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The Human Rights Committee and Articles 7 and 10(1) of the International Covenant on Civil and Political Rights, 1966

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I. Introduction

The International Covenant on Civil and Political Rights and the Optional Protocol thereto, adopted by the General Assembly of the United Nations in Resolution 2200A (XXI)¹ of 16 December 1966, entered into force on 23 March 1976 in accordance with Articles 49 of the Covenant and 9 of the Protocol respectively. As at 28 July 1989, there were eighty-seven States Parties to the Covenant and forty-five States Parties to the Protocol.

The Covenant established the Human Rights Committee, which consists of eighteen individuals serving in their personal capacity, as the central international organ of its implementation.² This body controls each of the three separate measures of implementation introduced by the Covenant.³ In each of these procedures the Committee plays the dominant role.

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1. U.N. Doc. A/6316.

2. Article 28.

3. On the measures of implementation contained in the Covenant, see generally; A.H. Robertson, *The Implementation System: International Measures*, in: L. Henkin (ed.), *The International Bill of Rights — The Covenant on Civil and Political Rights* (New York, 1981); R.S. Pathak, "The Protection of Human Rights" (1978), 18 *Indian J. Int. Law* 266; J.G. Merrills, (ed.), *A.H. Robertson, Human Rights in the World* (Manchester, 1989); F. Capotorti, *The International Measures of Implementation included in the covenants on Human Rights*, in: A. Eide/A. Schou (eds.), *Proceedings of the Seventh Nobel Symposium on the International Protection of Human Rights* (Stockholm, 1967); A.G. Mower, "Organising to Implement the UN Civil/Political Rights Covenant; First Steps by the Committee" (1978), 3, *Human Rights Review*, 122; *id.*, *Implementing United Nations Covenants*, in: A.A. Said (ed.), *Human Rights and World Order*, New Jersey 1978; *id.*, "The Implementation of the U.N. Covenant on Civil and Political Rights" (1977), 10 *Human Rights Journal* 271; B.G. Ramcharan, *Implementing the International Covenants on Human Rights*, in: B.G. Ramcharan (ed.), *Human Rights Thirty Years after the Universal Declaration* (The Hague, 1979); *Institutions et procedures issues des conventions relatives aux droits de l'homme . . .*, in: K. Vasak (ed.), *Les Dimensions Internationales des Droits de l'Homme*, UNESCO Manual (Paris, 1978); E. Schwelb, "The United Kingdom signs the Covenants on Human Rights" (1969), 18 *I.C.L.Q.* 457; *id.*, "Civil and Political Rights: the International Measures of Implementation" (1968), 62 *Am. J. Int. Law* 827; *id.*, "The International measures of Implementation of the International Covenant on Civil and Political Rights and of the Optional Protocol" (1977), 12 *Texas International L.J.* 141; D.L. Shelton, *The Optional Protocol to the International Covenant on Civil and Political Rights*, in: H. Hannum (ed.), *Guide to International Human Rights Practice* (London, 1984);

First, the Committee's duty is to study reports submitted by the States Parties, in accordance with Article 40(1), and to transmit its reports, and such general comments as it may consider appropriate, to the States Parties.⁴ It may also transmit these general comments to the Economic and Social Council of the United Nations, together with the copies of the reports it has received from the States Parties.⁵ This is the only activity of the Committee to which States are automatically subject on becoming parties to the Covenant. Secondly, the Committee is competent to consider communications from a State Party which considers that another State Party is not giving effort to the provisions of the Covenant. In such a case, it must make available its good offices to the States Parties concerned with a view to a friendly solution of the matter. This function can be exercised by the Committee only if both States concerned have declared that they recognize its competence to receive and consider such communications from States Parties. Furthermore, this procedure only became applicable when ten States Parties accepted the competence of the Committee. As at 28 July 1989, twenty-four such declarations of acceptance had been lodged with the Secretary-General of the United Nations. Other functions with respect to inter-state proceedings are performed by an *ad hoc* conciliation commission. The optional inter-state communication procedure in its entirety is regulated in detail by Articles 41 and 42 of the Covenant.⁶ Thirdly, with respect to States Parties to the Optional Protocol, the Committee is competent to receive and consider

M. Lippman, "Human Rights Revisited: The Protection of Human Rights under the International Covenant on Civil and Political Rights" (1980), 10 California Western International Law Journal, 450; R. Starr, "International Protection of Human Rights and the United Nations Covenants" (1967), Wisconsin L.Rev., 863-890; see also: "U.N. Rights Covenants become Law: So What? (1976), 70; Proceedings of the Am J. Int. Law 97.

4. "The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned; (b) Thereafter whenever the Committee so requests."

5. Article 40(4). See in particular, on the operation of the reporting system: D.D. Fischer, "Reporting under the Covenant on Civil and Political Rights: the First Five Years of the Human Rights Committee" (1982), 76 American J. of International Law, 142-153; F. Jhabvala, "The Practice of the Covenant's Human Rights Committee, 1976-82: Review of the State Party Reports" (1984), 6 Human Rights Quarterly 81; J.L. Gomez del Prado, "United Nations Conventions on Human Rights: The Practice of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination in Dealing with Reporting Obligations of States Parties" (1985), 7 Human Rights Quarterly 492; see also: the Annual Reports of the Human Rights Committee since 1977 for lists of reports by State Parties and their contents.

6. See in particular: S. Leckie, "The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking" (1988), 10 Human Rights Quarterly 249.

communications from individuals who claim to be victims of a violation by a State which is a party both to the Covenant and to the Optional Protocol of any of the rights set forth in the Covenant. The function of the Committee here is to "forward its views to the State Party concerned and to the individual."⁷

II. *General Remarks*

The Human Rights Committee has had ample opportunity to examine, interpret, and pronounce upon the provisions of article 7 of the Covenant, very often in conjunction with article 10(1), in its jurisprudence under the Optional Protocol. It has also issued general comments on both these provisions. Article 7 prohibits, in the first place, torture or cruel, inhuman or degrading treatment or punishment, and article 10(1) provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Very many cases, especially but not exclusively, the early spate of communications against Uruguay and other South American countries, have raised issues under these two provisions.

