner. On 4 March 2013, Trial Court No. 19 rejected the author's request for house arrest and ordered him to continue serving his sentence in Prison No. 8, Domingo Arena. The Court pointed out that the detention centre had sufficient facilities to meet the author's needs and that arrangements had been made so that, in the event of an emergency, he would be quickly moved to hospital, as had in fact happened when he was taken to the Military Hospital, where he had stayed from 30 August to 6 November and on 12 and 30 November 2012, and again between 3 December 2012 and 4 March 2013; and that, notwithstanding his advanced age and multiple ailments, according to a supplementary report by a forensic doctor, his repeated syncopal episodes had occurred not only in the prison, but also in the hospital and were thus unrelated to the place of detention.

The complaint

3.1 The author claims to be the victim of violations by the State party of articles 2, 6, 7, 9, 14, 15 and 26 of the Covenant.

3.2 The author refers to article 1 of Act No. 15848, which is applicable to his case and which stipulates that "the exercise of punitive power has expired". He asserts that his rights under the Covenant were violated because the proceedings brought by the courts of the State party failed to observe the basic principles of criminal law, such as the applicability of the statute of limitations to criminal offences, the non-retroactivity of criminal law and the notions of *res judicata* and *ne bis in idem*. In his case, the

evidence submitted at trial was inconsistent, and his sentence was based on testimony from biased witnesses and information from one-sided newspaper research and biased publications, in violation of due process and the right to a fair hearing by an impartial tribunal. The evidence was collected with no regard for judicial guarantees, no oversight by his counsel and no certainty as to its authenticity or provenance. He claims that, at every hearing, the same witnesses appeared — all of them former Armed Forces detainees. The author adds that he was persecuted as an "enemy of the State", including for offences committed in other countries, which were also investigated in those countries on the basis of different factual assumptions and with other persons being found responsible. The courts failed to take account of the provision contained in article 29 of the Criminal Code regulating due obedience, which precludes criminal liability in a military structure. Moreover, in most proceedings brought against military and police personnel, the prosecutor was M.G., someone who has openly expressed views opposed to the Armed Forces.

3.3 The author claims that the cases brought against him are time-barred under articles 117 and 119 of the Criminal Code, and that the judge should therefore have declined to try them, and the prosecutor should have sought their dismissal. However, the State party's courts arbitrarily determined that the period of limitation should begin to run from 1 March 1985, despite the absence of any legal provision to that effect. Contrary to the findings of Court No. 19, the author submits that, before that date, the courts were free to try any case within the State party's legal order. He adds that even taking 1 March 1985 as the starting date, the offence of homicide for which he was tried became subject to limitation in 2005. However, in his case, the courts applied the concept of dangerousness under article 123 of the Criminal Code in order to extend the period of limitation for that offence. The application of that article to his case is unlawful and arbitrary, considering his age, his state of health and the fact that he has never evaded justice.

3.4 The author argues that the State party's Constitution enshrines the principle of the non-retroactivity of criminal law, and that, consequently, Act No. 18026 of 25 September 2006 cannot be applied in his case, since the acts for which he is being tried occurred some 30 years earlier.

3.5 Some of the acts for which he was sentenced in 2009 had, prior to that date, already been adjudicated on the basis of a decision vested with *res judicata* effect. In this regard the author notes that, in the context of the proceedings brought by J.G. in relation to the offences of deprivation of liberty and homicide of M.C.G., the Supreme Court had dismissed the constitutional challenge brought against article 3 of Act No. 15848 and had closed the case.[4] Later, however, with no regard for the Supreme Court judgement, the author was tried for offences committed against M.C.G., in violation of the principles of *res judicata* and *ne bis in idem*. Moreover, the Supreme Court went against its own case law, which between 1985 and 2005 had consistently found Act No. 15848 to be constitutional. The Act had even been successfully put to a referendum on two occasions.

3.6 The author's detention in 2006 was arbitrary, illegal and motivated by a spirit of revenge. In this context, the Court decided arbitrarily not to apply Act No. 15848, which was still in force.

