CCPR/C/OP/2

INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE under THE OPTIONAL PROTOCOL

Volume 2

Seventeenth to thirty-second sessions
(October 1982-April 1988)

UNITED NATIONS
New York, 1990

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UNITED NATIONS

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INTRODUCTION

1. The International Covenant on Civil and Political Rights and the Optional Protocol thereto were adopted by the General Assembly on 16 December 1966 and entered into force on 23 March 1976.

2. In accordance with article 28 of the Covenant, the States parties established the Human Rights Committee on 20 September 1976.

3. Under the Optional Protocol, individuals who claim that any of their rights set forth in the Covenant have been violated and who have exhausted all available domestic remedies may submit written communications to the Human Rights Committee for consideration. Of the 87 States that have acceded to or ratified the Covenant, 42 have accepted the competence of the Committee to receive and consider individual complaints by ratifying or acceding to the Optional Protocol.* These States are Argentina, Austria, Barbados, Bolivia, Cameroon, Canada, the Central African Republic, Colombia, Congo, Costa Rica, Denmark, the Dominican Republic, Ecuador, Equatorial Guinea, Finland, France, Gambia, Iceland, Italy, Jamaica, Luxembourg, Madagascar, Mauritius, the Netherlands, Nicaragua, Niger, Norway, Panama, Peru, Portugal, Saint Vincent and the Grenadines, San Marino, Senegal, Spain, Suriname, Sweden, Togo, Trinidad and Tobago, Uruguay, Venezuela, Zaire and Zambia. No communication can be received by the Committee if it concerns a State party to the Covenant which is not also a party to the Optional Protocol.

4. Under the terms of the Optional Protocol, the Committee may consider a communication only if certain conditions of admissibility are satisfied. These conditions are set out in articles 1, 2, 3 and 5 of the Optional Protocol and restated in rule 90 in the Committee's provisional rules of procedure, pursuant to which the Committee shall ascertain:

(*a*) That the communication is not anonymous and that it emanates from an individual, or individuals, subject to the jurisdiction of a State party to the Protocol;

(*b*) That the individual claims to be a victim of a violation by that State party of any of the rights set forth in the Covenant. Normally, the communication should be submitted by the individual himself or by his representative; the Committee may, however, accept for consideration a communication submitted on behalf of an alleged victim when it appears that the victim is unable to submit the communication himself;

(*c*) That the communication is not an abuse of the right to submit a communication under the Protocol;

(*d*) That the communication is not incompatible with the provisions of the Covenant;

(*e*) That the same matter is not being examined under another procedure of international investigation or settlement;

(*f*) That the individual has exhausted all available domestic remedies.

5. Under rule 86 of its provisional rules of procedure, the Committee may, prior to the forwarding of its final views on a communication, inform the State party on whether "interim measures" of protection are desirable to avoid irreparable damage to the victim of the alleged violation. A request for interim measures, however, does not imply a determination of the merits of the communication. The Committee has requested such interim measures in a number of cases, e.g. where the carrying out of a death sentence or the expulsion or extradition of a person, appeared to be imminent.

6. With respect to the question of burden of proof, the Committee has established that such burden cannot rest alone on the author of a communication, especially if one considers that the author and the State party do not always have equal access to the evidence, and that frequently the State party alone is in possession of the relevant information. It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities.

7. The Committee started its work under the Optional Protocol at its second session in 1977. From that session to the thirty-second session in the spring of 1988, 288 communications relating to alleged violations by 26 States parties were placed before it for consideration. The status of these communications is as follows:

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8. It is useful to note that the Committee is neither a court nor a body with a quasi-judicial mandate, like the organs created under another international Human Rights instrument, the European Convention on Human Rights (i.e., the European Commission of Human Rights and the European Court of Human Rights). Still, the Committee applies the provisions of the Covenant and of the Optional Protocol in a judicial spirit and, performs functions similar to those of the European Commission of Human Rights, in as much as the consideration of applications from individuals is concerned. Its decisions on the merits (of a communication) are, in principle, comparable to the reports of the European Commission, non-binding recommendations. The two systems differ, however, in that the Optional Protocol does not provide explicitly for

* As at 30 June 1988.

friendly settlement between the parties, and, more importantly, in that the Committee has no power to hand down binding decisions as does the European Court of Human Rights. States parties to the Optional Protocol endeavour to observe the Committee's views, but in case of non-compliance the Optional Protocol does not provide for an enforcement mechanism or for sanctions.

9. In its eleven years of existence, the Committee has received many more than the 288 registered communications mentioned above. The Secretariat regularly receives enquiries from individuals who intend to submit a communication to the Committee. Such enquiries are not immediately registered as cases. In fact, the number of authors who eventually resubmit their cases for consideration by the Committee under the Optional Protocol is relatively low, partly because the authors discover that their cases do not satisfy certain basic criteria of admissibility, such as the required exhaustion of domestic remedies, partly because they realize that a reservation or a declaration by the State party concerned may operate to preclude the Committee's competence to consider the case. These observations notwithstanding, the number of communications placed before the Committee each year is increasing steadily, and the Committee's work is becoming better known to lawyers, research workers and the general public. If this volume of *Selected Decisions* contributes to making the work of the Committee more generally known, it will have served a useful purpose.

10. The first step towards a wider dissemination of the Committee's work was the decision, taken during the seventh session, to publish its views, that publication was desirable in the interest of the most effective exercise of the Committee's functions under the Protocol, and that publication in full was preferable to the publication of brief summaries. In the Annual Reports of the Human Rights Committee, beginning with the 1979 report and up to the 1987 report, covering up to the thirtieth session inclusive, all of the Committee's views (76), a selection of 29 of its decisions declaring communications inadmissible, and one decision to discontinue consideration have been published in full.[1]

11. At its fifteenth session, the Committee decided to proceed with the periodical publication of a selection of its decisions under the Optional Protocol, including certain important decisions declaring communications admissible and other decisions of an interlocutory nature. Volume 1 of this series, covering decisions taken from the second to the sixteenth sessions, inclusive, was published in 1985 in English.[2] The present volume covers decisions taken from the seventeenth to the thirty-second sessions, inclusive. It contains all "views" adopted under article 5 (4) of the Optional Protocol, all decisions declaring communications inadmissible, one decision to deal jointly with communications, three decisions declaring communications admissible, two interim decisions requesting additional information from the author and State party and two decisions under rule 86 of the Committe's provisional rules of procedure, requesting interim measures of protection.

12. With regard to the publication of decisions relating to communications declared inadmissible or on which action has been discontinued; the names of the author(s) and of the alleged victim(s) are replaced by letters or initials. With respect to decisions of an interlocutory kind, including decisions declaring a communication admissible, the names of the author(s), the alleged victim(s) and the State party concerned may also be deleted.

13. Communications under the Optional Protocol are numbered consecutively, indicating the year of registration (e.g. No. 1/1976, No. 288/1988).

14. At its fifteenth session, the Human Rights Committee discussed the usefulness of publishing a digest of the Committee's jurisprudence as reflected in its final decisions. Such a digest would facilitate a systematic study of the Committee's interpretation of the provisions of the International Covenant on Civil and Political Rights and of the Optional Protocol thereto. Although the Committee has established a number of important precedents since 1977, its jurisprudence is still evolving. It is to be expected that in the course of the coming years, the Committee will issue the first volume of a digest of its jurisprudence.[3]

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[1] See *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 40* (A/34/40); *Thirty-fifth Session, Supplement No. 40* (A/35/40); *Thirty-sixth Session, Supplement No. 40* (A/36/40); *Thirty-seventh Session, Supplement No. 40* (A/37/40); *Thirty-eighth Session, Supplement No. 40* (A/38/40); *Thirty-ninth Session, Supplement No. 40* (A/39/40); *Fortieth Session, Supplement No. 40* (A/40/40); *Forty-first Session, Supplement No. 40* (A/41/40); *Forty-second Session, Supplement No. 40* (A/42/40).

[2] *Human Rights Committee, Selected Decisions under the Optional Protocol (Second to sixteenth sessions)*, New York, 1985 (United Nations publication, Sales No. E.84.XIV.2), hereinafter referred to as *Selected Decisions . . .*, vol. 1. French and Spanish versions were published in June 1988.