The jurisprudence reveals a somewhat cautious approach to interpretation which, however, might well be justified in the circumstances of the trans-continental application of Covenant. A

7. Article 5(4) of the Optional Protocol. On the Jurisprudence of the Human Rights Committee see generally: P.R. Ghandi, *The Human Rights Committee and the Right of Individual Communication* (1986), 57 *British Yearbook of International Law* 201; A. de Zayas/Th. Moller/T. Opsahl, "Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee" (1985), 28 *German Yearbook of International Law* 9; *id.*, "Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee" (1989), 26 *Comparative Juridical Rev.*, 3; A.F. Bayefsky, "The Human Rights Committee and the case of Sandra Lovelace" (1982), 20 *Canadian Year Book of International Law* 244; V. Dimitrijevic, *Activity of the Human Rights Committee* (1983), 34 *Rev. of International Affairs* 24; B.G. Ramcharan, "The Emerging Jurisprudence of the Human Rights Committee" (1980), 6 *Dalhousie L.J.* 7; C. Jones, "Human Rights: Rights of Relatives of Victims — Views of the Human Rights Committee in the Quinteros Communication" (1984), 25 *Harvard International L.J.*, 470; M. Nowak, "The Effectiveness of the International Covenant on Civil and Political Rights — Stocktaking after the first Eleven Sessions of the U.N. Human Rights Committee" (1980), 1 *Human Rights L.J.* 136; C. Tomuschat, *Evolving Procedural Rules: The U.N. Human Rights Committee's First Two Years of Dealing with Individual Communications*, *ibid.*, 249; M. Nowak, "UN Human Rights Committee: Survey of Decisions given up till July 1981" (1981), 2 *Human Rights L.J.* 168; *id.*, "UN Human Rights Committee: Survey of Decisions given up till October 1982" (1982), 3 *Human Rights L.J.*, 207; *id.*, "UN Human Rights Committee: Survey of Decisions given up till July 1984" (1984), 5 *Human Rights L.J.*, 199; *id.*, "UN Human Rights Committee: Survey of Decisions given up till July 1986" (1986), 7 *Human Rights L.J.*, 287; B. Graefrath, "Trends Emerging in the Practice of the Human Rights Committee" (1980), 3 *Bulletin of the GDR Committee for Human Rights* 3.

number of interesting features emerge from a study of this case-law. A remarkable point is that, although the Committee delivered decisions on whether or not there had been breaches of articles 7 and 10(1) from 1979, when it forwarded its first views under article 5(4)⁸ of the Optional Protocol, it was not until 1982 that it availed itself on the opportunity to interpret these rights by way of “general comments” under article 40(4) of the Covenant. In effect, therefore, for three years or so it was declaring certain forms of treatment to be self evidently in breach of the articles concerned, since there is very little by way of interpretation of the proscriptions in the cases themselves, especially in early cases. This is, in itself, surprising since the Committee has always appeared to be much less reticent in its jurisprudence particularly on the procedural provisions of the Optional Protocol and on other ‘key’ substantive provisions, such as article 4, encapsulating the right to derogate.⁹

It is also interesting to observe — and this appears to be a more general phenomenon — that the Committee is reluctant to make reference to the jurisprudence of other regional institutions established for the protection of human rights, such as the European Convention on Human Rights, 1950, and the American Convention on Human Rights, 1969.¹⁰ In one sense, this is perfectly understandable. The Committee is a singular body entrusted with supervision of an international treaty in which many diverse systems of law and politics are represented in contradistinction, for example, to the European Convention, the States Parties to which are relatively homogeneous in terms of political systems and ideology. Accordingly, it may be that interpretations given to a term under the European Convention will not necessarily be apposite to an interpretation of the same or similar term under the Covenant; or it may be impossible to clothe the particular provision in an international treaty with the same amount of detail in interpretation as it would be possible to do in a more ‘specific’ regional context. Also, it is no doubt true that the Committee wishes to stamp its own particular character on the emerging case-law. Nevertheless, there does seem to be a very rich vein of interpretative data emanating, for example, from the European Convention, which is relatively untapped.

Occasionally, there is a suspicion of inconsistency — facts which are remarkably similar have produced indifferent pronouncements — and sometimes some rather thought-provoking issues have been shelved, or,

8. “The Committee shall forward its views to the State Party concerned and to the individual.”

9. See P.R. Ghandhi, “The Human Rights Committee and Derogation in Public Emergencies” (1989) 32, *German Yearbook of International Law*, 323.

10. See J.G. Merrills, (ed.), A.H. Robertson, *op.cit. supra*, footnote 3, at p.68.

it has not been found necessary to deal with the issue because of a determination of inadmissibility.¹¹ In general, therefore, for a variety of reasons including, of course, the fact that the Committee is a comparative newcomer to the international stage when compared with the European institutions at Strasbourg, the case-law of the Committee seems less dense and developed.

III. *Analysis*

From an analytical point of view it seems appropriate to divide the jurisprudence into two segments: the first being the period 1979-1982 before the "general comment" on articles 7 and 10(1), and the second being the period after 1982 including the general comments themselves.

(i) *The first period*

The very first case in which the Committee gave final views and which articles 7 and 10(1) were considered was *Massera v. Uruguay*.¹² Several conclusions may be drawn from this case. First, detention "under conditions seriously detrimental to . . . health" will be a breach of article 10(1) and 7, though in respect of the latter article it is uncertain whether this is on the basis that such treatment is "inhuman" or "degrading"; it seems probable that it is inhuman since in *Buffo Carballal v. Uruguay*,¹³ the Committee referred to broadly similar conditions as "harsh". Secondly, article 10(1) will cover situations where a detainee has been held incommunicado for some months and cases where he is denied the right to be visited by any family member or the possibility of communicating with counsel of his own choosing. This is amply illustrated in the subsequent case-law.¹⁴ Thirdly, with respect to one of the alleged victims, *viz.* José Luis Massera, the Committee held that there had been a breach of article 7 and article 10(1) "because during his detention he was tortured as a result of which he suffered permanent physical damage"; this finding does not make it clear whether torture