3.7 The courts arbitrarily and unreasonably denied the author's applications to serve his sentence under house arrest. In his case, this denial amounts to treatment contrary to his rights under articles 6 and 7 of the Covenant. In this connection, the author states that he is over 72 years old and in very frail health; that he needs constant care; that he has on several occasions been admitted to the Military Hospital; and that he

[4] See footnote 2 above.

nearly died following three syncopal episodes due to a lack of immediate medical assistance and proper medical equipment. As regards his state of health, the author maintains that he has various conditions, including ischaemic heart disease, prostatitis, acute urinary infections, renal insufficiency, chronic liver disease, Parkinson's disease, trunk melanoma, scotoma in the left eye, muscle disease, diverticular colopathy, cervical and lumbar spinal degeneration, carpal tunnel syndrome and pansinusitis. Lastly, he points out that, because of his age, a 25-year prison sentence amounts, in practice, to life imprisonment.

3.8 In relation to article 15 of the Covenant, the author claims that he was accused of acts that were not considered criminal offences at the time they occurred. The author emphasizes that the non-applicability of the statute of limitations to war crimes and crimes against humanity is regulated by Act No. 18026, which entered into force on 25 September 2006. The Act cannot therefore be applied to events that occurred before that date.

3.9 Lastly, the author argues that Acts Nos. 15737 and 15848 are applied differently by the State party, in violation of his rights under article 26 of the Covenant. In the author's view, Act No. 15848, whatever its title, should be seen as an amnesty law that is generally applicable. However, unlike Act No. 15737, which is applied across the board, Act No. 15848 is not considered an amnesty law and requires the executive branch to determine whether or not a fact under investigation falls within the scope of the Act.

State party's observations on admissibility

4.1 On 24 July 2014, the State party submitted its observations on the admissibility of the communication. The State party maintains that the communication should be declared inadmissible because it is manifestly unfounded and is an abuse of the right to submit a communication *ratione materiae*.

4.2 The State party asserts that the author was given a criminal trial in accordance with all due process guarantees, by independent and impartial courts and with full respect for the rule of law.

4.3 The author was deprived of liberty under a warrant issued by a duly authorized judge, in accordance with the law, and had access to counsel of his own choosing with all necessary guarantees in order to prepare and conduct his defence, submit evidence and review the evidence submitted by the prosecution. He also had the opportunity to exercise all the remedies available under the State party's legislation.

4.4 As to his conviction, the State party points out that, although the prosecutor sought to have the author tried for the offence of enforced disappearance, the judgement handed down by Court No. 19 found him guilty only of homicide under especially aggravated circumstances against 28 persons, in repeated offences. The judgement was subsequently upheld by the Court of Appeal. Moreover, the Supreme Court denied the author's appeal in cassation, finding no violation or erroneous enforcement of the legal standards applicable in the case. The Supreme Court also found that the evidence had "duly attested to the defendants' participation in a coordinated punitive action, kidnapping, torture and 28 homicides under especially aggravated circumstances, against Uruguayan citizens — very serious acts that clearly reflect[ed] the defendants' extreme dangerousness". Every court found that the offence of enforced disappearance was not applicable in the author's case.

4.5 The State party informs the Committee that the author had been prosecuted for homicide in connection with other acts by first-instance Trial Court No. 1 in Paso de los Toros and by first-instance Criminal Trial Court No. 1 (Second Rota) and had been acquitted in the first trial. It cannot therefore be asserted that the author was

discriminated against or that his trials were not conducted in accordance with due process.

4.6 Although the author was convicted by Court No. 19 for the crime of homicide under especially aggravated circumstances, the prosecutor's request to convict him of the offence of enforced disappearance was based on the most recent legal scholarship and case law in international human rights law, according to which crimes against humanity are not subject to the statute of limitations and the prosecution of such crimes is mandatory for all States. The State party adds that States have an obligation to investigate serious human rights violations, in light of the right to the truth, memory and justice.