[3] For an introduction to the Committee's jurisprudence from the second to the twenty-eighth sessions, see A. de Zayas, J. Möller, T. Opsahl, "Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee" in *German Yearbook of International Law*, vol. 28, 1985, pp. 9-64. Reproduced by the United Nations Centre for Human Rights as Reprint No. 1, 1989.

INTERLOCUTORY DECISIONS

A. Decisions transmitting a communication to the State party (rule 91) and requesting interim measures of protection (rule 86)

Communication No. 210/1986*

Submitted by: X (name deleted) on 28 January 1986
Alleged victim: The author
State party: S
Date of decision: 21 July 1986 (twenty-eighth session)

Subject matter: Claim of innocence by individual sentenced to death—Petition for leave to appeal to the Judicial Committee of the Privy Council

Procedural issues: Interim measures of protection—Exhaustion of domestic remedies—Request for further information from State party

Substantive issues: Right to appeal—Right to seek pardon or commutation of sentence—Review of conviction and sentence

Articles of the Covenant: 6 (4) and 14 (5)
Article of the Optional Protocol: 5 (2) (b)
Rules of Procedure: 86 and 91

The Human Rights Committee,

Noting that the communication is submitted by a person under sentence of death,

Noting further the author's allegation that the Privy Council of S will no longer grant stays of execution to anyone whose time for filing papers for the Judicial Committee of the Privy Council in London has expired, and his expressed concern that a change from the earlier policy, allowing persons under death sentence to appeal to the Judicial Committee of the Privy Council after the time-limit for so doing has expired, may result in a warrant for his execution to be issued without further notice,

Wishing to be sufficiently informed about the relevant legislative provisions and orders in council concerning appeals procedures and implementation of death sentences in S before considering further the question of the admissibility of the present communication,

Relying on the willingness of the Government of S to co-operate with the Committee at this early stage in the consideration of the subject-matter,

Decides:

1. To request the State party, under rule 86 of the Committee's provisional rules of procedure, not to carry out the death sentence against the author, before the Committee, in the light of the State party's reply to the present decision, has had the opportunity to consider further at its next session, scheduled, at this time, to be held from 23 March to 10 April 1987, the question of admissibility of the present communication;

2. To transmit the communication to the State party under rule 91 of its provisional rules of procedure and to request the State party (*a*) to clarify whether persons sentenced to death have a right of appeal to the Privy Council in London or whether they must first apply for leave to appeal; (*b*) to clarify whether there is a statutory time-limit for filing such appeals or for seeking leave to so appeal; (*c*) to furnish the Committee with the text of the relevant legislative provisions and orders in council concerning appeals to the Judicial Committee of the Privy Council; (*d*) to clarify whether appeal to the Privy Council constitutes a first or second appeal in this instance; (*e*) to inform the Committee whether the author has, in fact, been allowed to appeal to the Privy Council in London; and (*f*) to inform the Committee whether persons sentenced to death may seek pardon or commutation of sentence up to the time of execution or whether there is a time-limit for applying for clemency;

3. To request the State party to provide the information sought not later than 10 December 1986;

4. That any reply received from the State party be communicated, for information, to the author of the communication or to his legal counsel, as may be indicated by him;

5. That this decision be communicated to the State party and to the author of the communication and his legal counsel.

* Not previously published in the annual report of the Human Rights Committee.

Communication No. 252/1987*

Submitted by: X (name deleted) on 9 September 1987
Alleged victim: The author
State party: S
Date of decision: 13 November 1987 (thirty-first session)

Subject matter: Claim of innocence by individual under death sentence, awaiting execution

Procedural issues: Interim measures of protection—Exhaustion of domestic remedies—Request for further information from author

Substantive issues: Fair trial—Review of conviction and sentence

Articles of the Covenant: 6 (4) and 14 (5)
Article of the Optional Protocol: 5 (2) (b)
Rules of Procedure: 86 and 91

Decision under rule 86 and rule 91

The Human Rights Committee,

Noting that the communication is submitted by a person under sentence of death, X,

Considering that further factual information would be needed from the author before the Committee can consider the question of the admissibility of the communication,

Relying on the willingness of the Government of S to co-operate with the Committee at this early stage in the consideration of the subject-matter,

Decides:

1. To transmit the communication, for information, to the State party and to request the State party, under rule 86 of the Committee's provisional rules of procedure, not to carry out the death sentence against X before the Committee has had an opportunity to consider further the question of the admissibility of the present communication;

2. To request the author (*a*) to describe, in as detailed a manner as possible, the treatment received at the Hunts Bay police station on 5 April 1984; (*b*) to specify when he was informed of the charges against him, and when he was brought before a judge or judicial officer; (*c*) to explain what he considers to have been unfair in the conduct of his trial and appeal; (*d*) to clarify whether he was assisted by a lawyer in the preparation of his defence and during the trial and appeal; (*e*) to clarify whether he had adequate opportunity to consult with his lawyer prior to and during the trial and appeal; (*f*) to clarify whether the witnesses against him were cross-examined; (*g*) to clarify whether he or his lawyer sought to have witnesses testify on his behalf and, if so, whether these witnesses were given the opportunity to testify under the same conditions as witnesses against him; (*h*) to elaborate on his allegation that only poor persons are on death row, because "they have neither money nor friends"; and (*i*) to clarify whether legal aid was offered to him during his trial and appeal and whether it is now available for petitioning for leave to appeal to the Judicial Committee of the Privy Council;

3. Further to request the author to provide the Committee with the text of the written judgement of the trial court and the written judgement of the Court of Appeal;

4. To request the author under rule 91 to provide the information sought not later than 1 February 1988;

5. That any reply received from the author be communicated to the State party for information;

6. That this decision be communicated to the author and to the State party.

* Not previously published in the annual report of the Human Rights Committee.

B. Decision to deal jointly with communications (rule 88)

Communications Nos. 146/1983 and 148-154/1983*

Submitted by: Kanta Baboeram-Adhin on behalf of her deceased husband, John Khemraadi Baboeram (146/1983), on 5 July 1983; Johnny Kamperveen on behalf of his deceased father, André Kamperveen (148/1983), on 31 July 1983; Jenny Jamila Rehnuma Karamat Ali on behalf of her deceased husband, Cornelis Harold Riedewald (149/1983), on 31 July 1983; Henry François Leckie on behalf of his deceased brother, Gerald Leckie (150/1983), on 31 July 1983; Vidya Satyavati Oemrawsingh-Adhin on behalf of her deceased husband, Harry Sugrim Oemrawsingh (151/1983), on 31 July 1983; Astrid Sila Bhamini-Devi Sohansingh-Kanhai on behalf of her deceased husband, Somradj Robby Sohansingh (152/1983), on 31 July 1983; Rita Dulci Imanuel-Rahman on behalf of her deceased brother, Lesley Paul Rahman (153/1983), on 4 August 1983; Irma Soeinem Hoost-Boldewijn on behalf of her deceased husband, Edmund Alexander Hoost (154/1983), on 4 August 1983

Alleged victims: John Khemraadi *Baboeram*, André *Kamperveen*, Cornelis Harold *Riedewald*, Gerald *Leckie*, Harry Sugrim *Oemrawsingh*, Somradj Robby *Sohansingh*, Lesley Paul *Rahman* and Edmund Alexander *Hoost*.

State party: Suriname

Date of decision: 10 April 1984 (twenty-first session)

Decision to deal jointly with eight communications

Rule 88 of the Committee's provisional rules of procedure

The Human Rights Committee,

Considering that communications Nos. 146/1983 and 148/1983 to 154/1983, concerning John Khemraadi Baboeram, André Kamperveen, Cornelis Harold Riedewald, Gerald Leckie, Harry Sugrim Oemrawsingh, Somradj Robby Sohansingh, Lesley Paul Rahman and Edmund Alexander Hoost, all relate to the same events, said to have taken place in December 1982 in Suriname,

1. *Decides*, pursuant to rule 88, paragraph 2, of its provisional rules of procedure, to deal jointly with these communications;

2. *Further decides* that this decision be communicated to the State party and to the authors of the communications.

