



## International Covenant on Civil and Political Rights

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### Human Rights Committee

102nd session

11–29 July 2011

### Views

#### Communication No. 1610/2007

<i>Submitted by:</i>	L.N.P. (represented by the Gender, Law and Development Institute (INSGENAR) and the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM))
<i>Alleged victim:</i>	The author
<i>State party:</i>	Argentine Republic
<i>Date of communication:</i>	25 May 2007 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 8 October 2007 (not issued in document form)
<i>Date of adoption of Views:</i>	18 July 2011
<i>Subject matter:</i>	Discrimination against a girl of indigenous origin who was a victim of rape
<i>Substantive issues:</i>	Gender equality/cruel, inhuman or degrading treatment/equality before the courts and right to review of conviction and sentence by a higher tribunal/interference in private and family life/protection of minors/equality before the law and prohibition of discrimination/right to effective remedy

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\* Reissued for technical reasons.

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

<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Articles of the Covenant:</i>	Article 2, paragraph 3; article 3; article 7; article 14, paragraphs 1 and 5; article 17; article 24; article 26
<i>Articles of the Optional Protocol:</i>	Article 2 and article 5, paragraph 2 (b)

On 18 July 2011, the Human Rights Committee adopted the annexed text as its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1610/2007.

[Annex]

## Annex

### **Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (102nd session)**

concerning

#### **Communication No. 1610/2007\*\***

*Submitted by:* L.N.P. (represented by the Gender, Law and Development Institute (INSGENAR) and the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM))<sup>1</sup>

*Alleged victim:* The author

*State party:* Argentine Republic

*Date of communication:* 25 May 2007 (initial submission)

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

*Meeting* on 18 July 2011,

*Having concluded* its consideration of communication No. 1610/2007, submitted to the Human Rights Committee by Ms. L.N.P. under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication and the State party,

*Adopts* the following:

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

1. The author of the communication is Ms. L.N.P., an Argentine citizen born in 1988, who claims to be the victim of violations by the Argentine Republic of the rights recognized in article 2; article 3; article 7; article 14, paragraphs 1 and 5; article 17; article 24; and article 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 8 November 1986.

\*\* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Ahmad Amin Fathalla, Mr. Cornelius Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Krister Thelin and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Fabián Omar Salvioli did not participate in the adoption of the present decision.

<sup>1</sup> The two organizations enclose a power of attorney signed by the author and her legal representatives for the purpose of submitting the communication to the Committee.

### The facts as submitted by the author

2.1 The author belongs to the Qom ethnic group<sup>2</sup> and lives at the place known as El Espinillo, situated in the north of the Chaco Province of Argentina. On 3 October 2003, soon after the author had turned 15 years of age, she was sexually assaulted by three young Creoles<sup>3</sup> aged between 17 and 20 years. The author asserts that, on the evening of that date, she was called over by the three young men, with whom she was acquainted, in the village square and taken behind the church that gave onto the square, where she was forced by the eldest of the three, assisted by the other two, to practice oral sex, after which she was subjected to anal penetration. According to the author, the aggressor covered her mouth when she tried to scream and pinned her against the wall holding her arms, while the other two hid the scene with their jackets.

2.2 Immediately after the assault, the author went alone, in her blood-stained clothes, to the village police station, where she was kept waiting for approximately three hours before being sent to the local medical centre. When she arrived there, the author recounts that she was kept waiting again for several hours, standing up, before she was attended to. At around 4 a.m., she was subjected to a medical examination by the head of the medical centre, who performed anal and vaginal palpations which caused her intense pain. The medical report states that anal injuries were found which tallied with the violent assault that had occurred between 30 and 40 minutes prior to the examination. The author draws attention to the discrepancy between the time at which she was attended in the medical centre — approximately 4 a.m. — and the time entered in the medical report, which was 00.30 a.m. The author argues that this was an attempt to show that she was treated immediately, whereas, in actual fact, she was kept waiting for hours both in the police station and at the medical centre.

2.3 Worried about the author's absence, her family and several members of the Qom community started looking for her. When they found out what had happened, they met in front of the village police station, where the author's mother filed a complaint, written in Spanish and without any translation, despite the mother's difficulties in communicating in that language. Nevertheless, a judicial investigation was ordered; the three aggressors were arrested and the author was subjected to a forensic examination on 7 October. The report of the forensic physician of 7 October corroborated the conclusion of the medical report issued on 4 October. On 5 November 2003, a social worker was dispatched to the author's village "in order to enquire into lifestyles, habits and any other facts of interest" for the investigation. The author maintains that the social worker investigated only the victim, her family and her community, enquiring about her morals, but leaving aside the three accused.

