

G. Communication No. 296/1988, J. R. C. v. Costa Rica
(Decision of 30 March 1989, adopted at the
thirty-fifth session)

Submitted by: J. R. C. [name deleted]
Alleged victim: The author
State party concerned: Costa Rica
Date of communication: 25 March 1988 (date of initial letter)

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

Meeting on 30 March 1989,

Adopts the following:

Decision on admissibility

1. The author of the communication (initial letter dated 25 March 1988, and further letter dated 27 December 1988) is J. R. C., of undetermined nationality, at present detained at the Centro de Detenciones de San Sebastián in San José, Costa Rica, awaiting expulsion from that country. He states that according to his adoptive parents he was born in Mexico, but that there is no evidence of this fact and that he has no document to establish his identity. He claims to be a victim of violation of articles 9 and 14 of the International Covenant on Civil and Political Rights by Costa Rica. He is represented by counsel.

2.1 He states that on 4 July 1982 he clandestinely entered Costa Rica from Nicaragua, where he had participated in the Sandinista movement. The Costa Rican immigration police, however, arrested him and a tribunal sentenced him to two years' imprisonment on charges of "ideological falsehood" and use of a false document. In 1985, upon completion of his term of imprisonment, he was expelled to Honduras, where police authorities immediately detained him under charges of having participated in a kidnapping said to have occurred in 1981. After escaping from prison in 1987, he re-entered Costa Rica in order to marry a Costa Rican woman by whom he had a son out of wedlock. On 24 November 1987, however, he was again detained by Costa Rican police.

2.2 With regard to the exhaustion of domestic remedies, the author states that on 11 December 1987 he invoked article 48 of the Costa Rican Constitution before the Costa Rican Supreme Court, requesting to be released from detention or, in the alternative, to be brought before a judge if there were any charges against him. The Supreme Court, however, denied the author's requests on the grounds that on 25 November 1987 the Ministry of Immigration had adopted a resolution to deport him as a danger to national security. The author claims that he has exhausted all domestic remedies available.

3. By decision of 8 July 1988, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party, requesting information and observations relevant to the question of the admissibility of the communication.

4.1 In its submission under rule 91, dated 31 October 1988, the State party objects to the admissibility of the communication under article 3 of the Optional Protocol as incompatible with the provisions of the Covenant and as an abuse of the right of submission and, under article 5, paragraph 2 (b), of the Optional Protocol, because the author has not exhausted all available domestic remedies.

4.2 With regard to the facts, the State party points out that the author: "... possesses no documents accrediting him as a citizen of any country, and therefore considers himself to be stateless. There are indications that he may have been born in Mexico, but there is no evidence to confirm this. He took an active part in the revolutionary struggle in Nicaragua, which culminated in the overthrow of the régime by the Sandinistas and the establishment of the Government of the Sandinista National Liberation Front. He was also involved in guerrilla activities, alternately in El Salvador and Honduras, and also in Nicaragua, between 1978 and 1981. He has been linked with the Sandinista National Liberation Front and is known among Central American guerrillas by the alias of 'Commander Sarak'."

4.3 In July 1982, he entered Costa Rican territory clandestinely and without documents. He never took any steps to obtain migrant status in Costa Rica. However, he did try to obtain papers identifying him as a refugee through the Regional Office of the United Nations High Commissioner for Refugees (UNHCR) in Costa Rica, by using false documents. He was arrested in Costa Rican territory together with other aliens in 1982, in the city of Liberia, armed with an M-23 sub-machine-gun and ammunition. The papers confiscated from him on this occasion included documents implicating him in a terrorist plan to attack the Guatemalan Embassy at San José, in order to take diplomats hostage and subsequently to demand a cash ransom as well as the release and granting of amnesty to Guatemalan political prisoners and their transfer to Mexico.

4.4 He was tried and sentenced by the Costa Rican court in 1982 on two charges of "ideological falsehood" and one charge of the use of false documents, and sentenced to two years' imprisonment. On completion of his sentence, the Costa Rican authorities ordered his deportation, and this subsequently took place after considerable efforts to find a country that would agree to take him. It was finally possible to deport him to Honduras on 1 October 1985, and he was then banned from entering the national territory.