* Not previously published in the annual report of the Human Rights Committee.

C. *Decisions declaring a communication admissible (Cases subsequently discontinued or withdrawn)*

Communication No. 94/1981*

Submitted by: L. S. N. (name deleted) on 6 April 1981
Alleged victim: The author
State party: Canada
Date of decision on admissibility: 30 March 1984 (twenty-first session)

Subject matter: Loss of Indian status by female Canadian citizen of Indian origin

Procedural issues: Inadmissibility ratione temporis—*Exhaustion of domestic remedies—Events prior to entry into force of the Covenant—Withdrawal of communication following legislative amendments*

Substantive issues: Minorities—Discrimination based on sex

Articles of the Covenant: 2 (1), 3, 23, 26 and 27
Article of the Optional Protocol: 5 (2) (b)

1. The author of the communication (initial letter dated 6 April 1981; further submissions of 26 May, 19 July and 26 November 1982 and 28 June 1983) is *L. S. N.*, a 26-year-old Canadian citizen of Indian origin, living in Canada. She states that she lost her Indian status in accordance with section 12 (1) (*b*) of the Indian Act, after having married a non-Indian on 30 August 1975. Pointing out that an Indian man who marries a non-Indian woman does not lose his Indian status, she claims that the Act is discriminatory on the grounds of sex and contrary to articles 2 (1), 3, 23 (1) and (4), 26 and 27 of the Covenant. As to the admissibility of the communication on the ground of exhaustion of domestic remedies, she states that she finds herself in the same situation as Sandra Lovelace (case No. 24/1977).[1] Sandra Lovelace, in her submission to the Committee, contended that she was not required to exhaust local remedies since the Supreme Court of Canada had held that, notwithstanding the provisions of the Canadian Bill of Rights providing for "equality before the law . . . without discrimination by reason of sex", section 12 (1) (*b*) was fully operative.

2. By its decision of 21 October 1982, 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. At the same time, the author was requested to furnish factual information in regard to her family and marital circumstances and in regard to any effect of loss of Indian status upon her participation in the life of the Indian community.

3. By a letter of 28 June 1983, the author points out that her communication is similar to that of Mrs. Lovelace in every respect, including the fact that her date of marriage was prior to the entry into force of the Covenant for Canada, and requests that the Committee find Canada in breach of article 27 of the Covenant as previously held in the case of Sandra Lovelace.

4.1. On 23 August 1983, the State party submitted its observations on the admissibility of the communication. It contests the admissibility of the communication in so far as article 26 of the Covenant is concerned, arguing that

> any claim by the author of the present communication that her rights to equality before the law or to the equal protection of the law have been violated is based on her loss of Indian status on 30 August 1975 as a result of the operation of s.12 (1) (*b*) of the Indian Act. Her loss of Indian status was final upon that date; any possible subsequent effects of that loss occurring after the coming into force of the Covenant in Canada were in regard to her family life or her participation in the life of the Indian community. In other words, such effects do not relate to Article 26 of the Covenant.

The State party does not contest the admissibility of "the portion of the communication relating to articles 23 and 27, . . . and also the portion relating to articles 2 (1) and 3, but only to the extent that they bear on the interpretation of articles 23 and 27".

4.2. In its submission Canada expresses its commitment to remove from the Indian Act "any provisions which discriminate against women or in some other way offend human rights", referring in particular to the work of a Parliamentary Sub-Committee on Indian Women which, in its report of 21 September 1982 recommended, *inter alia*, that the Indian Act should be amended so that Indian women no longer lose their Indian status upon marrying non-Indians and that Indian women who had previously lost their status should, upon application, be entitled to regain it. The State party affirms that "the necessary steps are now being taken to develop legislation to amend the Indian Act".

4.3. The State party recognizes that at present no domestic remedies are available to the author of the communication. It is, however, pointed out that as of

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* Not previously published in the annual report of the Human Rights Committee.

[1] Views adopted on 30 July 1981, *Selected Decisions. . .*, vol. 1, pp. 83-87.

April 1985 (when sect. 15 (1) of the Canadian Charter of Rights and Freedoms will come into effect), there will be an available domestic remedy in Canada for persons who feel that they have been discriminated against on the basis of sex by federal laws.

4.4. The State party also refers to several other provisions of the Constitution Act, 1982 "which are of relevance to the claims of the author of the communication". Particularly mentioned in this connection are sections 24, 25, 27 and 28 of the Act (protection of established rights and freedoms, interpretation of the Charter in a manner consistent with the preservation and enhancement of the multicultural heritage, equal rights for men and women and the right to a remedy before a court when rights guaranteed by the Charter have been infringed).

4.5. In addition, the State party stresses the need for more factual information in the case in order to enable it to make an adequate submission on the merits of the case. It requests in particular factual information in regard to the family and marital circumstances of the author, and in regard to any effect of loss of Indian status upon her participation in the life of the Indian community, as already requested from the author in paragraph 4 of the Committee's decision of 21 October 1982.

5.1. In a letter dated 27 October 1983, the author comments on the State party's submission, contesting in particular the State party's statement that the communication is inadmissible with respect to issues raised under article 26 of the Covenant. The author urges the Committee to consider the individual opinion annexed to case No. 24/1977, Sandra Lovelace, in this respect. The author also rejects as inappropriate the State party's contention that articles 2 (1) and 3 be considered only to the extent that they bear on the interpretation of articles 23 and 27. The author submits that the Committee should declare the communication admissible under articles 2 (1), 3, 23, 26 and 27.

5.2. In a further letter, dated 9 December 1983, the author furnished the following additional information relevant to her family and marital circumstances. She states that she is married, that prior to her marriage she had lived with her parents on the Tobique reserve, that she had been warned that she would not be allowed to live on the reserve if she married a white man, and that since her marriage she has lived in several different white communities. She also alleges in general terms the loss of cultural, political and economic rights as a result of the loss of her Indian status, without, however, any further explanations.

6. The Committee notes the State party's contention that the communication in so far as it relates to article 26 is inadmissible *ratione temporis*, because Mrs N's loss of Indian status was final before the entry into force of the Covenant for Canada. However, the Committee reserves for its examination of the merits the questions of interpretation and application of article 26 as well as of any other article which might be considered, such as article 12. This examination will depend on the submission by the author of more precise facts on which her claim of violation of the Covenant is based.

7. With regard to the exhaustion of domestic remedies, the Committee takes note of the State party's statement that no domestic remedies are available in the case. Accordingly, the Committee concludes that the communication is not inadmissible under article 5 (2) (*b*) of the Optional Protocol.

8. The Human Rights Committee therefore decides:

(1) That the communication is admissible in so far as it relates to events said to have continued or taken place on or after 23 March 1976, the date on which the Covenant and the Optional Protocol entered into force for Canada;

(2) That, in accordance with article 4 (2) of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(3) That any explanations or statements received from the State party shall be communicated by the Secretary-General to the author, under rule 93 (3) of the provisional rules of procedure of the Committee, with the request that any comments which the author may wish to submit thereon should reach the Human Rights Committee in care of the Centre for Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

(4) That the author shall be requested to furnish, within six weeks of the date of the transmittal to her of this decision, any additional factual information in regard to the communication, and in particular to specify more precisely the respects in which she alleges that the rights under article 23 of the Covenant to protection of the family, the rights guaranteed under article 27 to persons belonging to minorities with regard to culture, religion or language, and any other rights under the Covenant, have been violated in her case and the steps, if any, which she has taken to enable her to enjoy those rights in practice (see paras. 4.5 and 5.2 above);

(5) Any information received from the author pursuant to paragraph 4 above shall be transmitted to the State party to enable it to take that information into account in the preparation of its submission under article 4 (2) of the Covenant;

(6) That this decision be communicated to the State party and the author of the communication.

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At its twenty-sixth session, the Committee closed its examination of communication No. 94/12 following a letter of 31 July 1985 by the author withdrawing the communication in view of the abrogation of article 12 (1) (b) *of the Indian Act. See in this connection HRC 1983 report, pp. 249* et seq.

