ANNEX VII

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

concerning

Communication No. 55/1979

Submitted by: Alexander MacIsaac (represented by Etel Swedahl)

Alleged victim: Alexander MacIsaac

State Party concerned: Canada

Date of communication: 3 July 1979

Date of decision on admissibility: 25 July 1980

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

Meeting on 14 October 1982,

Having concluded its consideration of communication No. 55/1979 submitted to the Committee by Alexander MacIsaac under the Optional Protocol to the International Covenant on Human 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. The author of this communication (initial letter dated 3 July 1979 and a further letter dated 21 April 1980) is Alexander MacIsaac, a Canadian citizen, residing in Kingston, Ontario, Canada. He is represented by Etel Swedahl.

2.1 The author alleges that he is a victim of a a breach by Canada of article 15 (1) of the International Covenant on Civil and Political Rights. The relevant facts which are not in dispute, are as follows:

2.2 On 26 November 1968, the author was sentenced to a term of eight years imprisonment on counts of armed robbery. On 21 March 1972, after serving circa three years and four months, the author was released on parole from a federal penitentiary in Campbellford, Ontario. On 27 June 1975, he was convicted of a criminal offence while still being on parole and, on 25 July 1975, he was sentenced to a term of 14 months imprisonment. Pursuant to the conviction, by operation of the Parole Act 1970, the time which the author had spent on parole from 21 March 1972 to 27 June 1975 (three years, three months and six days) was automatically forfeited and he was required to re-serve that time. The author was

again released on 7 May 1979, to serve the remaining part of his sentence under mandatory supervision.

2.3 On 15 October 1977, the Criminal Law Amendment Act 1977 was proclaimed in force. The new law, inter alia, repealed certain provisions of the Parole Act 1970 and, in effect, abolished automatic forfeiture of time spent on parole (forfeiture of parole) upon subsequent conviction for an indictable offence committed while still on parole. The Criminal Law Amendment Act 1977 now stipulates that only the sanction of revocation of parole is presently applicable to persons on parole, which sanction is invoked at the discretion of the National Parole Board rather than automatically by law upon conviction of an indictable offence. Section 31 (2) (a) of the Criminal Law Amendment Act 1977 provides further that, upon revocation of parole, any time that a person had spent on parole after the coming into force of this provision, that is after 15 October 1977, is credited against his/her sentence. Consequently, a person presently in the position in which the author found himself on 27 June 1975 would not necessarily attract any sanction concerning revocation of parole and, even if such a sanction were to be invoked, would not be required to re-serve the period of time spent on parole after 15 October 1977.

2.4 The author claims that, by specifying that section 31 (2) (a) of the Criminal Law Amendment Act 1977 shall not be retroactive, the Government of Canada has contravened article 15 (1) of the Covenant. He submits that section 31 (2) (a), in providing that time spent on parole after 15 October 1977 is not to be re-served in prison upon revocation of that parole, constitutes a lighter penalty within the meaning of article 15 of the Covenant. He further submits that, contrary to article 2 (2) of the Covenant, the Government of Canada has failed to enact legislation to give effect to article 15.

2.5 The author submits that in the present state of the law in Canada, any recourse to domestic courts, for the purpose of obtaining the remedy he seeks, would be futile. He therefore endeavoured to seek relief by applying, on 5 September 1978, for the Royal Prerogative of Mercy. This recourse was unsuccessful and the author claims that the rejection by the Government of Canada of the application for an executive remedy, that is to say the exercise of the Royal Prerogative of Mercy, constitutes a violation of article 2 (3) (a) of the Covenant.

2.6 The author maintains that there are no further domestic remedies to exhaust, and states that the same matter has not been submitted to any other international procedure of investigation. The author, in conclusion, states that the object of his submission is to seek redress of the alleged violation by the State party of article 15 of the Covenant and, specifically, to obtain an amendment of section 31 (2) (a) of the Criminal Law Amendment Act 1977, so as to make that section compatible with article 15 of the Covenant.

3. By its decision of 10 October 1979, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication.

4. By a note dated 24 March 1980, the State party objected to the admissibility of the communication on the ground that the communication was incompatible with the provisions of the International Covenant on Civil and Political Rights and as such

was inadmissible under article 3 of the Optional Protocol to the Covenant. The State party contested in particular that Canada was in breach of article 15 of the Covenant by not making retroactive section 31 of the Criminal Law Amendment Act 1977. In support of these arguments, it was submitted that the word "penalty" in article 15 of the Covenant referred to the punishment or sanction decreed by law for a particular offence at the time of its commission. Therefore, in respect of a particular criminal act, a breach of the right to a lesser penalty can only occur when there is a reduction of the punishment which can be imposed by a court; parole was the authority granted by law to a person to be at large during his term of imprisonment; it did not reduce the punishment which, according to law, could be imposed for a given offence, but rather dealt with the way a sentence would be served. The State party further maintained that the relevant provisions of the Criminal Law Amendment Act 1977 did not reduce the penalty which the law decrees for any given criminal offence and that, therefore, the new provisions did not result in a "lighter penalty" within the meaning of article 15 of the Covenant.