11. On the jurisprudence on admissibility, see P.R. Ghandhi, *op.cit. supra*, footnote 7, 201-251.

12. Comm.no.R1/5, GAOR, 34th Session, Supplement No.40(A/34/40), Report of the Human Rights Committee, p.124.

13. Comm.no.R8/33, GAOR, 36th Session, Supplement No.40(A/36/40), Report of the Human Rights Committee, p.125.

14. See *Drescher Caldas v. Uruguay*, comm.no. 43/1979, GAOR, 38th session, Supplement No.40(A/38/40), Report of the Human Rights Committee, p.192; *Martínez Machado v. Uruguay*, comm.no.83/1981, GAOR, 39th Session, Supplement No. 40(A/39/40), Report of the Human Rights Committee, p.148; *Gilboa v. Uruguay*, comm.no.147/1983, GAOR, 41st session, Supplement No. 40(A/41/40), Report of the Human Rights Committee, p.128.

necessitates “permanent physical damage” or whether “permanent physical damage” justifies an additional finding under article 10(1). Although the finding makes abundantly clear that there is a close relationship between the two articles, it is not very precise and the way it is expressed in this decision seems to imply that a breach of article 7 automatically involves a breach of article 10(1), because the latter article stands at the bottom of a sliding scale of graduated proscriptions covered by both articles in conjunction. Such an interpretation receives support from the wording of the Committee’s decision on articles 7 and 10(1) in *Grille Motta v. Uruguay*.¹⁵

Fourthly, the only specific allegation of torture made and found was that in respect of José Luis Massera and related only to ‘head-hooding’; however, it seems appropriate to conclude that other techniques which are involved in relation to another victim in this case — ‘planton’ (wall-standing), electric shocks (particularly in the genital region) and ‘bastinado’ (blows) — would necessarily be considered as torture. This conclusion is borne out by later cases where these and other complementary techniques, such as ‘submarino seco’, ‘caballete’, ‘picano’, ‘stringing-up’, asphyxiation, denial of anything to eat or drink, were explicitly found to be torture.¹⁶ Finally it should be noted that the interesting issue of the “psychological” torture pleaded by the author herself did not have to be considered because her claim was inadmissible *ratione temporis*.¹⁷

15. Comm.no.R2/11, GAOR, 35th Session, Supplement No.40(A/35/40), Report of the Human Rights Committee, p.132.

16. See for example *Lopez Burgos v. Uruguay*, comm.no.R12/52, GAOR, 36th Session, Supplement No.40(A/36/40), Report of the Human Rights Committee, p.176; *Sendic v. Uruguay*, comm.no.R14/63, GAOR, 37th Session, Supplement No.40(A/37/40), Report of the Human Rights Committee, p.114; *Bleier v. Uruguay*, comm.no.R7/30, GAOR, 37th Session, Supplement No.40(A/37/40), Report of the Human Rights Committee, p.130; *Quinteros v. Uruguay*, comm.no. 107/1981, GAOR, 38th Session, Supplement No.40(A/38/40), Report of the Human Rights Committee, p.216; for a case not involving Uruguay but where a finding of torture was made, see *Muteba v. Zaire*, comm.no.124/1982, GAOR 39th Session, Supplement No.40(A/39/40), Report of the Human Rights Committee, p.182; see also *Gilboa v. Uruguay*, comm.no.147/1983, GAOR, 41st Session, Supplement No.40(A/41/40), Report of the Human Rights Committee, p.128; *Cariboni v. Uruguay*, comm.no.159/1983, GAOR, 43rd Session, Supplement No.40(A/43/40), Report of the Human Rights Committee, p.184; *Herera Rubio v. Colombia*, comm.no.161/1983, GAOR, 43rd Session, Supplement No.40(A/43/40), Report of the Human Rights Committee, p.190; *Lafuente Penarrieta et al v. Bolivia*, comm.no.176/1984, GAOR, 43rd Session, Supplement No.40(A/43/40), Report of the Human Rights Committee, p.199; *Miango v. Zaire*, comm.no. 194/1985, GAOR, 43rd Session, Supplement No.40(A/43/40), Report of the Human Rights Committee, p.218; *Berterretche Acosta v. Uruguay*, comm.no.162/1983, GAOR, 44th Session, Supplement No.40(A/44/40), Report of the Human Rights Committee, p.183.

17. See P.R. Ghandi, *op.cit. supra* footnote 7, at p.219.

The case of *Santullo v. Uruguay*¹⁸ appeared to raise the compelling issue of whether the threat of torture to the victim's wife and children might not in itself amount to a breach of article 7 in respect of the victim himself. Unfortunately, this issue was not dealt with by the Committee, in what may be described as a timid decision to hold that "it cannot find that there has not been a violation of [article 7]". This rather negative finding was explicitly spurned by Mr. Walter Tarnopolsky in his individual opinion which drew the support of five other Committee members. Whether one can draw the inference that these individual members would have upheld a finding of torture against the victim himself in the circumstances outlined would seem doubtful in the context of a rather perfunctory four line expression of individual opinion, which makes no express referral to such a possibility.

Allied to this issue of 'transferred' torture is that of mental torture. Does a prison régime the express purpose of which is to break a detainee's will mentally amount to "torture" *etc.* within the meaning of article 7? In *Lanza v. Uruguay*¹⁹ the Committee stated that in respect of, *inter alia*, such a plea that there had been violations of article 7 and article 10(1) "because of the treatment which [the victims] received during their detention". Unfortunately, such wording does not indicate clearly into which article the particular activity falls — article 7 or article 10(1). This is unfortunate from the point of view of precision.²⁰ This rather imprecise way of expressing its view was persisted in by the Committee in *Torres Ramirez v. Uruguay*,²¹ where the Committee held that the treatment the author received, which included various forms of torture and ill-treatment — in particular lack of food and clothing — were a breach of articles 7 and 10(1). Once again, the wording of the decision does not make clear whether the particular ill-treatment singled out for mention was envisaged as within article 7 *or* in article 10(1); it may be presumed that they fall within the latter.