Communication No. 125/1982*

Submitted by: M. M. Q. (name deleted) on 10 August 1982
Alleged victim: The author
State party: Uruguay
Declared admissible: 6 April 1984 (twenty-first session)

Subject matter: Confiscation of passport by consulate

Procedural issues: Individual subject to State's jurisdiction—Competence of the HRC

Substantive issues: Renewal of passport—Freedom of movement

Article of the Covenant: 12
Article of the Optional Protocol: 1

1. The author of the communication (initial letter dated 10 August 1982 and a further letter dated 20 September 1983) is M. M. Q., a Uruguayan citizen, living at present in Barcelona, Spain, alleging that she is a victim of a breach by Uruguay of articles 2 (1), 12 and 19 (1) of the International Covenant on Civil and Political Rights.

2.1. The author, a teacher, states that she lives outside Uruguay because of the political persecution which opponents of the present régime generally face in Uruguay. She adds that she left the country with a valid Uruguayan passport. Upon expiration of this passport she was issued a new passport (No. 047343) by the Uruguayan Consulate General in Rome, Italy, on 2 May 1980.

2.2. The author submits that on 21 June 1982 she presented herself at the Uruguayan Consulate in Barcelona and requested a certificate of her Uruguayan citizenship which she needed for an entry visa to France. She was requested by the consular officer to present her passport, which the consular officer subsequently refused to return, indicating to her that the passport had been wrongly issued because she figured on "the lists". No further explanation was given. A letter dated 23 June 1982, which Mrs. M. M. Q. sent to the Uruguayan Consulate through a notary public by registered mail and in which she asked that her passport be returned or a written explanation given for its retention, remained unanswered.

2.3. The author claims that the confiscation of her valid passport by the Uruguayan Consulate in Barcelona, Spain, constituted an "illegal seizure" *(apropiación indebida).*

2.4. She affirms that there are no domestic remedies which could be effectively pursued in her case. She also indicates that she has not submitted the same matter to another procedure of international investigation or settlement.

3. By its decision of 4 October 1982 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 15 March 1983 the State party objects to the competence of the Human Rights Committee on the ground that the communication does not meet the requirements for admissibility laid down in article 1 of the Optional Protocol as M. M. Q. "is not subject to the jurisdiction of the State against which she is making her allegations".

5. In her comments dated 20 September 1983 the author rejects the State party's contention that the communication is inadmissible because she does not come within its jurisdiction in the matter concerned. She maintains that with respect to the granting of a passport, the Uruguayan authorities are fully competent to issue a passport outside Uruguay as well as inside.

6.1. The Human Rights Committee does not accept the State party's contention that it is not competent do deal with the communication because the author does not fulfil the requirements of article 1 of the Optional Protocol. The question of the issue of a passport by Uruguay to a Uruguayan national, wherever he may be, is clearly a matter within the jurisdiction of the Uruguayan authorities and he is "subject to the jurisdiction" of Uruguay for that purpose.

6.2. The Committee finds, on the basis of the information before it, that it is not precluded by article 5 (2) (*a*) of the Optional Protocol from considering the communication. The Committee is also unable to conclude that, in the circumstances of this case, there are effective domestic remedies available to the alleged victim which she has failed to exhaust. Accordingly, the Committee finds that the communication is not inadmissible under article 5 (2) (*b*) of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(1) That the communication is admissible;

(2) That, in accordance with article 4 (2) of the Protocol, the State party shall be requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(3) That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Protocol must primarily relate to the substance of the matter under consideration, and in particular the specific violations of the Covenant alleged to have occurred;

(4) That any explanations or statements received from the State party shall be communicated by the Secretary-General to the author of the communication under rule 93 (3) of the provisional rules of procedure of the Committee with the request that any additional observations which she may wish to submit should reach the Human Rights Committee, in care of the Centre for Human Rights, United Nations Office at Geneva, within six weeks of the date of transmittal;

* Not previously published in the annual report of the Human Rights Committee.

(5) That this decision be communicated to the State party and to the author of the communication.

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At its twenty-sixth session the Committee discontinued its examination of communication No. 125/1982 following the receipt of a letter from the author, dated 2 December 1985, indicating that a new passport had been issued to her after the change of Government in Uruguay, that she had returned to her country, and requesting the Committee to consider the case closed.

Communication No. 131/1982*

Submitted by: N. G. (name deleted) on 29 December 1982
Alleged victim: D.C.B.
State party: Uruguay
Declared admissible: 25 July 1984 (twenty-second session)

Subject matter: Detention of Uruguayan citizen by military authorities

Procedural issues: Standing of author—Exhaustion of domestic remedies

Substantive issues: Physical and psychological torture—Detention incommunicado

Articles of the Covenant: 7 and 10
Articles of the Optional Protocol: 1 and 5 (2) (b)

1.1. The author of the communication (initial letter dated 29 December 1982 and further letters of 30 May 1983 and 4 January 1984) is N. G., an Austrian citizen (since 1981), residing at present in Austria. She submits her communication on behalf of D. C. B., a Uruguayan worker detained in Libertad prison.

1.2. The author alleges that Mr. D. C. B. was arrested by members of the Uruguayan security forces in front of his place of work in Montevideo on 23 March 1982. His family was informed only eight months later of his detention at Libertad prison to which he allegedly was transferred after having been held incommunicado and under torture at the Cavalry Regiment No. 4. (His family could discern torture marks when first visiting him in prison.) The author further states that prison visits for the family are rare and take place without direct contact with the prisoner, by telephone, in wire-tapped booths, under the control of women prison guards. The author adds that after each visit the tape-recorded conversations are studied by psychiatrists. She also states that every two weeks Mr. D. C. B. is permitted to write a one-page letter to his family, which is, however, subject to arbitrary censorship by prison officials. (The author encloses a copy of the only letter received by Mr. D. C. B.'s family by the time of the submission of the case to the Human Rights Committee. Mr. D. C. B. had not yet been brought to trial.)

1.3. As far as the exhaustion of domestic remedies is concerned, Mrs. N. G. affirms that a request for *habeas corpus* submitted by the family immediately after Mr. D. C. B.'s disppearance and a *solicitud de aparecimiento* introduced a month later remained without result; and that consequently all available domestic remedies have been exhausted in the case.

1.4. The author also states that, before submitting the case to the Human Rights Committee, efforts had been undertaken, without avail, to bring the case before the International Committee of the Red Cross, Amnesty International and the Austrian Red Cross.

1.5. The author claims that Mr. D. C. B. is a victim of a breach by Uruguay of articles 2, 3, 7, 9 10, 16, 19 and 26 of the International Covenant on Civil and Political Rights.

2. By its decision of 17 March 1983 the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party, requesting information and observations relevant to the admissibility of the communication and asking for copies of any court orders or decisions relevant to this case. The author was also requested to furnish detailed information as to the grounds and circumstances justifying her acting on behalf of the alleged victim.

3. In response to the Working Group's request, the author informed the Committee by letter of 30 May 1983 that she was acting at the request of the alleged victim's family, in view of her long-standing friendship with them. In addition the author gave the name and address of the alleged victim's wife, in case the Committee should wish to contact her in order to verify the author's standing to submit a communication on behalf of Mr. D. C. B. By letter dated 16 June 1984, the alleged victim's wife confirmed the authority of N. G. to act in the case before the Human Rights Committee.

4. In its submission under rule 91, dated 8 November 1983, the State party objects to the admissibility of the case because "the appropriate procedural remedies in this instance have not been exhausted, since the case is pending judgement". The Government of Uruguay also comments on the author's submission, stating that "it considers the language of the communication inappropriate, in that it uses expressions such as 'concentration camp' to refer to Military Detention Establishment No. 1, which amply meets the

* Not previously published in the annual report of the Human Rights Committee.

requirements of a detention centre that is a model of its kind. Moreover, it should be emphasized that Mr. D. C. B. was not subjected to any kind of physical or psychological coercion and was at all times treated in accordance with the applicable legal provisions. Lastly, it should be pointed out that this person was committed to stand trial for the offences of 'subversive association' and 'action to upset the Constitution in the degree of conspiracy followed by preparatory acts', under the Military Penal Code."