4.7 In view of these considerations, the State party maintains that the statute of limitations cannot apply at times when individual rights are impaired or due process guarantees are not available. The State party underscores that the author's case involves not only ordinary offences but homicide under especially aggravated circumstances, given that, at the time the offences were committed, the International Convention for the Protection of All Persons from Enforced Disappearance was not yet in force. However, as found by the courts that tried the case, the author is responsible for the most serious and systematic human rights violations, which included enforced disappearance, torture, extrajudicial killing, and arbitrary and unlawful detention, committed in the State party under a civil-military dictatorship between 1973 and 1985.

4.8 The State party argues that the author cannot use his communication to the Committee as a means of obtaining a fourth hearing.

Author's comments on the State party's observations on admissibility

5.1 On 15 August 2014, the author replied to the State party's observations on admissibility. The author reiterates his allegations and maintains that the State party violated article 2 of the Covenant because the criminal law was applied differently for political reasons.

5.2 The author claims that, taking into account his age and state of health, the sentence of 25 years is equivalent in his case to life imprisonment or the death penalty and is a violation of his rights under articles 6 and 7 of the Covenant.

5.3 The author stresses that he was not convicted of crimes against humanity and that the periods of limitations for the offence of homicide should therefore be applied.

5.4 The author informs the Committee that he has been in the Military Hospital for two full years and that he was transferred from prison to that hospital on several occasions in the past because of his very poor state of health.

5.5 The author contends that the State party failed to apply the statute of limitations to the criminal offences he was charged with, or the principles of *ne bis in idem* and *res judicata*, and that he was not treated equally before the law compared with other citizens, in violation of articles 9, 14, 15 and 26 of the Covenant.

5.6 The author informs the Committee that he was not convicted, only tried, by first-instance Criminal Trial Court No. 1 (Second Rota) (see paragraph 4.5 above).

5.7 The author claims that he did not have access to the file in the case before Court No. 19, which sentenced him for the offence of aggravated homicide, that the defence was not permitted due review of the evidence and that the prosecutor, M.G., was not impartial, because she had had ties to the movements opposed to the regime that had governed the State party in the 1970s.

5.8 The author maintains that the remains of two of the victims for whose deaths he was convicted had been found in Argentina and claims that that shows that he was sentenced without sufficient evidence.

5.9 His communication does not constitute an abuse of the right of submission, given that he has exhausted domestic remedies and meets the criteria for admissibility under the Optional Protocol and the Committee's rules of procedure.

5.10 The author informs the Committee that, on 23 July 2014, he was visited in the Military Hospital by representatives of the International Committee of the Red Cross (ICRC) regional delegation in Brasilia, one of them a doctor, and claims that ICRC recommended that the State party's authorities should immediately grant him house arrest.

State party's observations on the merits

6.1 On 15 January 2015 the State party submitted its observations on the merits of the communication and reiterated its view that the communication should be declared inadmissible.

6.2 With regard to articles 2 and 26 of the Covenant, the State party states that the criminal proceedings against the author were not politically motivated and that they were conducted in accordance with ordinary criminal law, notably the Criminal Code, the Code of Criminal Procedure and other legislation applicable to the case, as well as the State party's Constitution, the American Convention on Human Rights and the Covenant.

6.3 The laws granting temporary impunity to those guilty of serious human rights violations under the regime that governed the State party between 1973 and 1985 had been revised to ensure renewed enforcement of the law, the pursuit of historical memory and the punishment of the perpetrators. The author was one of the military officers who had been most active under the regime, being a member of the units that had implemented Operation Condor, and he was charged with gross and systematic violations of human rights.

6.4 He was lawfully sentenced to 25 years' imprisonment, in accordance with the legislation in force and with international standards, and in proportion to the seriousness of the offence committed and the harm inflicted. From the moment of his pretrial detention to the present day, the State party has taken the necessary steps to protect his life, personal safety, and physical and psychological integrity, and guarantee him decent treatment. Accordingly, the State party maintains that neither the penalty nor its enforcement constitutes a violation of articles 6 and 7 of the Covenant.