A similar criticism could be made of the decision in *Weinberger Weisz v. Uruguay*,²² where the Committee held that allegations of torture, food

18. Comm.no. R2/9, GAOR, 35th Session, Supplement No.40(A/35/40), Report of the Human Rights Committee, p.107.

19. Comm.no.R2/8, GAOR, 35th Session, Supplement No.40(A/35/40), Report of the Human Rights Committee, p.111.

20. See also *Soriano de Bouton v. Uruguay*, comm.no.129/37, GAOR, 36th Session, Supplement No.40(A/36/40), Report of the Human Rights Committee, p.143.

21. Comm.no.R1/4, GAOR, 35th Session, Supplement No.40(A/35/40), Report of the Human Rights Committee, p.121.

22. Comm.no.R7/28, GAOR, 36th Session, Supplement No. 40(A/36/40), Report of the Human Rights Committee, p.114.

rationing, and refusal of visits by family were “severe treatment” falling within articles 7 and 10(1); it is again presumed that the allegation of food rationing fell within article 10(1). The allegation of compulsory injection of hallucinogens was not specifically mentioned in the Committee’s decision. This may seem odd, as the Uruguayan government did not issue a specific refutation of the allegations — only denials of a general character — and it could have raised an issue under the second sentence of article 7, which reads: “[i]n particular, no one shall be subjected without his free consent to medical or scientific experimentation.” In *Viana Acosta v. Uruguay*²³ the allegations of psychiatric experimentation seem not to have been sufficiently substantiated.

At its fourteenth, fifteenth, and sixteenth sessions the Committee gave final views on a series of cases involving, *inter alia*, issues under articles 7 and 10(1). These precede the general comments on articles 7 and 10 adopted by the Committee towards the end of the sixteenth session. From this series of cases a number of observations may be made.

In *Pinkney v. Canada*²⁴ one of the complaints made by the applicant was that whilst in prison he had been continually insulted, humiliated, and physically ill-treated because of his race by prison guards, which he alleged was, *inter alia*, a breach of article 10(1). The Committee found however that “it [did] not have before it any verifiable information to substantiate [the applicant’s] allegations of violations of article 10(2)” This seems to leave the door ajar for a holding that racial harassment may contravene article 10(1). *Sentic v. Uruguay*²⁵ suggests that being held in solitary confinement may, according to the circumstances be a breach of article 7: here the circumstances included ‘planton’, limited rest and sleep, beatings, insufficient food and no family visits.²⁶ This case also indicates that denial of necessary medical attention will be a breach of article 10(1). In *Cubas Simones v. Uruguay*²⁷ the Committee held that where Uruguay had wrongfully denied that the victim had been detained — this coupled with the fact that the victim had

23. Comm.no.110/1981, GAOR, 39th Session, Supplement No.40(A/39/40), Report of the Human Rights Committee, p.169.

24. Comm.no.R7/27, GAOR, 37th Session, Supplement No.40(A/37/40), Report of the Human Rights Committee, p.101; a similar claim of racial harrasment was made in the *Bleier* case (see footnote 16) wherein the Committee found there to be (*inter alia*) a breach of article 10(1).

25. Comm.no.R14/63, GAOR, 37th Session, Supplement No.40(A/37/40), Report of the Human Rights Committee, p. 114.

26. This interpretation was subsequently upheld in the general comments adopted on article 7 by the Committee at the end of its sixteenth session.

27. Comm.no.R17/70, GAOR, 37th Session, Supplement No.40(A/37/40), Report of the Human Rights Committee, p. 174.

been held *incommunicado* — amounted to a breach of article 10(1). In *amendola Massiotti and Baritussio v. Uruguay*²⁸ the Committee indicated what it thought could amount to “inhuman treatment”. It shows that, at this stage of its jurisprudence, the Committee often preferred to give examples of what conduct might fall within a particular stipulation rather than define the term conceptually. Here, the Committee held that there was “inhuman treatment” where, in one prison, cells were habitually flooded in the rainy season, where there was gross overcrowding, no open-courtyard and the prisoners were kept indoors under artificial light all day without access to fresh air or light, and, in another prison, gross overcrowding again, insufficient sanitary conditions (one washbasin and four toilets for one hundred prisoners) and hard labour (making roads, putting up prison buildings, mixing concrete). Finally, it is interesting to note that in *A.M. v. Denmark*²⁹ the intriguing issue of whether deportation could in certain circumstances amount to “degrading treatment or punishment” arose; however, since the Committee made a decision of inadmissibility under article 5(2)(a) of the Optional Protocol, this point did not have to be faced.³⁰

(ii) *The second period*

(a) *The general comments themselves*

The general comments on articles 7 and 10 (nos. 7 and 9 respectively) were adopted by the Committee at its 378th meeting (sixteenth session) held on 27th July 1982.³¹ The Committee made the following important general observations in paragraph 1 of its comment on article 7. First, the Committee pointed out that even in times of public emergency under article 4(1), no derogation from the stipulation of article 7 is permissible at all under the terms of article 4(2). The mere fact of non-derogability stresses the fundamental nature of article 7. Secondly, the purpose of the provision is to protect the integrity and dignity of the human person. Thirdly, the Committee made clear that it is insufficient for a State to argue that this article has been effectively implemented in its domestic law by mere prohibition of the forms of conduct outlawed by the article

28. Comm.no.R6/25, GAOR, 37th Session, Supplement No.40(A/37/40), Report of the Human Rights Committee, p. 187; for another example of a finding of inhuman treatment see *Viana Acosta v. Uruguay*, comm.no.110/1981, GAOR, 39th session, Supplement No.40(A/31/40) Report of the Human Rights Committee, p.169.

29. Comm.no.R26/121, GAOR, 37th Session, Supplement No.40(A/37/40), Report of the Human Rights Committee, p.212.

30. See P.R. Gandhi, *op.cit. supra* footnote 7, at p.229-30.

31. See GAOR, 37th Session, Supplement No.40(A/37/40), Report of the Human Rights Committee, p.94-5 and 96-7.

or by rendering them crimes; something more is required: article 7 read in conjunction with article 2 means that a State must establish some machinery of control. In particular, complaints about ill-treatment must be investigated thoroughly by the competent authorities; those found guilty must be dealt with appropriately and victims must have effective remedies, including most importantly, the right to obtain compensation.