4.5 Subsequently, although it is not known exactly when, he re-entered Costa Rican territory clandestinely and illegally. He was again arrested by the Costa Rican authorities on 24 November 1987 and immediately, in a decision taken on 25 November 1987, the Directorate-General for Migration and Aliens' Affairs again ordered his deportation, since he was illegally in the country, had previously been deported and had a criminal record that marked him out as a dangerous person and a threat to national security and public order. He was detained until a country could be found that would agree to take him. The State party points out that it has approached the consulates and embassies of numerous friendly countries, thus far without success, and that it is continuing its endeavours to find a receiving country.

5.1 The State party further observes that the author committed the serious offence of unlawful association prejudicial to the public peace. For this offence, the Second Higher Criminal Court, First Section, of San José, in a judgement handed down on 7 December 1982, sentenced him to two years' imprisonment.

5.2 From the above judgement it emerges that the following was proved in the proceedings:

"(a) The author received political and military instruction in the Republic of Cuba and, at the time when the offence was committed, was part of a guerrilla commando known as the 'Ernesto Che Guevara Commando', in which he was known as 'Commander Sarak';

"(b) At the time when he was arrested, an M-23 sub-machine-gun was confiscated from him with four magazines and 170 9 mm-calibre projectiles for that weapon, and triangular black-cloth masks, one of which carried a badge reading 'Che Guevara Commando'. A number of documents were also confiscated, including one confirming his membership of the guerrilla movement and the draft of a 'war report' of the so-called 'Che Guevara Commando';

"(c) The Commando was proposing to carry out in Costa Rican territory a terrorist operational known as 'Death to the Fascist Government of Guatemala'. The details of this terrorist attack against the Guatemalan Embassy at San José and its aims are specified in the judgement of the court;

"(d) The author of this communication, the accused in the trial in question, admitted to the courts that he was part of the 'Che Guevara' guerrilla commando and gave details of plans which were going to be put into effect in Costa Rica, coinciding with the details of the 'war report' confiscated from him when he was arrested. Mr. J. R. C. added that the commando of which he was chief was made up of two other men who were not arrested, and that one of them was also carrying a sub-machine-gun;

"(e) Documentary evidence was adduced at the trial proving that the author was in the vanguard of the army of the Sandinista National Liberation Front, as a member of the 'Filemón Rivera' and 'Facundo Picado' columns."

6.1 With regard to an alleged violation of article 9, paragraph 1, of the Covenant, the State party submits that this provision does not apply to the author because he entered illegally into the national territory and is breaking the country's laws (since he was prohibited from entering Costa Rica by a final decision of 1 October 1985 of the Directorate-General for Migration and Aliens' Affairs). The State party further submits that there are other provisions of the Covenant relating to liberty of person and freedom of movement which show that persons who are unlawfully in the territory of a State do not have the right to reside in the country or to move freely within it. These restrictions are set out in article 12, paragraph 1, of the Covenant. Pursuing the analysis of the provisions of article 9, paragraph 1, of the Covenant, the State party argues:

"... that the author is not subject to arbitrary detention or imprisonment, since he has been detained under a decision by the competent authority and if he is deprived of his freedom this is because in accordance with the Migrants and Aliens Act and its regulations anyone who has unlawfully entered the country and who is under an order of expulsion shall be kept in detention during the deportation procedure, particularly if allowing him to remain at liberty would endanger national security and public order. The author's background shows him to be a highly dangerous person owing to his past guerrilla and terrorist activities, as well as his criminal record in Costa Rica, where he was sentenced for a number of offences. The security measures

adopted by the State in keeping him in detention until he can be deported are therefore fully justified."

The length of the author's detention pending deportation is attributable to the fact that in spite of concerted efforts by the State party, no other country has hitherto agreed to accept Mr. J. R. C. into its territory.