6.5 As for the author's claims under articles 9 and 14, the State party notes that the author's trial was conducted with respect for due process and in accordance with the legislation in force, and within a reasonable time frame for a case of its complexity. The author was able to exercise his right to a defence, and all judicial proceedings were conducted by the competent authorities and in an independent and impartial manner.

6.6 As to the author's request for house arrest, the State party points out that this is a matter for the court's discretion and is an exceptional measure, applied in cases in which the person's life is in danger or he or she is in extremely poor health. In the author's case, the rejection of his request for house arrest was based on a report by forensic doctors duly appointed by the court dealing with the request, which states that "owing to his age and cardiovascular disease, there is a risk of sudden death at any time or place", so that being held in a prison facility exclusively for military personnel

will neither reduce nor increase the risk of death from the health conditions affecting him.

Author's comments on the State party's observations on the merits

7.1 By letter of 5 March 2015, the author submitted comments on the merits of the communication and reiterated his previous pleadings.

7.2 The author reiterates that, because of his frail health and advanced age, he is now held permanently in the Armed Forces Central Hospital, and the State party has not followed the ICRC recommendation to grant him house arrest immediately, despite several requests from him and the fact that the recommendations were brought to the attention of the Criminal Enforcement Court (First Rota). In the author's view this refusal demonstrates the lack of impartiality of the State party's authorities.

7.3 Unlike other convicted prisoners, the author has not had any special exit permit since the time of his arrest, even for the deaths of close family members.

7.4 The author argues that article 2 of the Covenant has been violated by the State party, since the criminal proceedings taken against him, as well as the adoption of legislation such as Act No. 18831, were part of a campaign of political persecution by the Government of the State party. In that context, the State party is seeking to ignore basic standards of criminal law, such as the statute of limitations, the principle of *ne bis in idem* and the non-retroactivity of criminal legislation.

7.5 The author adds that the prosecutor in the trial was dismissed from office by the regime that governed the State party between 1973 and 1985 and that her husband was a prisoner during that period, so she should have recused herself from the proceedings for lack of impartiality.

7.6 The author claims that the State party cannot ignore Acts Nos. 15737 and 15848, which made it possible to restore democracy and peace in the country. Moreover, the failure to repeal Act No. 15737, which granted amnesty to a group of persons, and allowed them to escape trial for serious criminal offences, implies unequal treatment of persons who may have committed criminal offences in the period between 1973 and 1985, in violation of article 3 of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether or not the case is admissible under the Optional Protocol to the Covenant.

8.2 As required by article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under any other procedure of international investigation or settlement.

8.3 The Committee notes that the author's criminal trial was conducted in Court No. 19, that the sentence of that Court was appealed in the Court of Appeal, and that, subsequently, on 6 May 2011, the Supreme Court dismissed the author's appeal in cassation. The Committee also notes that the State party has not submitted any objections regarding the exhaustion of domestic remedies. In the circumstances, the Committee finds that it is not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

8.4 The Committee takes note of the author's claims under article 2 of the Covenant, to the effect that the criminal proceedings against him, including the way in which the criminal law was applied, and the adoption of new legislation by the State party, such

as Act No. 18831, were motivated by political considerations. The Committee recalls its case law, according to which the provisions of article 2 of the Covenant, which lay down general obligations for States parties, cannot in and of themselves give rise to a claim in a communication under the Optional Protocol. The Committee therefore considers that the author's contentions in this regard are inadmissible under article 2 of the Optional Protocol.[5]

8.5 As to articles 3 and 26 of the Covenant, the Committee takes note of the author's claims that Acts Nos. 15737 and 15848 were applied differently because Act No. 15848 was not considered a generally applicable amnesty law and required the executive branch to determine whether or not facts under investigation fell within the scope of the Act; and that the failure to repeal Act No. 15737 also results in unequal treatment of persons who may have committed similar offences in the period between 1973 and 1985. The Committee notes that Acts Nos. 15737 and 15848 are different in nature and scope and that the author does not claim discrimination by comparison with women or discrimination under the law by comparison with other persons in similar situations. Consequently the Committee considers that the author has not sufficiently substantiated these claims for the purposes of admissibility, and finds this part of the communication inadmissible under article 2 of the Optional Protocol.