The Committee suggested a number of safeguards which may make such control effective: (i) provisions against detainees being held incommunicado, which grant access to persons such as lawyers, doctors, and family members without prejudice to the investigation; (ii) provisions requiring that detainees should be held in publicly recognised places and that their names should be entered in a central register which is available to interested parties; (iii) provisions making confessions or other evidence obtained through torture *etc.* inadmissible in court; and (iv) training and instructions to law enforcement officials not to apply to detainees treatment which violates article 7.

In paragraph 2 of the general comment the Committee dealt with the interpretation of the specific prohibitions. The Committee made the obvious point that the terms of the article demand protection far beyond the notion of torture as normally understood. The Committee felt that it might not be necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment, thus presumably envisaging a 'spectrum' with some overlap application. Clearly, where a "spectrum" of banned conduct exists within the confines of the same article, it is not, strictly speaking necessary to define precisely within which part of the 'spectrum' particular conduct falls, since it will be caught somewhere; however, this is of course at the expense of legal precision. The distinction between "torture" and "cruel", "inhuman" or "degrading treatment or punishment" is one of "kind, purpose and severity of the particular treatment" according to the Committee. Thus, presumably, for example, if cruel treatment is employed to extract a confession that might remove the conduct to the plan of torture. Corporal punishment, "including excessive chastisement as an educational or disciplinary measure" falls within the scope of the prohibition of article 7, according to the Committee. By implication, albeit oddly perhaps, "chastisement as an educational or disciplinary measure" does not appear to fall within the definition of "corporal punishment" unless it satisfies a further criterion — that it was "excessive". The interpretation of key terms may be criticized as being, at the very least, rather vague.

The Committee then went on to endorse what had already emerged from the pre-existing case-law, that solitary confinement may, according to all the circumstances, and especially where a detainee has been kept

incommunicado, amount to a breach of article 7. The scope of the article includes pupils and patients in educational and mental institutions as well as detainees. The committee imposed the duty on public authorities to ensure protection by the law against treatment proscribed by article 7 even when perpetrated by persons acting outside the scope of or without any official authority. Finally, the Committee stressed what is already obvious from the pre-existing case-law, namely that there is a close nexus between articles 7 and 10(1), indeed, they may be seen as complementary.

In paragraph 3 of the general comment the Committee deals specifically with the more neglected terms of the second sentence of article 7, namely, that: “no one shall be subjected without his free consent to medical or scientific experimentation”. The intention of the drafters was manifestly to outlaw the hideous scientific experimentation of the Nazi concentration camps. The Committee stressed that “special protection in regard to such experiments is necessary in the case of persons not capable of giving their consent”, for example, minors, mental patients *etc.*, but did not in any way seek to elaborate upon what such special protection might consist of.

Article 10(1) reads: “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”. One might be forgiven for suggesting that the legal value of such a provision was certainly open to question. However, it is a measure of the Committee’s creative development of the provision that it now stands solidly as an additional bulwark to and closely allied with the provisions of article 7. In paragraph 2 of its general comment on this article the Committee emphasised this factor, describing it as “supplement[ing] article 7 as regards to treatment of *all*³² persons deprived of their liberty”. The Committee stated categorically that since this provision was a “basic standard of universal application” it could not “depend entirely on material resources”. This underpins the fundamental nature of article 10(1) and once again illustrates its close relationship with article 7. As with article 7, 10(1) is not confined to prisoners, but extends also to detainees and those held in hospitals and correctional institutions.

(b) *The subsequent jurisprudence*

A considerable number of cases worthy of note on articles 7 and 10(1) have arisen since the general comments on them in communications in which the Committee has given its final views.

32. Emphasis added.

*Campora Schweizer v. Uruguay*³³ raises two points to observe. First, the essence of one of the allegations was that at one particular detention centre the entire régime was geared to “totally destroying the individual personality” of all the prisoners — in effect, an allegation of psychological torture; this aspect was not considered of itself by the Committee. Secondly, it is hard to reconcile this case with the *Massera* case. As we have seen, in that case the Committee decided that detention “under conditions seriously detrimental to . . . health” would contravene both article 10(1) and 7. In the instant case, the detention certainly seemed to have this quality: constant harassment and persecution by guards, a régime of arbitrary prohibitions, stark contrast between solitude-isolation and being closely watched (*inter alia* via peepholes and microphones), solitary confinement for ninety days at a time, malnutrition leading to breakdown of physical and mental health, lack of fresh air and facilities for exercise, coupled with psychological pressure. Yet the committee elected to find a breach of article 10(1) *only* by virtue of the fact that the victim had been detained under “inhuman prison conditions”. If, as seems likely, the Committee was trying to draw a distinction between *mistreatment* (on which there was insufficient specific evidence after 23 March 1976) and *conditions of imprisonment*, this is yet another source of discrepancy since these concepts seem inextricably interwoven in the *Massera* decision.

This decision seems even more extraordinary when compared with *Marais v. Madagascar*,³⁴ where the Committee held that there had been a breach of articles 7 and 10(1) because of “the human conditions” in which the victim had been held, in essence, solitary confinement in a basement cell for over three years; it may be that the Committee put much more weight relatively on the fact of solitary confinement rather than the surrounding physical circumstances as prevailed in the *Campora Schweizer* case. However, such a suggestion can only be made with some diffidence since in *Wight v. Madagascar*,³⁵ it was an amalgam of solitary confinement and surrounding physical conditions that elicited a finding of a breach of articles 7 and 10(1) on the basis of inhuman conditions of detention, just as in the *Marais* case and in *Martinez Portorreal v. The Dominican Republic*,³⁶ a similar finding of breaches of articles 7 and

33. Comm.no.66/1980, GAOR, 38th Session, Supplement No.40(A/38/40), Report of the Human Rights Committee, p.117.

34. Comm.no.66/1980, GAOR, 38th Session, Supplement No.40(A/38/40), Report of the Human Rights Committee, p.117.

35. Comm.no.115/1982, GAOR, 40th Session, Supplement No.40(A/40/40), Report of the Human Rights Committee, p.171.

36. Comm.no.188/1984, GAOR, 43rd Session, Supplement No.40(A/43/40) Report of the Human Rights Committee, p.207.

10(1) was made on the basis of inhuman conditions of detention evidenced only by the surrounding circumstances.