5.1. In a further submission dated 4 January 1984, the author comments on the State party's submission and alleges that political prisoners at the "Military Detention Centre No. 1" take a physical and psychological battering, as illustrated by the following general examples:

A. The selective and arbitrary use of punishment, including confinement for up to three consecutive months in "punishment cells" compounded by the fact that prisoners are not generally informed of the reasons for such punishment. It necessarily follows that there is no possibility of avoiding such punishment.

B. Of the same order are the surprise searches of cells carried out at night, during which personal belongings are stolen and/or destroyed, and the super-aggressiveness of the guards on duty.

C. In addition, there are many cases in which the officer responsible for the custody and welfare of prisoners has himself participated in the interrogation and torture of a prisoner at other detention centres, a practice which generates pathological anxiety in the prisoner.

D. Another variety of violence is the obligatory sharing of a cell with prisoners who are under psychiatric treatment. One well-known case is that of José M. S., who refused to share his cell with someone who, as well as being a danger to a normal prisoner, was putting his own mental health at risk; as a result, José M. S. was held in a punishment cell for 130 days and, on conviction, exactly two years more were added to his sentence.

E. Needless to say, medical assistance is in flagrant contradiction with Hippocratic ethics, since prisoners suffering from psychological problems or psychiatric illnesses (mainly on the second floor) are not allowed out for more than one hour per day and are given no treatment other than the enforced injection of psychotropic drugs, which are very dangerous because of their side-effects.

With regard to the psychological variety of torture, mention may be made of:

(*a*) The arbitrary suspension of family visits;

(*b*) The arbitrary suspension of correspondence;

(*c*) The excessive censorship of correspondence;

(*d*) The strict ban on any communication between prisoners, including prisoners linked by family ties;

(*e*) Degrading work by way of punishment.

5.2. With regard to the specific case of the alleged victim, the author refers to a letter dated 21 November 1982 from Dr. B. C. B. stating that when he visited his brother and client in jail, "I also witnessed the torture to which he was subjected". No details are however provided in this respect.

6. On the basis of the information before it, the Committee finds that it is not precluded by article 5 (2) (*a*) of the Optional Protocol from considering the communication, as there is no indication and the State party has not claimed that the same matter is currently being examined under another procedure of international investigation or settlement. As to the question of exhaustion of domestic remedies, the Committee notes that, although the trial of D. C. B. is pending, the allegations of violations of the Covenant relate to his detention incommunicado for eight months, from March to November 1982, during which time his whereabouts were not made known to his family and to ill-treatment in prison, in respect of which the State party has not shown that there is or was an effective domestic remedy which the alleged victim has failed to exhaust. The Committee therefore is unable to conclude that in the circumstances of this case there are domestic remedies which could have been effectively pursued with respect to these alleged violations. Accordingly, the Committee finds that the communication is not inadmissible under article 5 (2) (*a*) and (*b*) of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(1) That the author is justified in acting on behalf of D. C. B.

(2) That the communication is admissible with respect to allegations of ill-treatment and detention incommunicado;

(3) That, in accordance with article 4 (2) of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(4) That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stresses that, in order to perform its responsibilities, it requires specific responses to the allegations which have been made by the author of the communication and the State party's explanations of the actions taken by it. The State party is again requested to enclose copies of any court orders or decisions of relevance to the matters under consideration, and also (*a*) to inform the Committee whether the alleged victim has been brought before the military judge of first instance in person and what are the relevant laws and practices in this respect and (*b*) to inform the Committee as to the outcome of the trial of first instance of D. C. B. and whether the judgement of the court of first instance is subject to appeal;

(5) That any explanations or statements received from the State party shall be communicated by the Secretary-General under rule 93 (3) of the provisional rules of procedure of the Committee to the author, with the request that any comments which she may wish to submit thereon should reach the Human Rights Committee in care of the Centre for Human Rights, United Nations Office at Geneva, within six weeks of the date of transmittal;

(6) That this decision be communicated to the State party and to the author of the communications.

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At its twenty-fourth session the Committee discontinued examination of communication No. 131/1982 following the receipt of a letter from the author, dated 17 January 1985, indicating that the alleged victim had been released and requesting the Committee to consider the case closed.

D. Interim decisions after admissibility decision

Communication No. 107/1981*

Submitted by: María del Carmen Almeida de Quinteros on 17 September 1981
Alleged victim: Elena Quinteros Almeida (author's daughter)
State party: Uruguay
Date of interim decision: 15 October 1982 (seventeenth session)

Procedural issues: State party's duty to investigate—Request for further information—Sufficiency of State party's reply under article 4 (2) of the Optional Protocol

Article of the Optional Protocol: 4 (2)

The Human Rights Committee,

Noting that the author of the communication has submitted detailed information, including eyewitness testimonies, concerning the detention of her daughter, Elena Quinteros,

Taking note also of the brief information submitted by the State party on 14 June and 13 August 1982, to the effect that Elena Quinteros has been sought throughout Uruguay since 8 May 1975 and that the Government of Uruguay had no part in the events described by the author of the communication,

Concerned, however, that the State party has made no attempt to address in substance the serious and corroborated allegations made against it, but merely denies any knowledge thereof,

Concluding, that the information furnished by the State party, so far, is insufficient to comply with the requirements of article 4 (2) of the Optional Protocol,

1. *Urges* the State party, without further delay and with a view to clarifying the matters complained of, to conduct a thorough inquiry into the allegations made and to inform the Human Rights Committee of the outcome of such inquiry not later than 1 February 1983, in care of the Centre for Human Rights, United Nations Office at Geneva;

2. *Decides*, that any reply received from the State party pursuant to operative paragraph 1 above shall be transmitted to the author of the communication to enable her to comment thereon if she so wishes. Any such comments should reach the Human Rights Committee, in care of the Centre for Human Rights, United Nations Office at Geneva, within four weeks of the date of transmittal;

3. *Further decides*, that this decision shall be communicated to the State party and to the author of the communication.

* Not previously published in the annual report of the Human Rights Committee.

Communication No. 155/1983*

Submitted by: Eric Hammel on 1 August 1983
Alleged victim: The author
State party: Madagascar
Date of interim decision: 2 April 1986 (twenty-seventh session)

Procedural issues: Insufficiency of submissions from both author and State party—Request for further information

Article of the Optional Protocol: 4 (2)

The Human Rights Committee,

Noting the information placed before it by the parties, including the information furnished after the communication was declared admissible on 28 March 1985, that is, the author's submission of 18 September 1985, the State party's submission of 27 September 1985, the author's comments of 17 October 1985 and the State party's further observations of 13 January 1986,

Noting the observation of the State party that the two applications lodged by the author with the Administrative Chamber of the Supreme Court, one concerning the Postal Administration and the other for the abrogation of the expulsion order, are still pending,

Noting the State party's observation that the author could have sought review of the expulsion order pursuant to articles 6 and 15 of Act No. 62-006,

* Not previously published in the annual report of the Human Rights Committee.

Noting further the author's comment that, in the circumstances of his expulsion, it was materially impossible for him to avail himself of the remedy provided for by Act No. 62-006 within the stipulated eight-day time limit, considering that he was notified of the expulsion order at 2 p.m. on Thursday, 11 February 1982, and that he was expelled a few hours later on the same day,

Wishing to be further informed on the points noted above,

Decides:

1. That the author of the communication be requested to clarify further why he did not pursue the remedy provided for in Act No. 62-006 during the week from 12 to 19 February 1982;

2. That the State party be requested to indicate when the proceedings lodged by Maître Eric Hammel before the Administrative Chamber of the Supreme Court are expected to be concluded, if pursued in a timely fashion by the parties;

3. That the State party be requested further to inform the Committee as to the reasons for Maître Hammel's expulsion at such short notice, without his being able to seek review of the decision to expel him prior to his expulsion;

4. That both parties be requested to provide the Committee with the information and clarifications sought within two months of the transmittal to them of the present decision, in care of the Centre for Human Rights, United Nations Office at Geneva;

5. That any information or clarifications received from either party pursuant to this decision be communicated to the other party for information;