8.6 The Committee takes note of the author's claims under article 9, namely that his arrest in 2006 was unlawful, arbitrary and motivated by a spirit of revenge, and that Court No. 19 arbitrarily decided not to apply Act No. 15848. The Committee also takes note of the State party's arguments that the author was deprived of liberty under a warrant issued by a duly authorized judge, in accordance with the law; that he enjoyed all the necessary guarantees and had the opportunity to exercise all the remedies provided for in law; and that he was tried within a reasonable time considering the complexity of the case. The Committee finds that the author has merely made allegations of a general nature and that this claim is not sufficiently substantiated for the purposes of article 2 of the Optional Protocol, and that this part of the communication must therefore be declared inadmissible under article 2 of the Optional Protocol.

8.7 The Committee takes note of the author's claims under article 15 of the Covenant, to the effect that he was charged by the Public Prosecution Service with the offence of enforced disappearance of persons, criminalized in the State party by Act No. 18026, which entered into force on 25 September 2006. The Committee takes note of the State party's comments to the effect that the author was convicted only of the offence of homicide under especially aggravated circumstances and that, despite an appeal by the Public Prosecutor, this sentence was upheld by the higher courts, and he was never sentenced for or convicted of the offence of enforced disappearance of persons. Consequently, the Committee considers that the author has not sufficiently substantiated these claims for the purposes of admissibility and concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

8.8 The Committee takes note of the author's claim under article 14, paragraph 7, of the Covenant, to the effect that some of the acts for which he was sentenced in 2009 had, prior to that date, already been adjudicated on the basis of a judicial decision vested with *res judicata* effect. The Committee notes, however, that the author refers to another criminal trial, relating to a victim not covered by the criminal proceedings referred to in this communication, and that, on the basis of the information contained in the case file, there is nothing to indicate that the author was tried twice for the same offence committed against the 28 persons described as victims in the trial in Court No.

[5] See, for example, communication No. 1887/2009, *Peirano Basso v. Uruguay*, Views of 19 October 2010, para. 9.4, and communication No. 802/1998, *Rogerson v. Australia*, Views of 3 April 2002, para. 7.9.

19. Consequently, the Committee considers that this part of the author's claim is inadmissible under article 2 of the Optional Protocol.

8.9 The Committee takes note of the author's claims that he was unable to mount a defence, as the evidence used against him was gathered with no regard for due process, no oversight by the defence and no certainty as to its authenticity or provenance, and that he did not have access to the file. The Committee notes that the author has not explained to the Committee in what way his right to a defence was restricted in the course of the criminal proceedings, and his claims are not supported by any documentation that might lead to the conclusion that his right to a defence was, in fact, impaired by the State party's authorities. The Committee therefore considers that the author has not sufficiently substantiated this claim for the purposes of admissibility and concludes that it is inadmissible under article 2 of the Optional Protocol.

8.10 The Committee considers that the author's claims under articles 6 and 7, and the remainder of the author's complaint, which raises significant issues with respect to article 14, paragraph 1, of the Covenant, have been sufficiently substantiated for the purposes of admissibility. Given that no other impediments to admissibility exist, the Committee finds them admissible.

Consideration of the merits

9.1 The Committee has considered the case in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee takes note of the author's claim that the sentence of 25 years' imprisonment amounts, in practice, to life imprisonment and that, given his advanced age and frail health, the denial of house arrest, in spite of a recommendation by the International Committee of the Red Cross, is a violation of articles 6 and 7 of the Covenant. The Committee also takes note of the State party's contentions that, from the time of the author's pretrial detention to the present day, it has taken the necessary steps to protect his life, personal safety, and physical and psychological integrity and guarantee him decent treatment, and that house arrest is an exceptional measure to be used in cases where the person's life is in danger or he or she is in extremely poor health.