What is clear from these cases and others, for example, *Angel Estrella v. Uruguay*,³⁷ is that inhuman prison conditions will certainly justify a finding of a breach of articles 10(1). The *Angel Estrella* case also seems to involve the assumption that psychological torture, at least when accomplished by severe physical mistreatment, will amount to a breach of article 7, since this aspect was involved in the treatment complained of which the Committee found to be a violation of that article, thus apparently solving the interpretational difficulty raised in the *Lanza* case discussed already.

*Vasilskis v. Uruguay*³⁸ represents a step forward in the article 7 jurisprudence of the Committee. Instead of feeling obliged to justify a finding of a breach of articles 7 and 10(1) by reference to specific acts of misconduct, the Committee simply invoked the general purpose behind article 7, as explained by the Committee in its general comment, which is, in effect, spelt out in article 10(1), to find that both the provisions just referred to had been breached because the victim had not been treated in prison “with humanity and with respect for the inherent dignity of the human person”.

This case was followed in *Larrosa Bequio v. Uruguay*³⁹ and in *Luyeye v. Zaire*⁴⁰ — but in respect of a holding of a breach of article 10(1) only — and only on terms that the victim had not been treated with “humanity”. It is uncertain to what extent, if at all, the truncated finding in *Luyeye* differs from the fuller finding made, for example, in the *Vaselskis* case (discussed above) or *Almirati Nieto v. Uruguay*,⁴¹ where the full finding that article 10(1) had been breached because the victim had not been treated in prison with “humanity and with respect for the inherent dignity of the human person” was made.⁴² This latter decision

37. Comm.no.74/1980, GAOR, 38th Session, Supplement No.40(A/43/40), Report of the Human Rights Committee, p.150; see also *Cariboni v. Uruguay*, comm.no.159/1183, GAOR, 43rd Session, Supplement No.40(A/43/40), Report of the Human Rights Committee, p.184.

38. Comm.no.80/1980, GAOR, 38th Session, Supplement No.40(A/38/40), Report of the Human Rights Committee, p.173.

39. Comm.88/1981, *idem.*, p.180.

40. Comm.no.90/1981, *idem.*, p.197.

41. Comm.no.92/1981, *idem.*, p.201; see also *Romero v. Uruguay*, comm.no.85/1981, GAOR, 39th Session, Supplement No.40(A/39/40), Report of the Human Rights Committee, p.159; *Berterreche Acosta v. Uruguay*, comm.no.162/1983, GAOR, 44th Session Supplement No. 40(A/44/40), Report of the Human Rights Committee, p.183.

42. See also *Lluberias v. Uruguay*, comm.no.123/1982, GAOR, 39th Session, Supplement No. 40(A/39/40), Report of the Human Rights Committee, p.175 for an identical finding. It is equally uncertain whether those findings differ in any way from a finding that article 10(1) was breached because the conditions of detention (including solitary confinement for several

seems also to display no obvious reason why a breach of article 7 was not also found by the Committee since its stated in paragraph 10.4 of its views that Uruguay had “refuted only in general terms the author’s detailed allegations that her father is held under inhuman prison conditions at Libertad [prison]. . . . The submissions of the State party in this respect are an insufficient answer to the allegations made. The Committee recalls its findings in other cases that a practice of inhuman treatment existed at Libertad prison during the period to which the present communication relates . . .” Exactly the same criticism may be made of the decision in *Estradet Cabreira v. Uruguay*.⁴³

The case of *Quinteros v. Uruguay*⁴⁴ was a significant advance in the jurisprudence of the Committee on the rights of relatives of victims. The author alleged that her daughter Elena was abducted by Uruguay military personnel from the sanctuary of the Venezuelan embassy in Montevideo to which she had escaped following her arrest because of her political opinions. The author claimed that since that day (28 June 1976) she had no official information as to the whereabouts of her daughter and nor was her detention officially admitted. In so far as the claim related to herself, the author alleged that, *inter alia*, she *herself* was a victim of a violation of article 7 because of the psychological torture she endured in not knowing where her daughter was. The Committee in its decision stated boldly that it understood: “the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7.” Here there is a categoric finding of psychological torture inflicted upon a person (close relative) who is not also the recipient of acts of physical mistreatment. This development of the terms of the Covenant is to be warmly applauded and is undoubtedly a high point in the jurisprudence of the Committee.

months) failed to “respect the inherent dignity of the human person” — see *Gomez de Voituret v. Uruguay*, comm.no.109/1981, GAOR, 39th Session, Supplement No.40(A/39/40), Report of the Human Rights Committee, p.168.

43. Comm.no.105/1981, 38th Session, Supplement No.40(A/38/40), Report of the Human Rights Committee, p.209; see also *Romero v. Uruguay*, comm.no.85/1981, GAOR, 39th Session, Supplement No.40(A/39/40), Report of the Human Rights Committee, p.159; *Berterretche Acosta v. Uruguay*, comm.no.162/1983, GAOR, 44th Session, Supplement No.40(A/44/40), Report of the Human Rights Committee, p. 183.

44. Comm.no.107/1981, GAOR, 38th Session, Supplement No.40(A/38/40), Report of the Human Rights Committee, p.216; see also C. Jones, Human Rights: Rights of Relatives of Victims — Views of the Human Rights Committee in the *Quinteros* Communication (1984), 25 Harvard International L.J., 470.