6. That this decision be communicated to the State party and to the author of the communication.

FINAL DECISIONS

A. Reversal of decisions on admissibility

Communication No. 113/1981

Submitted by: C. F. *et al.* (name deleted) on 10 December 1981
Alleged victims: The authors
State party: Canada
Declared admissible: 25 July 1983 (nineteenth session)
Declared inadmissible: 12 April 1985 (twenty-fourth session) setting aside the earlier decision on admissibility

Subject matter: Denial of right to vote to inmates of federal penitentiaries in Canada

Procedural issues: Review of admissibility decision —Inadmissibility due to mootness—Non-exhaustion of domestic remedies

Substantive issues: "Effective remedy"—Exercise of the right to vote of prisoners—Declaratory judgement—Available remedy

Articles of the Covenant: 1, 2 (1), 2 (3) and 25
Article of the Optional Protocol: 5 (2) (b)
Rule of Procedure: 93 (4)

1. The authors of the communication (initial letter of 10 December 1981 and further letter of 3 June 1983) are C. F., M. L. and J.-L. L., three Canadian citizens detained at the time of submission in different federal penitentiaries in the province of Quebec, Canada, alleging a breach by Canada of article 25 (*b*), and article 2, paragraphs 1 and 3 (*b*), of the International Covenant on Civil and Political Rights, relating to the general provincial elections held in Quebec on 13 April 1981. The object of the communication is to vindicate their right to vote in the Quebec provincial general elections held on 13 April 1981 and to ensure that prisoners can exercise their right to vote in any elections which may be held in the future, whether federal or provincial.

2. The facts of the case were set out in detail in the Committee's decision of 25 July 1983 by which it declared the communication to be admissible. In the following, only a summary account will be given.

3.1. On 19 August 1976, the International Covenant on Civil and Political Rights and the Optional Protocol thereto entered into force for Canada. In order to bring the Quebec Election Act into conformity with the provisions of article 25 of the Covenant, several amendments to the Act were adopted by the National Assembly of Quebec on 13 December 1979, establishing, *inter alia*, the right of every inmate to vote in general elections in Quebec and adding special provisions relating to voting procedures for inmates (arts. 51-64 of the Election Act, 1979). Article 64 of this Act provided in particular that . . . "to allow inmates to exercise their right to vote, the Director General of Elections may make any agreement he considers expedient with the warden of any house of detention established under an Act of Parliament of Canada or of the Legislature". In view of the upcoming general provincial elections in Quebec on 13 April 1981, the Director General of Elections of Quebec, on 11 March 1981, concluded an agreement pursuant to article 64 of the Election Act with representatives of the wardens of the provincial detention centre of Quebec concerning the voting of the detainees of provincial detention centres.

3.2. To enable the voting of detainees of federal penitentiaries in Quebec at general elections, an agreement similar to the one concluded between the wardens of provincial detention centres and the Director General of Elections of Quebec was required between the Solicitor General of Canada, as head of the federal penitentiary system, and the appropriate provincial authorities, in the specific case the Director General of Elections of Quebec. The Director General of Elections of Quebec therefore contacted the Solicitor General's Office suggesting the conclusion of an administrative agreement concerning the voting of inmates of federal penitentiaries in the province of Quebec. In a letter dated 4 March 1981, the Solicitor General of Canada informed the Director General of Elections of Quebec, his decision not to conclude, for the time being, such an administrative agreement which would permit detainees in federal penitentiaries to vote in general provincial elections. He argued that that matter still required further study.

3.3. Prompted by this negative decision of the Solicitor General of Canada, the authors, on 26 March 1981, filed a request for a temporary injunction (*"requête et injonction provisoire interlocutoire et pour une audience urgente"*), on their own behalf and as authorized representatives of co-detainees, with the Federal Court of Canada, division of first instance, asserting that under the Election Act of Quebec they were fully entitled to vote in the forthcoming general election in Quebec. They claimed that the decision of the Solicitor General of Canada not to permit inmates of federal penitentiaries to vote in provincial general elections was discriminatory because it prevented them,

as inmates of federal penitentiaries in Quebec, from casting their vote in the forthcoming general elections on 13 April 1981, while inmates of provincial detention centres were allowed to do so. In substantiation of their claim they referred to domestic laws in Canada (*"Code civil"* of Quebec (art. 18) and *"Charte des droits et libertés de la personne"* (art. 22)), as well as to international instruments which Canada had ratified, specifically the International Covenant on Civil and Political Rights, which provide for the enjoyment of the right to vote without discrimination. They requested, *inter alia*, that their right to vote be recognized and the Solicitor General of Canada be advised to stop obstructing the exercise of the applicants' right to vote, seeking prompt action by the court to ensure that the administrative arrangements for their full participation in the general elections of 13 April 1981 could be made in time.

3.4. On 30 March 1981, the authors' request for an injunction was rejected by the federal court of first instance, for reasons of "form" and of "substance". In his opinion on the rejection of the request the judge stated, *inter alia*, that the "right to vote" of detainees in federal penitentiaries was not contested in the decision of the Solicitor General which concerned the "exercise" of this right during detention, a condition which normally affected the civil rights of a person in certain respects. He also pointed out that the Quebec Election Act, *"dans sa forme et dans son esprit"*, acknowledged the necessity of an agreement (*"entente"*) in order to allow inmates the exercise of the right to vote; such agreement could not be forced upon the Federal Government by provincial authorities.

3.5. The authors indicate that they did not appeal this decision before the Federal Court of Appeal. They claim that in the circumstances of their specific case, an appeal would have proven totally useless and futile, because the deadline for effective participation in the general elections in Quebec on 13 April 1981 expired the very day of the court of first instance's decision.

4.1. By a note dated 30 August 1982, the State party objected to the admissibility of the communication on the grounds that the authors had failed to exhaust domestic remedies as required by article 5, paragraph 2 (*b*), of the Optional Protocol; and that the communication was without object or moot and therefore inadmissible under article 1 of the Optional Protocol.

4.2. As regards the non-exhaustion of domestic remedies, the State party argues that the authors, by seeking an interlocutory decision against the Solicitor General's negative reply, had chosen an inappropriate remedy and that instead they should have applied for a declaratory judgement as to their right to vote. The State party claims that such a declaration would have been an "effective and sufficient" remedy according to international jurisprudence and Canadian legal practice. The State party admits that it could be argued that there was not sufficient time to get a declaratory judgement before the Quebec provincial elections of 1981 were held and that therefore a declaration was not an effective remedy in regard to the present communication. The State party, however, argues that the real object of the communication is to assert the right of inmates in federal penitentiaries in relation to future elections (see para. 1 above) and therefore concludes that it was not "too late" for the authors to seek a declaration of their rights in the domestic courts to achieve this object of their claim. Consequently, domestic remedies had not been exhausted.

4.3. The State party also argues that the authors, after the entry into force of the Canadian Charter of Rights and Freedoms on 17 April 1982, should have sought the remedy granted in section 24 (1) of the Charter whenever one of its substantive provisions is alleged to have been violated. Since the Charter recognizes the right to vote (sect. 3), the authors would have obtained full redress in respect of any future elections.

5.1. On 7 June 1983, the authors of the communication forwarded their comments in reply to the State party's submission under rule 91 of the provisional rules of procedure. They refute the State party's contention that the communication is inadmissible on grounds of non-exhaustion of domestic remedies and mootness of the object of the communication.

5.2. As regards the first, the authors maintain that the period available was not long enough to allow them to have recourse to the remedy of a declaratory judgement before the elections of 13 April 1981. They submit that, after the elections, in the state of the law as it was before the adoption of section 3 of the Constitution Act of 1982, an action for a declaratory judgement did not constitute an effective and sufficient domestic remedy ensuring respect for their right to vote. They refer in this connection to Canadian jurisprudence in the case of *John Ernest McCann et al.* v. *The Queen and Dragan Cernetic*, head of a penitentiary institution in British Columbia, (1976) IC.F.570, concerning inmates' claims that they had been subjected to cruel and unusual punishment or treatment in a special unit of the prison. They argue that a declaratory judgement delivered by Judge Heald at first instance of the Federal Court of Canada on 30 December 1975 in favour of the inmates' claims did not relieve the prison situation, nor did it affect the treatment of prisoners in other Canadian institutions in the future. The authors conclude that this case shows that a declaratory judgement would be pointless in their case, which is similar, because execution of such judgement would depend entirely on the decisions of the Solicitor General.