9.3 The Committee notes that the courts determined the author's sentence in accordance with the law and in proportion to the seriousness of the criminal offences committed and the harm caused. At the same time, the Committee notes that the author has a number of ailments and is in frail health, and that medical reports state that his life is at risk and that he could succumb to sudden death. However, the author is not being held in an ordinary prison but rather for the past three years has been serving his sentence in the Military Hospital. The author has not claimed to the Committee that the care and medical treatment at the Military Hospital are inadequate, or adduced any convincing evidence that might so indicate, and has not explained why his life or integrity would be at less risk under house arrest. Nor has he claimed that the authorities wish to transfer him to prison. Consequently, and given the particular circumstances of the case, the Committee does not have sufficient information to find a violation of articles 6 and 7 of the Convention.

9.4 With reference to article 14, paragraph 1, of the Covenant, the Committee takes note of the author's claims that the judicial authorities were not impartial, since his conviction and sentence were based on testimony from biased witnesses and information from one-sided newspaper research and biased publications; that in most of the proceedings against military and police personnel, the prosecutor has been

M.G., someone who had openly expressed views opposed to the Armed Forces and who was removed from her post by the same regime that governed the State party between 1973 and 1985. In addition, the courts failed to find that the offence of homicide for which he was tried under articles 117 and 119 of the Criminal Code was time-barred, but arbitrarily ruled that the limitation period started to run from 1 March 1985 and that the concept of dangerousness, established in article 123 of the Criminal Code, was applicable to the author's case, so as to be able to extend the period of limitation for the offence by one third, without taking into account his age, his state of health and the fact that he has never evaded justice.

9.5 The Committee also takes note of the State party's arguments that the author was given a criminal trial with all judicial guarantees that was conducted by independent and impartial courts; that the courts found him criminally liable after examining and weighing all the evidence against him; and that the evidence used in the trial for aggravated homicide attested to the author's extreme dangerousness, which is why an extension of the period of limitation under article 123 of the Criminal Code was applicable. Moreover, the judicial decision to take 1 March 1985 as the start date for calculating the limitation period was not arbitrary, and the evidence submitted to the courts showed that the author was responsible for gross and systematic human rights violations, such as enforced disappearance, torture, extrajudicial killing, and arbitrary and unlawful detention, committed in the State party under a civil-military dictatorship between 1973 and 1985.

9.6 The Committee notes that, at this point in the communication, the author's claims basically refer to the evaluation of the facts and the evidence, and the application of domestic legislation by the courts of the State party. The Committee recalls its case law, according to which it is for the courts of States parties to evaluate the facts and the evidence in each case, or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.[6] The Committee has examined the materials submitted by the author, including the decisions of Court No. 19, the Appeals Court and the Supreme Court, dated 26 March 2009, 4 February 2010 and 6 May 2011, respectively, and considers that these materials do not demonstrate that the proceedings against the author suffered from such defects. The Committee also notes that the decision to take 1 March 1985 as the starting date for calculating the period of limitation was not arbitrary, since it took into account the fact that that was the date when democracy was restored in the State party and that, before that date, the judicial authorities had not, in practice, enjoyed full guarantees and freedom to bring criminal proceedings; it also took into account the seriousness of the acts being tried, given that they might constitute serious violations of human rights under the Covenant and other international treaties. Accordingly, the Committee considers that the criminal proceedings taken against the author did not violate his rights under article 14, paragraph 1, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any provision of the Covenant.

[6] See communication No. 1616/2007, *Manzano et al. v. Colombia*, decision adopted on 19 March 2010, para. 6.4; and communication No. 1622/2007, *L.D.L.P. v. Spain*, decision adopted on 26 July 2011, para. 6.3.