The case of *Conteris v. Uruguay*⁴⁵ is interesting for several reasons. First, it shows that when the Committee speaks of “extreme ill-treatment” or “severe ill-treatment” (apparently used indifferently in this case) the Committee is in fact referring to torture, in this case, hanging by the wrists for ten days, subjection to burnings and repeated ‘submarino’ — immersing of the head of the victim in water fouled by blood, urine and vomit almost to the point of drowning. Secondly, the case illustrates that in the terminology of the Committee harsh treatment falls a degree below degrading treatment. Thirdly, degrading conditions of detention (presumably no different from degrading treatment) may be evidenced by repeated solitary confinement — this is in harmony with the general comment — and transferral from one part of the prison to another to induce disorientation. Simple “ill-treatment” will, it seems qualify only for a finding of a breach of article 10(1) according to the decision in *Mpandanjila et al v. Zaire*⁴⁶ and *Solorzano v. Uruguay*.⁴⁷

In *Pratt and Morgan v. Jamaica*,⁴⁸ several important questions had to be considered by the Committee. The case concerned the imposition of the death penalty for murder on both applicants. The facts and allegations were particularly complicated but, in essence, insofar as they concern article 7 the allegations were these: (i) the delays in the judicial proceedings against them constituted cruel, inhuman and degrading treatment in violation of article 7: by the time a petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 17 July 1986 some nine years had elapsed since the alleged offence and seven years since conviction; and, (ii) the fact that they had been confined to death-row since their conviction and sentence in January 1979 (‘death-row phenomenon’) constituted cruel, inhuman and degrading treatment prohibited by article 7. It must also be mentioned that on 13 February 1987 a warrant was issued for the execution of both men to take place on 24 February 1987. A stay of execution was granted to both men on 23 February 1987 but they were notified of the stay only 45 minutes before the executions were to take place on 24 February. (In fact, there was later a second warrant for execution and a second stay in February and March 1988).

45. Comm.no. 139/1983, GAOR, 40th Session, Supplement No.40(A/40/40), Report of the Human Rights Committee, p.196.

46. Comm.no.138/1983, GAOR, 41st Session, Supplement No.41(A/41/40), Report of the Human Rights Committee, p.121.

47. Comm.no.156/1983, GAOR, 41st Session, Supplement No.41(A/41/40), Report of the Human Rights Committee, p.134.

48. Comm.nos.210/1986 and 225/1987, GAOR, 44th Session, Supplement No.40(A/44/40), Report of the Human Rights Committee, p.222.

In rejecting the first limb of the applicants' arguments under article 7, the Committee declared that: "[i]n principle, prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners. However, the situation could be otherwise in cases involving capital punishment and an assessment of the circumstances of each case would be necessary. In the present cases the Committee does not find that the authors have sufficiently substantiated their claim that delay in judicial proceedings constituted *for them*⁴⁹ cruel, inhuman and degrading treatment under article 7." The Committee does not say what evidence will suffice; but since the test would seem to be subjective, presumably any medical or psychiatric evidence would be sufficient.

The Committee did not deal with the "death-row phenomenon" argument either in isolation or in relation to the first argument. Surely it is possible to argue that the death-row phenomenon in itself is self-evidently a circumstance bringing the delay within the ambit of article 7? Instead, the Committee opted to deal with the narrow issue of warrants for execution and the notification of the stay of execution under article 7. It said: "[i]t is uncontested that the decision to grant a first stay of execution, taken at noon on 23 February 1987, was not notified to the authors until 45 minutes before the scheduled time of the execution on 24 February 1987. The Committee considers that a delay of close to 20 hours from the time the stay of execution was granted to the time the authors were removed from their death cell constitutes cruel and inhuman treatment within the meaning of article 7."

*Vuolanne v. Finland*⁵⁰ probably represents the Committee's most detailed analysis of article 7 and, incidentally by a State Party, outside the terms of the general comment on the article in question. In this case, the applicant went A.W.O.L. during compulsory military service. As a disciplinary measure, he was punished with ten days of close arrest-confinement in the guardhouse without service duties. He alleged breaches of various articles including article 7. In relation to this article he complained that: (i) he was confined in a cell of 2 × 3 metres with a tiny window, furnished only with a camp bed, a small table, a chair, and a dim electric light; (ii) he was only allowed out of his cell for purposes of eating, going to the toilet and to have fresh air for half an hour a day;

49. Emphasis added.

50. Comm.no.265/1987, GAOR, 44th Session, Supplement No.40(A/44/40), Report of the Human Rights Committee, p.249; see also the note from the Finnish government responding to the Committee's decision of a violation of article 9 paragraph 4 with a declaration of legislative preparations in *idem.*, p.311.

(iii) he was prohibited from talking to other detained persons and from making any noise in his cell; and, (iv) that his isolation was almost total. As a supplementary argument, the author pleaded that if these facts were insufficient to form the basis of a holding under article 7, then they must fall within the terms of article 10(1). In a detailed pronouncement, that went beyond the terms of the general comment, the Committee recalled that:

article 7 prohibits torture and cruel or other inhuman or degrading treatment. It observes that the assessment of what constitutes inhuman or degrading treatment falling within the meaning of article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim. A thorough examination of the present communication has not disclosed any facts in support of the author's allegations that he is a victim of a violation of his rights set forth in article 7. In no case was severe pain or suffering, whether physical or mental, inflicted upon Antti Vuolanne by or at the instigation of a public official; nor does it appear that the solitary confinement to which the author was subjected, having regard to its strictness, duration and the end pursued, produced any adverse physical or mental effects on him. Furthermore, it has not been established that Mr. Vuolanne suffered any humiliation or that his dignity was interfered with apart from the embarrassment inherent in the disciplinary measure to which he was subjected. In this connection, the Committee expresses the view that for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty. Furthermore, the Committee finds that the facts before it do not substantiate the allegation that during his detention Mr. Vuolanne was treated without humanity or without respect for the inherent dignity of the person, as required under article 10, paragraph 1, of the Covenant."

In particular, the Committee has both clarified and emphasized the highly substantive nature of the analysis by specifically singling out factors such as sex, age, and state of health of the victim as determinants of whether they constitute treatment prohibited by article 7. The infliction of severe pain or suffering, whether physical or mental, is elucidated as a criterion for the application of article 7, a rather vague term which will certainly need to be further refined. Further, the Committee has articulated the view that for treatment to be degrading the humiliation or debasement involved "must exceed a particular level". It is not made clear whether this is subjective or objective; is it debasement in the victim's own eyes or in that of others? It is suggested that the subjective view must be correct as being more in harmony with the general tone of the analysis. However, the Committee does state that mere deprivation of liberty will not justify a finding of "degrading

treatment”; it states that “other elements” are entailed without giving any examples.