5. On 21 April 1980, comments on behalf of the author of the communication were submitted in reply to the State party's submission of 24 March 1980, disputing in particular the State party's contention that the granting of parole did not come within the legal term "penalty". In substantiation, the author referred to legal practice in Canada, according to which two meanings of "penalty" exist: a narrower meaning of being a pecuniary punishment and a general or primary meaning of being "the consequences visited by law upon the heads of those who violate the laws".

6. By its decision of 25 July 1980, the Committee, after finding, inter alia, that the communication was not incompatible with the provisions of the Covenant, declared the communication admissible.

7.1 In its submission under article 4 (2) of the Optional Protocol, dated 18 February 1981, the State party sets out, inter alia, the law relating to the Canadian parole system and asserts that it is not in breach of its obligations under the International Covenant on Civil and Political Rights. It contends:

(a) That article 15 of the International Covenant on Civil and Political Rights deals only with criminal penalties imposed by a criminal court for a particular criminal offence, pursuant to criminal proceedings;

(b) That the forfeiture of parole is not a criminal penalty within the meaning of article 15 of the Covenant;

(c) That by replacing forfeiture of parole by revocation of parole it did not substitute a "lighter penalty" for the "commission of an indictable offence while on parole".

7.2 The State party further elaborates on the definition of the word "penalty" as used in article 15 (a) of the Covenant.

7.3 The State party submits that there are various kinds of penalties: these may be criminal, civil or administrative. This distinction between criminal penalties and administrative or disciplinary ones, the State party argues, is generally accepted. Criminal penalties, it further submits, are sometimes referred to as "formal punishment" while the administrative penalties are referred to as "informal punishment".

7.4 The State party contends that in Canada the grant of parole is an administrative matter left entirely to the discretion of the National Parole Board (Ex parte McCaud (1965) 1 C.C.C. 168 at 169, Supreme Court of Canada). Therefore parole established under the Parole Act is a privilege accorded to certain prisoners at the discretion of the Parole Board and not a right to which all prison inmates are entitled (Mitchell v. The Queen (1976) 2 S.C.R. 589 at 593, per Mr. Justice Ritchie speaking for the majority of the Supreme Court of Canada). A grant of parole does not have the effect of altering the length of a sentence imposed by a court upon an offender (Regina v. Wilmott, (1966) 2 O.R. 654 at 662, Ontario Court of Appeal) or of making changes in sentences (Marcotte v. Deputy Attorney General of Canada (1975) 1 S.C.R. 108 at 113, Supreme Court of Canada). Rather parole provides that the offender serves his sentence outside the prison, not as a free man, but under supervision and subject to terms and conditions imposed. Because the essence of parole is release on conditions (Howarth v. National Parole Board (1976) 1 S.C.R. 453 at 468 per Dicson dissenting on another point, Supreme Court of Canada), a person on parole is not a free man (Regina v. Wilmott (1966) 2 O.R. 257 at 662, Ontario Court of Appeal); and because a person on parole is not a free man, his parole may be suspended or revoked at the discretion of the National Parole Board. Revocation of a parole is an administrative decision and is not part of the criminal prosecution (Howarth v. National Parole Board (1976) 1 S.C.R. 453 at 474, 475 and 461).

7.5 The State party adds that the setting or context of article 15 of the Covenant is criminal law. The words "guilty", "criminal offence" and "offender" are evidence that when the word "penalty" is used in the context of article 15, what is meant is "criminal penalty". The State party finds unacceptable Mr. MacIsaac's proposition that the word "penalty" in article 15 of the Covenant must be given a wide construction, which would mean that article 15 would apply to administrative or disciplinary sanctions imposed by law as a consequence of criminal convictions.

7.6 The State party furthermore refers to a series of Canadian court decisions on the nature and effects of parole, its suspension or revocation. It also argues, quoting various authorities, that the Canadian process of sentencing permits flexibility with respect to forfeiture of parole. It points out that "in sentencing Mr. MacIsaac, the judge did mention explicitly the fact that Mr. MacIsaac's parole had been forfeited. Although, in the judge's view, Mr. MacIsaac's criminal record was 'serious', he sentenced him to a term of imprisonment of 14 months for an offence carrying a statutory maximum of 14 years." Finally, the role of the National Parole Board is discussed in this context.

7.7 In the light of the above, the State party submits that the Human Rights Committee ought to dismiss Mr. MacIsaac's communication. Article 15, it submits, deals with criminal penalties, while the process of parole is purely administrative, and therefore the Criminal Law Amendment Act 1977 cannot be regarded as providing a ligher penalty within the ambit of article 15.

8. No further information or observations have been submitted on behalf of Mr. MacIsaac.

9.1 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.