6.2 With regard to an alleged violation of article 9, paragraph 4, of the Covenant, the State party submits that the evidence presented by the author himself demonstrates that his claim is unfounded, since on 11 December 1987 he applied for habeas corpus before the Supreme Court of Justice, which on 5 January 1988 declared the application unfounded, thus confirming the lawfulness of his detention. In its decision, the Court stated that "in the case of aliens unlawfully present in the territory of the Republic, detention constitutes the physical means of ensuring their expulsion, a measure already decreed by the Directorate-General for Migration and Aliens' Affairs".

6.3 With regard to an alleged violation of article 14 of the Covenant, the State party submits that at the time when the author submitted his communication, no criminal charge had been brought against him for his second illegal entry into Costa Rican territory. The State, acting through the Directorate-General for Migration and Aliens' Affairs, merely ordered the deportation of Mr. J. R. C. for entering the country illegally once the Costa Rican authorities had decided to deport the author, and their sole responsibility was to expedite the process, and to find a country which would agree to accept him.

6.4 With regard to the exhaustion of domestic remedies, the State party submits that:

"If, on entering the national territory, the author had intended to seek a means of remaining in the country with some kind of status as a migrant, the correct procedure would have been to apply to the courts to invalidate the expulsion order, proving that this decision on the part of the Directorate-General for Migration and Aliens' Affairs was not legally correct. For this purpose the author had normal remedies available, and could have filed an administrative petition in accordance with article 49 of the Political Constitution and article 20 of the Act Regulating Administrative Jurisdiction, No. 3667 of 12 March 1966 ...

"This was not the procedure chosen by the author ... With his communication to the Human Rights Committee, Mr. [R. C.] is endeavouring to cancel his detention, which is a precautionary measure and the consequence and result of the deportation order issued by the competent authorities, instead of endeavouring to have the order reversed by means of the remedies provided by law, which he has not used."

7.1 On 27 December 1988, the author commented on the State party's submission, pointing out that the exhaustion of domestic remedies in his case would be "highly technical, slow and expensive", whereas international human rights law only requires the exhaustion of remedies that are adequate and effective. According to him, the only effective remedy in his case would have been a successful action of habeas corpus, which the Supreme Court of Costa Rica had denied. The author therefore contends that effective remedies have been exhausted.

7.2 With respect to the State party's argument that the only reason for the author's detention is to assure his deportation, the author complains that such detention has proved disproportionate and indefinite.

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

8.2 Article 5, paragraph 2 (a), of the Optional Protocol precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. In this connection the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 Article 5, paragraph 2 (b), of the Optional Protocol precludes the Committee from considering a communication unless domestic remedies have been exhausted. In this connection the Committee notes that the State party has indicated that administrative and judicial remedies are still available to the author, that he could still file an administrative petition to invalidate the expulsion order, and, if unsuccessful, could apply to the courts for review. The author's belief that these remedies would be highly technical, slow and expensive does not absolve him from the requirement of at least engaging the relevant procedures.

8.4 The Committee has also examined whether the conditions of articles 2 and 3 of the Optional Protocol have been met. With regard to a possible breach of article 9 of the Covenant, the Committee notes that this article prohibits arbitrary arrest and detention. The author was lawfully arrested and detained in connection with his unauthorized entry into Costa Rica. The Committee observes that the author is being detained pending deportation and that the State party is endeavouring to find a host country willing to accept him. In this connection, the Committee notes that the State party has pleaded reasons of national security in connection with the proceedings to deport him. It is not for the Committee to test a sovereign State's evaluation of an alien's security rating. With respect to a possible violation of article 14 of the Covenant, a thorough examination of the communication has not revealed any facts in substantiation of the author's claim to be a victim of a violation of this article.

9. The Human Rights Committee therefore decides:

(a) The communication is inadmissible under articles 2, 3 and 5, paragraph 2 (b), of the Optional Protocol because the author's claims are either unsubstantiated or incompatible with the provisions of the Covenant, and because domestic remedies have not been exhausted;

(b) This decision shall be communicated to the author and to the State party.