2.4 After several months of police investigations, court proceedings were opened on charges of sexual abuse with carnal intrusion against the three individuals responsible. According to the author, neither she nor her family were informed of their right to appear as plaintiffs at the trial in accordance with articles 89 and 94 of the Code of Criminal Procedure of Chaco Province. The entire trial was conducted in Spanish, without interpreters, which hampered the testimony both of the victim and of other witnesses whose

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<sup>2</sup> According to the author, the original Toba people (who now refer to themselves as Qom) have been living on the economic, social and cultural margins of society since the end of the nineteenth century. After the so-called "desert campaign", the Qom members who survived the systematic killings that took place during that campaign were deprived of their lands, which were handed over to Creole farmers. The author maintains that this government policy strengthened racist attitudes towards the indigenous peoples among the colonists. According to the author, racial tensions were further aggravated after 2000, when the Qom communities were granted land titles to 140,000 hectares and the non-indigenous families occupying the lands were relocated elsewhere.

<sup>3</sup> The term "Creole" refers to non-indigenous citizens.

main language is Qom. Furthermore, the testimony of three members of the Qom community was not accepted on the grounds that their statements were “nonsensical” and influenced by “the local animosity between Creoles and Tobas”. In a judgement on 31 August 2004, the Second Criminal Chamber of the town of Presidencia Roque Sáenz Peña acquitted the three accused. The Chamber concluded that, while the fact of anal intrusion was proved and had even been admitted by the main person accused, it was not proven that such intrusion had not occurred with the author’s consent. The judgement states that “it would be difficult to speak of [the author’s] sexual inexperience considering that [her] defloration had occurred long ago” according to the two medical reports. The Court also concluded that the fact that the principal accused was of adult age was not a basis for concluding that the author had been taken advantage of.

2.5 According to the author, since they were not plaintiffs in the trial, neither she nor her legal representatives were notified of the judgement and, for that reason, they were unable to appeal against it. The only person who could appeal the judgement within 10 days of notification was the Public Prosecutor. As he did not do so, the judgement took effect on 16 September 2004. The author maintains that she was also unable to lodge an appeal in cassation or on grounds of unconstitutionality for the same reason, i.e., that those remedies were reserved for the parties to the proceedings and were subject to the 10-day deadline following notification of the judgement, in conformity with articles 446 and 477 of the Code of Criminal Procedure of Chaco. Lastly the author points out that an *amparo* remedy would not have been feasible either, since, according to National *Amparo* Act No. 16.986, the remedy is not effective against judicial acts. In addition, that law establishes a time frame of 15 working days for lodging an appeal. The author maintains that, in the light of all the above factors, domestic remedies have been exhausted.

2.6 The author points out that, since her family was not notified of the judgement, and since they live in a remote village, without telephone or Internet coverage and without public transport, at a distance of 250 km from Presidencia Roque Sáenz Peña, where the judgement was handed down, and accessible only by a mud road which is impassable in the rainy season, she was unable to find out the result of the judgement until almost two years had gone by. Seeing that the aggressors were still free, a group of youths of the indigenous association Meguexogochi<sup>4</sup> cycled 80 km to the locality of Castelli to reach a telephone in order to contact the National Human Rights Secretariat. On 4 July 2006, the Secretariat sent a request for information to the Second Criminal Chamber of Presidencia Roque Sáenz Peña. The Chamber replied to the request, informing the Secretariat of the acquittal. The author cites these reasons as justification for not bringing the case before the Committee until almost three years had passed.

2.7 According to the author, her case is by no means exceptional, since Qom girls and women are frequently exposed to sexual assault in the area, while the pattern of impunity that exists in regard to such cases is promoted by the prevalence of racist attitudes. The author adds that, in the opposite case, when a Creole woman says that she has been raped by a Qom, he is immediately arrested and sentenced.

### **The complaint**

3.1 The author claims that she was a victim of violations of article 2, article 3, article 7, article 14, paragraphs 1 and 5, article 17, article 24 and article 26 of the Covenant.