IV. *Inadmissibility Decisions*

The Committee’s decisions on inadmissibility have also produced some novel points. *M.F. v. The Netherlands*⁵¹ raised the interesting question as to whether, and if at all, in what circumstances, the compulsory expulsion of an alien might constitute “cruel and inhuman treatment” in violation of article 7. Unfortunately, the substantive issue did not have to be considered as the Committee found the communication to be inadmissible under article 2 of the Optional Protocol. Another interesting question, which was raised by the Committee itself, and which did not require determination owing to a decision of inadmissibility, arose in *J.M. v. Jamaica*,⁵² namely, whether a denial of a passport in the surrounding circumstances, including various detentions and deportations, might be degrading treatment within the meaning of article 7.

Similarly, in *S.H.B. v. Canada*⁵³ the extraordinary allegation that the Matrimonial Property Act of the Province of Alberta which gave judges “absolute and unchallengeable discretionary powers” exposed the petitioner to “cruel, inhuman and degrading treatment” by subjecting him “to the whims of the judge, and his prejudices” was levelled. The communication was declared inadmissible for failure to exhaust domestic remedies under article 5, paragraph 2(b), of the Optional Protocol; it is not thought that such a plea would have much chance of success on the merits.

In *L.C. et al. v. Jamaica*⁵⁴ the technical point arose as to whether a delay of six years occasioned by the Jamaican Court of Appeal’s failure to produce a written judgment thereby rendering impossible an application for leave to appeal to the Board of the Privy Council in the meanwhile, in a case involving capital punishment (execution), could in itself amount to “cruel, inhuman and degrading treatment” within article 7. However, this issue did not have to be dealt with since this communication was also declared inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

51. Comm.no.173/1984, GAOR, 40th Session, Supplement No.40(A/40/40), Report of the Human Rights Committee, p.213.

52. Comm. No. 165/1984, GAOR, 41st Session, Supplement No.40(A/41/40), Report of the Human Rights Committee, p.164.

53. Comm.no.192/1985, GAOR, 42nd Session, Supplement No.40(A/42/40), Report of the Human Rights Committee, p.174.

54. *L.C. et al. v. Jamaica*, comm.no.257/1987, GAOR, 43rd Session, Supplement No.40(A/43/40), Report of the Human Rights Committee, p.267.

There are other decisions on inadmissibility in which interesting points on articles 7 and 10(1) might have arisen but for that decision. In *H.C.M.A. v. The Netherlands*⁵⁵ the allegation was that a breach of the terms of article 7 had been perpetrated by a Royal Military Police officer who, when arresting the applicant during the break-up of a demonstration, had injured his jaw when he did not submit himself willingly to arrest. In *J.H. v. Finland*⁵⁶ the claim, which was not specifically pleaded, appeared to be that a sentence of 6½ years and fine of 378,000 Finnish markkaa for having smuggled and sold in Finland 15 kilos of hashish, was a breach, *inter alia*, of article 7 of the Covenant. In an adjunct case arising out of the same incident, *R.M. v. Finland*,⁵⁷ the allegation, again not apparently expressed explicitly, was that the absence of a lawyer and of a tape-recorder at the stage of preliminary investigation, which made it impossible to prove the conditions of ill-treatment to which he was allegedly subjected, was in itself a breach of article 7.

V. Conclusion

Although, of course, the Committee is not in any sense a court of law ("its views" are not strictly speaking binding and it lacks enforcement powers) it is well aware that for its authority to continue to be respected both by States Parties and petitioners alike, it must be seen to be acting competently and in a manner which, as nearly as possible, emulates the way in which a court of law acts. Its decisions must conform to a judicial pattern and its *rationes decidendi* be clearly revealed. Above all, a certain consistency in its jurisprudence is essential. The Committee's impartiality and objectivity are beyond doubt but the examination of the case-law on articles 7 and 10(1) concluded above reveals a worrying lack of consistency in certain respects and, to a degree, a lack of internal logical coherence. Occasionally, there are traces of timidity, which stand in marked contrast to more radical decisions such as *Quinteros*⁵⁸ or searching ones such as in *Vuolanne*.⁵⁹ Of course, from time to time the Committee may have no alternative but to withhold its opinion on difficult, interesting or sensitive issues because of a finding of inadmissibility; one wonders, however, whether it might not be possible

55. Comm.no.213/1186, GAOR, 44th Session, Supplement No.40(A/44/40), Report of the Human Rights Committee, p.267.

56. Comm.no.300/1988, GAOR, 44th Session, Supplement no.40(A/44/40), Report of the Human Rights Committee, p.298.

57. Comm.no.301/1988, *idem.*, p.300.

58. See footnote 44.

59. See footnote 50.

in some instances at least to hand down a few comments in these cases by way of *obiter dicta*.

Nevertheless, it must be recognised that the Committee is faced with tremendous difficulties in the development of its case-law, not least having to interpret a provision in a way which is in harmony with the multitude of a legal and political systems represented within the States Parties. Another feature needs to be borne in mind: the jurisprudential development of articles 7 and 10(1) by the Committee has been heavily influenced by the high proportion of communications involving these provisions brought against Uruguay, other Latin American States, and one or two African States. In one sense, this provides a good test of the Committee's success or failure since these countries were (at least at the time of submission of the individual communications) among the worst violators of fundamental human rights.

Unfortunately, there is very little direct evidence that the worst violators are heavily influenced by the views of the Committee when it has ordered release and-or payment of compensation in the cases discussed above. However, there are some positive indicators. In two notes dated 31 May and 10 July 1984 respectively, addressed to the Secretary-General of the U.N., the Uruguayan Government revealed the names of all those released from prison, including several whose cases had been brought before the Committee for consideration and concluded by its final views. The Committee also heard of the release of Dave Marais by the Malagasy authorities. Furthermore, the Committee has learned of the release by Uruguay of other petitioners from independent sources. Finally, it should be mentioned that at its twenty-fourth session (25 March to 12 April, 1985) the Committee received a message from the new Uruguayan Government's Minister for Foreign Affairs thanking it for its close attention to communications from Uruguay and promising to undertake full compliance with the terms of the Covenant in the future. The Committee's decisions under articles 7 and 10(1) must accordingly be rated as a qualified success since they have impacted positively on concrete human rights situations.⁶⁰

60. The author wishes to acknowledge the generous support of the Nuffield Foundation in this research.