5.3. Referring to the State party's argument that, since 17 April 1982, a remedy is available to the authors under sections 3 and 24* of the Canadian Charter of Rights and Freedoms, the authors point out that, while "section 3 of the Charter recognizes the right of every Canadian citizen to vote, it is to be noted that the remedy provided for in section 24 is available to the victims of a violation for the purpose of obtaining redress". They stress "that this remedy would be available to them only if they were victims in the future of a further violation of their right to vote", adding that

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* Section 24 (1) provides for remedies when a provision of the Charter is violated:

"Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

"the purpose of the present communication is to prevent such an occurrence, and there does not at present exist a domestic remedy that is effective and sufficient from the point of view of paragraph 2 (*b*) of article 5 of the Optional Protocol".

6.1. On 25 July 1983, the Committee declared the communication to be admissible. At the same time, however, it drew the attention of the State party concerned to rule 93 (4) of the Committee's provisional rules of procedure according to which a decision that a communication is admissible may be reviewed in the light of any pertinent information received at a later stage.

6.2. With regard to article 5, paragraph 2 (*b*), of the Optional Protocol the Committee observed that, although the authors might not have been able to obtain a declaratory judgement before the elections of 13 April 1981, a subsequent judgement could nevertheless in principle have been an effective remedy in the meaning contemplated by article 2, paragraph 3, of the Covenant and article 5, paragraph 2 (*b*), of the Optional Protocol. The Covenant provides that a remedy shall be granted whenever a violation of one of the rights guaranteed by it has occurred; consequently, it does not generally prescribe preventive protection, but confines itself to requiring effective redress *ex post facto*. However, the Committee was of the view that the Canadian Government had not shown that an action for a declaratory judgement would have constituted an effective remedy either with regard to the elections of 13 April 1981 or with regard to any future elections. On the basis of the Government's submission of 20 August 1982, it was not clear whether an action seeking to have declared unlawful the refusal of the competent prison authorities to let the alleged victims participate in the elections of 13 April 1981 would have been admissible. On the other hand, taking into account the authors' submission received on 7 June 1983, the Committee expressed doubt as to whether, and to what extent, executive authorities in Canada are bound to give effect to a declaratory judgement in similar circumstances arising in the future. Since it is incumbent on the State party concerned to prove the effectiveness of remedies which it claims have not been exhausted, the Committee concluded that article 5, paragraph 2 (*b*), of the Optional Protocol did not preclude the admissibility of the communication.

7.1. By a note dated 17 February 1984, the State party invoked rule 93 (4) of the Committee's provisional rules of procedure, which provides that "the Committee may review its decision that a communication is admissible in the light of any explanation or statements submitted by the State party pursuant to this rule". In doing so, the State party specifically relied on that part of the Committee's decision on admissibility indicating the possibility of review.

7.2. Referring to the Committee's conclusion that the State party had not established that a declaratory judgement was an available domestic remedy in the circumstances of the case, the State party now submits, *inter alia,*

that an action seeking to have declared unlawful the refusal of the competent prison authorities to let the alleged victims participate in the election of 13 April 1981 would have been admissible in the Federal Court, Trial Division. . . . In particular, Canada contends that the action would not have been dismissed on any of the following preliminary grounds:

(i) that a declaration is not available against the Crown;
(ii) that it would pertain to events concluded in the past, in regard to which no practical remedy or consequential relief was any longer available; or
(iii) that it did not disclose a reasonable cause of action.

In regard to (i), it is well established in Canadian law that a declaration may be granted against the Crown (*The King* v. *Bradley* [1941] S.C.R. 270). The statutory basis for granting such a declaration is section 18 of the *Federal Court Act*, R.S.C. 1970 2nd Supp. c. 10, which reads as follows:

"18. The Trial Division has exclusive original jurisdiction

"(*a*) to issue an injunction, writ of *certiorari*, writ of *mandamus*, or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

"(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada to obtain relief against a federal board, commission or other tribunal."

Indeed, in *McCann* v. *The Queen*, the case cited by the authors of this communication, a declaration was granted against the Crown.

In regard to (ii), Canada notes that the fact that the declaration would pertain to events concluded in the past, in regard to which no practical remedy or consequential relief was any longer available, would not render an action for a declaration inadmissible. Again, the *McCann* case provides authority for this point. The plaintiffs in that case were no longer being held in solitary confinement units at the time that the court considered their case. Nevertheless, the declaration was not refused on the ground that it would be of no practical utility. Rather, Heald, J., noted that it would provide practical guidance for the future as to the acceptable nature of solitary confinement units. . . .

Similarly, in the present case, although it is too late to provide the authors of the communication with the opportunity to vote in the 1981 Quebec election, a declaration that the Solicitor General had acted illegally would certainly give him practical guidance as to the course he should take in regard to future Quebec elections.

Canada also notes that in *Solosky* v. *The Queen* [1980], 1 S.C.R. 821, the Supreme Court of Canada indicated at 830 that so long as a "real issue" is involved, and particularly if it is an "important" one, the courts should not dismiss applications for declarations on the ground that they are lacking in practical effect and are of a hypothetical or academic nature. . . .

In regard to (iii), the authors of the communication have submitted that "after the elections, in the state of the law as it was before the adoption of section 3 of the Constitution Act of 1982, an action for a declaratory judgement did not constitute an effective and sufficient domestic remedy ensuring respect for their right to vote". It is submitted on behalf of Canada that, although it is not possible to predict the outcome of an action for a declaration in the circumstances of this case, there would appear to be sufficient legal basis for the action that it would not be struck out by a court pursuant to Rule 419 (1) of the Federal Court Rules. . . .

As the Supreme Court of Canada has indicated in *Attorney-General of Canada* v. *Inuit Tapirisat of Canada* et al. [1980] 2 S.C.R. 735 at 740:

"On a motion to strike [pursuant to Rule 419 (1)] a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the Court is satisfied that 'the case is beyond doubt' . . .".

7.3. The State party further submits

that executive authorities are sufficiently bound to give effect to declaratory judgements in similar circumstances arising in the future for a declaration to constitute an effective and sufficient available domestic remedy in the circumstances of this case.

The legal status of a declaration in Canada is as follows. A declaration is a statement of the law made by a judicial tribunal with authority to determine the nature of such law; it forms a binding precedent and, moreover, renders any issue determined by it *res judicata* (*Canadian Warehousing Association* v. *The Queen* [1969] S.C.R. 176). . . .

Although a declaration does not pronounce any direct sanction against a defendant if he or she fails to respect it, it is nevertheless a legal remedy of practical effectiveness in Canada. Indeed, one of the principal criteria taken into account by the courts in determining whether they have jurisdiction to grant a declaration is whether it would serve some practical use . . . In particular, as pointed out by Canada in its previous submissions on the admissibility of this communication, it is an established practice in Canada that the Crown will treat a declaration as equivalent to a judgement of mandatory effect. As noted in *The King* v. *Bradley* [1941] S.C.R. 270 at 276, "The subject's right to relief is declared by the Court in full assurance that the Crown will give effect to the right so declared". . . .

Indeed, it is therefore in regard to the Crown that declarations are regarded as especially useful and effective remedies. Thus, in *Gruen Watch Co.* v. *A.G. of Canada* [1950] O.R. 429, McRuer, C.J.H.C. said the following at 450:

"This peculiar right of recourse to the Courts (the declaratory order) is a valuable safeguard for the subject against any arbitrary attempt to exercise administrative power not authorized by statute, and judges ought not to be reluctant to exercise the discretion in them where a declaration will afford some protection to the subject against the invasion of his rights by unlawful administrative action."