3.2 The author maintains that, because she was a girl and because of her ethnicity, she was a victim of discrimination on police premises, during the medical examination to which

<sup>4</sup> The indigenous association Meguexogochi is made up of eight Toba Qom communities.

she was subjected and throughout the trial. She asserts that she had to wait for several hours standing up and in tears before anyone attended to her at the police station. When she was in the medical centre, where she was also kept waiting for several hours, she was subjected to palpations in the injured parts of her body without consideration for the intense pain that this caused her and purely in order to check whether the experience was really painful. She was also subjected to a vaginal examination to check her virginity, despite the fact that the attack she had suffered required an anal examination only. The court that heard the case introduced the virginity of the victim as a decisive factor in the trial. According to the author, unlike her, the accused youths spoke freely, giving a crude account of the facts, without denying carnal intrusion but asserting that she was a prostitute — a fact which was never proved and which was discredited by the report that was submitted on her social environment — and the court immediately took their side. She maintains that all the witnesses were asked if the author had a boyfriend and if she worked as a prostitute. According to the author, the court took no account of the fact that she had to express herself in a language that was not her own while in a state of profound distress when it found inaccuracies and discrepancies in her statement and invalidated it, while at the same time overlooking the inaccuracies and contradictions in the statements of the accused. The author concludes that the trial was flawed by gender bias that favoured impunity.

3.3 The author maintains that, throughout the proceedings, she was treated in a way that showed no regard for the fact that she was a girl or for her honour and dignity.

3.4 According to the author, she was unable to play a proper part in the trial and was denied her right to a fair trial and to due process because she had not received the necessary legal advice and had not been informed of her right to appear as a plaintiff at the trial.

3.5 The author alleges that the acts of physical and mental violence perpetrated by State officials, both at court and at the police station and medical centre where she was attended, caused her physical and moral injury.

3.6 The author maintains that the social worker who was sent to investigate her case questioned the neighbours about her family life and her morality, thereby violating her privacy, her honour and her good name, especially since it is such a small community, and that she was re-victimized as a consequence.

#### **Request by the State party for an amicable settlement**

4.1 On 30 April 2008, the State party informed the Committee that the Government of the Province of Chaco had requested that the Ministry of Foreign Affairs establish contact in order to explore the possibility of an amicable settlement of the case by the parties at the national level. The State requested that the Committee transmit the proposal to the author. Without prejudice to that proposal, the State reserved the right to make observations on the admissibility and merits of the case.

4.2 On 9 May 2008, the State party re-sent its message of 30 April and included an annex containing a series of communications from various executive and judicial authorities of the Province of Chaco, admitting the full responsibility of the provincial government in the case and requesting the national Government to iron out the matter and begin to remedy the harm suffered by the author.

#### **Author's comments**

5. On 10 June 2008, the author complained that the national Government had not admitted responsibility for the violations that she had endured, whereas the provincial authorities of the Chaco had done so. The author expressed her willingness to negotiate but only on condition that the national Government should admit its full responsibility and should be prepared to discuss measures for granting full compensation to the author, her

family and her community, as well as measures and programmes at national level to avoid the recurrence of similar cases in the future.

#### **Provisional consideration of the proposed amicable settlement by the Committee**

6. The State party's proposal for an amicable settlement was examined at the Committee's ninety-third session, in July 2008. In the light of the observations submitted by the author on 10 June 2008, however, the Committee decided to continue to pursue the normal procedure for the consideration of the communication and to request the State party to submit its observations on the merits without delay.

#### **Additional observations of the parties**

7. On 8 September 2008, the State party informed the Committee that a meeting would be held among the author, members of her family, their representatives, and representatives of the national and provincial governments in order to initiate a dialogue with a view to arriving at an amicable settlement of the case.

8. On 12 November 2008, the author reported that, at the meeting held with the national and provincial authorities, the Government of the Province of Chaco accepted the author's claims in full and added the offer of housing for her and her family in the vicinity. The author also reported that, in a letter sent by the Governor of Chaco to the Ministry of Justice, the former had requested that the national Government share responsibility for meeting the costs of compensation. The author added that the draft proposal for an amicable settlement prepared by the national Government was partially unsatisfactory owing to the ambiguity of the compensation plan and the vagueness of the terms used. The author reiterated her claim to a clear and express recognition of responsibility on the part of the national Government.

9. On 24 November 2008, the State party informed the Committee that, in its communication of 9 May 2008, the Government of the Province of Chaco, which bore primary responsibility for the human rights violations in the present case, had clearly stated its position, acceding unconditionally and proposing the opening of a conciliatory dialogue with a view to arriving at an amicable settlement. The State party recognized its international responsibility in the present case, undertaking to make every effort, in coordination with the Province of Chaco, to make full reparation to the author.