9.2 The Committee notes that the facts of the present case are not substantially in dispute. It recalls that the Canadian Criminal Law Amendment Act, 1977, removed the automatic forfeiture of parole for offences committed while on parole. This Act was made effective from 15 October 1977, at a time when the alleged victim was serving the sentences imposed on him under the earlier legislation, namely in 1968 (8 years) and 1975 (14 months). By the terms of section 31 (2) (a) of the Act, the deduction of time spent on parole from the unexpired term of imprisonment was, however, only applicable to offenders whose penalties were imposed after the coming into force of the new provisions. The author alleges that by not making the Act retroactive, Canada contravened the last sentence of 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."

The Government disputes this allegation.

9.3 The Committee notes that the provision just quoted refers to two points of time: the "commission of the offence" and the "imposition" of a penalty. If the provision applies only at the time when the offender is sentenced by the court, then it would not be applicable to the present case. It would in fact be inadmissible ratione temporis, since all relevant facts took place before the entry into force of the Covenant for Canada on 19 August 1976. If, on the other hand, the provision applies as long as the sentence is not fully served, the situation would be different. When declaring this case (and similarly R.12/50) admissible, the Committee left this point of interpretation open, because it had to consider the effect of the Act of 1977 on the position of Mr. MacIsaac.

10. The author states that the object of his submission is to obtain an amendment of section 31 (2) (a) of the Canadian Criminal Law Amendment Act, 1977, so as to make that section compatible with article 15 of the Covenant. It appears from the submissions of the parties and documents presented by them in this case, as well as in a similar case (R.12/50; views on 7 April 1982), that this matter is one considered to be of general interest as affecting hundreds of inmates in Canadian prisons. However, this fact alone is not a reason for the Committee to consider the general issue. The Committee notes in this respect that it is not its task to decide in the abstract whether or not a provision of national law is compatible with the Covenant, but only to consider whether there is or has been a violation of the Covenant in the particular case submitted to it. In the other case, the Committee expressed the view, without prejudice to the general legal issues, that the information submitted on behalf of the alleged victim did not clearly establish that his position in the end was substantially affected by the applicability or non-applicability of the new provision, and that therefore there was no violation of the Covenant.

11. In the absence of more precise submissions from the author in the present case, the Committee has attempted to examine in what way, if any, the position of the alleged victim was affected by the situation of which he basically complains. It notes that the system for dealing with recidivists was changed by the 1977 Act, to make it more flexible. The Act as amended provides, instead of the automatic forfeiture of parole, for a system of revocation at the discretion of the National Parole Board and sentencing for the recidivist offence at the discretion of the judge. However, the recidivist cannot be made to re-serve the full time spent on parole. Apparently, the author's claim in the present case is that he would have been released earlier on the hypothesis that the new provisions had been applied to

him retroactively. The Committee notes that it is not clear how this should have been done. However, here a comparison with the system existing before 1977 is necessary. Under the old system, the judge exercised his discretion in deciding the length of a penalty to be imposed. In the case of Mr. MacIsaac, whose second sentence was rendered in 1975, the recidivist offence carried a possible sentence of up to 14 years. While noting that Mr. MacIsaac's criminal record was "serious" and explicitly mentioning the fact that Mr. MacIsaac's parole had been forfeited, the judge in 1975 sentenced him to 14 months. The Committee notes that one cannot focus only on the favourable aspects of a hypothetical situation and fail to take into account that the imposition of the 14-month sentence on Mr. MacIsaac for a recidivist offence was explicitly linked with the forfeiture of parole. In Canadian law there is no single fixed penalty for a recidivist offence. The law allows a scale of penalties for such offences and full judicial discretion to set the term of imprisonment (e.g. up to 14 years for the offence of breaking and entering and theft as in Mr. MacIsaac's case). It follows that Mr. MacIsaac has not established the hypothesis that if parole had not been forfeited, the judge would have imposed the same sentence of 14 months and that he would therefore have been actually released prior to May of 1979. The Committee is not in a position to know, nor is it called upon to speculate, how the fact that his earlier parole was forfeited may have influenced the penalty meted out for the offence committed while on parole. The burden of proving that in 1977 he has been denied an advantage under the new law and that he is therefore a "victim" lies with the author. It is not the Committee's function to make a hypothetical assessment of what would have happened if the new Act had been applicable to him.

12. The Canadian Criminal Law Amendment Act 1977 in this light, and as explained by the State party, only entails a modification in the system of dealing with recidivist cases and leaves the question as to whether the total effect in the individual case will be a "lighter penalty" to the judge who sentences the recidivist offender. The new law does not necessarily result automatically, for those to whom it is applied, in a lighter penalty compared to that under the earlier legislation. The judge entrusted with sentencing the recidivist - now as before - is bound to take into account the facts of every case, including, of course, the revocation or forfeiture of parole, and exercise his discretion in sentencing within the prescribed scale of statutory minimum and maximum penalties.

13. These considerations lead to the conclusion that it cannot be established that in fact or law the alleged victim was denied the benefit of a "lighter" penalty to which he would have been entitled under the Covenant.

14. For these reasons the Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that the facts of the present case do not disclose any violation of article 15 (1) of the Covenant.