10.1 On 1 February 2010, the author reported that, after several meetings with representatives of the national and provincial governments, the provincial government had accepted and implemented most of the compensatory measures requested by the author, namely, a public apology, the payment of compensation, the grant of land and housing titles, the award of a US\$ 150 study grant and the organization of a seminar on gender discrimination and violence against women, to be attended on a compulsory basis by all the judicial officials of the province. The author considered the attitude of the Government of the Province of Chaco to be a positive one. As far as the national Government was concerned, she stated that it had carried out one of the measures requested: the approval of a comprehensive national law on violence against women. However, other aspects of the amicable settlement proposed by the Government were, in the author's view, imprecisely worded, including the portion relating to an express recognition of responsibility by the national Government and the failure to specify the amount of financial compensation. On that basis, the author concluded that the efforts to reach an amicable settlement had not been successful owing to the vagueness of the Government's commitments, and she therefore rejected the proposed amicable settlement and requested that the Committee should continue to consider the case.

10.2 On 25 March 2010, the author expanded upon her comments regarding the amicable settlement agreement proposed by the State party, saying that the main outstanding measures included the award of a study grant to continue her studies (the amount offered being insufficient), the grant of a life pension and the offer of free psychological treatment. The author recognized that the initiation of compensation by the Government had had a positive effect on her life, but she insisted on the need for the complete implementation of all the measures contained in the agreement signed with the Government in order to achieve full reparation. The author pointed out that it was very important for the Committee to issue its Views in her case, as it was the first of its kind to be adjudicated. The author also emphasized the importance of emblematic cases in Argentina, above and beyond the question of reparations for victims, in promoting major legislative, judicial and social changes and ensuring that such events did not recur. She asked that the Committee issue a statement requesting the Government to honour all the obligations that it has assumed in the agreement signed with the author.

11.1 On 13 May 2010, the State party informed the Committee of the compensatory measures adopted as part of the amicable settlement entered into with the author, including the preparation of a bill for the award of a life pension, as well as the measures referred to by the author in her communication of 1 February 2010.

11.2 On 5 August 2010, the State party transmitted a copy of Act No. 6.551, issued under Provincial Decree No. 1202 of 24 June 2010, concerning the award of a life pension to the author, as well as an attestation that the monthly payment of the pension had begun.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

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

12.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

12.3 The Committee notes the author's argument regarding the impossibility of exhausting the existing domestic remedies, which were reserved for the parties to the proceedings and subject to short application deadlines, due to the fact that she was not informed of her right to act as a plaintiff and that she was not notified of the acquittal judgement. It also notes the author's allegations regarding the unavailability of *amparo* proceedings, which would appear to be inapplicable in respect of judicial acts under existing domestic legislation. In the absence of any counter-arguments from the State party in that respect, the Committee considers that the author did not have access to any effective remedy to lodge her complaint relating to article 14 at national level. The Committee also notes that the State party has not raised the issue of the exhaustion of domestic remedies in connection with any of the author's other complaints. The Committee therefore finds that all available domestic remedies have been exhausted, as stipulated in article 5, paragraph 2 (b), of the Optional Protocol.

12.4 With regard to the author's allegations concerning the violation of the right to a second hearing, which is recognized in article 14, paragraph 5, of the Covenant, the Committee points out that the paragraph referred to provides a procedural guarantee which is available to any person charged with an offence to have the conviction and sentence reviewed by a higher tribunal. In the present case, as the judgement took the form of an acquittal, that provision does not apply. The Committee therefore considers that the

author's complaint under article 14, paragraph 5, is incompatible with the Covenant and declares it inadmissible in accordance with article 3 of the Optional Protocol.

12.5 Regarding the author's complaints under articles 2; 3; 7; 14, paragraph 1; 17; 24; and 26, the Committee considers that they have been sufficiently substantiated for the purposes of admissibility and declares the communication admissible with respect to those complaints.

*Consideration of the merits*

13.1 The Human Rights Committee has examined the present communication, taking into account all the information provided by the parties, in accordance with the provisions of article 5, paragraph 1, of the Optional Protocol.

13.2 The Committee acknowledges the recognition of responsibility by the State party, including that of the provincial authorities, for violations of its international obligations. The following paragraphs express the Committee's understanding of the specific provisions of the Covenant that provide the basis for the responsibility of the State party in the present case.

13.3 The Committee takes note of the author's allegations to the effect that she was a victim of discrimination based on the fact that she was a girl and an indigenous person, both during the trial and at the police station and during the medical examination to which she was subjected. The author alleges that the personnel of the police station of El Espinillo kept her waiting for several hours, in tears and with traces of blood on her dress, and that they did not take down any complaint, being content in the end to hand her over to the local medical centre. The author further alleges that, once at the medical centre, she was subjected to distressing tests which were not necessary to determine the nature of the assault committed against her, but were instead aimed at determining whether or not she was a virgin. The court that heard the case also invoked discriminatory and offensive criteria, such as "the presence of long-standing defloration" of the author to conclude that a lack of consent to the sexual act had not been demonstrated. The author further maintains that all the witnesses were asked whether she was a prostitute. The Committee considers that all the above statements, which have not been contested by the State party, reflect discriminatory treatment by the police, health and judicial authorities aimed at casting doubt on the morality of the victim. The Committee observes, in particular, that the judgement of the Criminal Chamber of Presidencia Roque Sáenz Peña bases its analysis of the case on the sexual life of the author and whether or not she was a "prostitute". The Chamber also takes the author's loss of virginity as the main factor in determining whether she consented or not to the sexual act. In the light of the uncontested facts which the Committee has before it, the Committee concludes that these facts reveal the existence of discrimination based on the author's gender and ethnicity in violation of article 26 of the Covenant.

13.4 The Committee further considers that the way in which the author was treated by the judicial, police and medical personnel, as described above, demonstrates a failure on the part of the State to fulfil its obligation to adopt the measures of protection required by the author's status as a minor, recognized in article 24 of the Covenant.

13.5 The Committee takes note of the author's affirmation to the effect that, since she was not informed of her right to act as plaintiff under the provincial legislation in force, she was unable to participate as a party to the court proceedings and that, as a consequence, she was not notified of the acquittal. The author further alleges that several irregularities occurred during the trial of the three accused. In particular, according to the author, the proceedings were held entirely in Spanish, without interpretation, despite the fact that both she and other witnesses had difficulty communicating in that language. In view of the

failure by the State to respond to those allegations, the Committee finds that the author's right to enjoy access to the courts in conditions of equality, as recognized in article 14, paragraph 1, was violated.

13.6 Regarding the author's affirmations concerning the physical and mental suffering that she endured, the Committee considers that the treatment she received in the police station and in the medical centre just after being assaulted, as well as during the court proceedings, when many discriminatory statements were made against her, contributed to her re-victimization, which was aggravated by the fact that she was a minor. The Committee recalls that, as pointed out in its general comment No. 20 and its jurisprudence, the right protected by article 7 covers not only physical pain but also mental suffering.<sup>5</sup> The Committee concludes that the author was the victim of treatment of a nature that is in breach of article 7 of the Covenant.

13.7 Regarding the author's complaint related to article 17 of the Covenant, the Committee considers that the constant enquiries by the social worker, by medical personnel and by the court into the author's sexual life and morality constitute arbitrary interference with her privacy and an unlawful attack on her honour and reputation, all the more so because those enquiries were not relevant to the rape case and related to a minor. The Committee recalls its general comment No. 28, in which it points out that interference, in the sense in which the term is used in article 17, arises when the sexual life of a woman is taken into consideration in deciding the extent of her legal rights and protections, including protection against rape.<sup>6</sup> In view of the above, the Committee finds a violation of article 17 of the Covenant.

13.8 The Committee notes the author's allegations to the effect that no remedy was available that would allow her to lodge the complaints currently before the Committee because, under existing domestic legislation, *amparo* proceedings cannot be brought in respect of judicial acts. In the absence of any response on the part of the State to that affirmation, the Committee considers that the author, as a victim, was not guaranteed an effective remedy. The Committee therefore finds a violation of article 2, paragraph 3, of the Covenant, in conjunction with articles 3; 7; 14, paragraph 1; 17; 24; and 26.

13.9 The Human Rights Committee, acting in accordance with article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, considers that the State party has violated articles 3; 7; 14, paragraph 1; 17; 24; and 26; and article 2, paragraph 3, in conjunction with all the aforementioned articles, of the International Covenant on Civil and Political Rights.

14. The Committee takes note of the compensatory measures agreed upon between the author and the State party through the amicable settlement procedure. While recognizing the progress made by the State party in implementing several of those measures, the Committee requests full implementation of the agreed commitments. The Committee further recalls that the State party has the obligation to ensure that similar violations are not perpetrated in the future, in particular by guaranteeing access for victims, including victims of sexual assault, to the courts in conditions of equality.

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<sup>5</sup> General comment No. 20 on prohibition of torture and cruel, inhuman and degrading treatment or punishment (art. 7), 10 March 1992, para. 5. See also the Committee's decisions in the cases *K.N.L.H. v. Peru* (communication No. 1153/2003), para. 6.3, and *L.M.R. v. Argentina* (communication No. 1608/2007), para. 9.2.

<sup>6</sup> General comment No. 28 on equality of rights between men and women (art. 3), 29 March 2000, para. 20.

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15. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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

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