7.4. In response to the allegation of the authors that the declaration granted in the *McCann* case was not given practical effect by the Crown, and that therefore a declaration is not an effective remedy in Canada, at least in so far as it pertains to the Solicitor General, Canada makes the following observations:

(i) In the *McCann* case, Heald, J., declined to grant a declaration that the Penitentiary Service Regulation authorizing the imposition of solitary confinement was invalid pursuant to the Canadian Bill of Rights as authorizing cruel and unusual punishment. Rather, he found that the particular conditions in the specific solitary confinement units in which the plaintiffs had been held were contrary to the Canadian Bill of Rights. Therefore, the fact that there are still solitary confinement units of a different character in other federal penitentiaries does not indicate that the Crown does not respect the rights set forth in declarations. Indeed, it notes that the reason the correction unit in which the plaintiffs had been held was closed for four months (as indicated in the submission of the authors of the communication) was to correct conditions so as to ensure that they complied with the declaration granted in the *McCann* case.

(ii) There were many factors that Heald, J., took into account in determining that the conditions in the solitary confinement units in which the plaintiffs had been held constituted cruel and unusual punishment, including such matters as the size of the cells, their inadequate ventilation, the insufficient time available to inmates for outdoor exercise, and more guards being involved in "skin frisks" than was necessary (at 601-04). These are all factors which involve a matter of degree, and it is therefore inevitable that controversy will arise as to whether subsequent conditions in these units changed sufficiently for there to have been compliance with the declaration. This complicating factor would not arise in regard to the issue of whether there had been compliance with a declaration that prison inmates had been improperly denied the means of exercising their right to vote in a Quebec general election.

If a declaration were granted in this case, it would pertain to events in the past in regard to which there is no consequential relief or practical remedy presently available. However, the power of a declaration does not lie in any sanction it pronounces against the defendant, but rather, in the circumstances of this case, in the respect the Crown necessarily has for binding statements of the law made by the judiciary. It therefore by no means follows that such a declaration would be devoid of practical effect. Indeed, as indicated above, the declaration in the *McCann* case pertained to past events, but it was nevertheless granted by the court because of the practical guidance it would provide for conduct in the future . . . Similarly, in the *Solosky* case it was assumed by the Supreme Court of Canada that if a declaration relating to future events were granted against the Crown, it would be of practical effect. Certainly in the present case, Canada can assure the Human Rights Committee that if a final declaratory judgement were granted that the Solicitor General had acted illegally in not taking the steps necessary to permit inmates in federal penitentiaries to vote in the Quebec general election of 13 April 1981, such steps would be taken by him or her in regard to future Quebec general elections as a necessary consequence of the declaratory judgement.

7.5. The State party "reiterates its claim that the present communication is inadmissible because of the failure of its authors to exhaust all available domestic remedies, and requests the Human Rights Committee to reconsider its decision on the admissibility of this communication. There are in fact two remedies available to the authors that have not been exhausted by them:

(i) The authors failed to seek a declaration that their rights had been violated in the circumstances of the Quebec election of 13 April 1981. An action for such a declaration would be admissible in the Canadian courts, and, if granted, would have a practical effect on the future course of conduct of Canadian authorities.

(ii) The authors failed to seek a declaration to the effect that in upcoming Quebec elections it would be contrary to section 3 of the Canadian Charter of Rights and Freedoms for the Solicitor General not to take the steps necessary to enable them to vote in such elections. Section 24 of the Charter has been so interpreted as to extend to prospective infringements or denials of Charter rights as well as to the past. It is therefore submitted that an action for such a declaration was available to the authors, and moreover would have constituted an acceptable *ex post facto* remedy for their complaint.

8. The State party also submits extensive explanations and statements on the substance of the matter, and argues that

it has not violated its obligations pursuant to article 2 (1) and (3) (*b*) of the International Covenant on Civil and Political Rights to respect the rights set forth in article 25 (*b*) of the Covenant. In particular, Canada submits that the refusal of the Solicitor General to take steps to enable inmates in federal penitentiaries to vote in the Quebec general election of 13 April 1981, did not constitute an unreasonable restriction upon their rights as set forth in article 25 (*b*) for the following reasons:

(i) Because of the substantial administrative problems involved in enabling inmates in federal penitentiaries to vote in general elections, it was not unreasonable to deprive them of the opportunity to vote in the Quebec election held on 13 April 1981.

(ii) It is not unreasonable to withhold the right to vote in general elections from people who have engaged in criminal misconduct sufficiently serious to justify their detention in a federal penitentiary.

9. The deadline for the presentation of the authors' comments on the State party's submission under article 4, paragraph 2, expired on 10 July 1984, during the Committee's twenty-second session. Because of the complexity of the subject-matter, the Committee deferred review of the admissibility of the case until its twenty-third session and, again, until its twenty-fourth session. No comments have been received from the authors.

10.1. Pursuant to rule 93, paragraph 4, of its provisional rules of procedure the Human Rights Committee has reviewed its decision on admissibility of 25 July 1983. On the basis of the additional information provided by the Canadian Government, the Committee concludes that the authors could have obtained redress for the violation complained of by seeking a declaratory judgement. The Committee has stressed in other cases that remedies whose availability is not reasonably evident cannot be invoked by the Government to the detriment of the author in proceedings under the Optional Protocol. According to the detailed explanations contained in the submission of 17 February 1984, however, the legal position appears to be sufficiently clear in that the specific remedy of a declaratory judgement was

available and, if granted, would have been an effective remedy against the authorities concerned. In drawing this conclusion, the Committee also takes note of the fact that the authors were represented by legal counsel.

10.2. Given the availability of a declaratory judgement as demonstrated by the State party concerned, the Committee does not feel it necessary to deal with the question as to whether a domestic remedy such as the one provided for in section 24 (1) of the Canadian Charter of Rights and Freedoms, which was established after the submission of the communication to the Human Rights Committee, needs to be resorted to in order to comply with the requirements set forth in article 5, paragraph 2 (*b*), of the Optional Protocol.

11. In the light of the above considerations, the Committee finds that it is precluded under article 5, paragraph 2 (*b*), of the Optional Protocol from considering the merits of the case and decides:

(1) The decision of 25 July 1983 is set aside;

(2) The communication is inadmissible.

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Follow up

The Canadian Government has informed the Committee that pursuant to a decision dated 2 December 1985 in the case *Lévesque* v. *Attorney-General of Canada*, the Federal Court of Canada upheld the right of penitentiary prisoners in Quebec to vote in provincial elections and ordered the Federal Minister of Justice and the Solicitor General to make the necessary arrangements to put this into effect.

Communication No. 165/1984

Submitted by: J. M. (name deleted) on 18 January 1984
Alleged victim: The author
State party: Jamaica
Declared admissible: 26 March 1985 (twenty-fourth session)
Declared inadmissible: 26 March 1986 (twenty-seventh session)

Subject matter: Denial of passport to individual claiming to be a Jamaican citizen

Procedural issues: Revision of admissibility decision by the Committee in the light of new submission by the State party—Unsubstantiated allegations—Compatibility of communication with the Covenant

Substantive issues: Effective remedy—Denial of passport—Freedom of movement—Citizenship

Article of the Covenant: 12
Articles of the Optional Protocol: 2 and 3
Rule of Procedure: 93 (4)

1.1. The author of the communication, dated 18 January 1984, is J. M., who claims to be a Jamaican citizen born in Kingston, Jamaica, in 1954. He is represented by Rev. Yves-Jean Gabel, the Director of the Foyer évangélique universel (FEU) in Brussels, Belgium, where he resided without a residence permit at the time of the submission of the communication. It is alleged that, after losing his passport in Paris on 22 June 1983, he has been unsuccessful in obtaining a new passport and also unable to return to his home country, Jamaica. A one-page letter signed by J. M. authorizing Rev. Gabel to represent him before the Human Rights Committee is enclosed with the communication.

1.2. The facts are described as follows: upon losing his passport on 22 June 1983, J. M. obtained, on the same day, a certificate from the Jamaican Consulate in Paris confirming his identity. The certificate was issued for the purpose of facilitating his travel to the Jamaican Embassy in Brussels, Belgium, where he hoped to obtain a new passport. On 7 July 1983, J. M. was denied a new passport at the Jamaican Embassy in Brussels because he was not in possession of a birth certificate. He allegedly requested the responsible officer at the Embassy to contact the competent services in Kingston in order to provide a birth certificate. Allegedly, however, the Jamaican Embassy had him evicted from the Embassy and he was arrested by the Belgian police. From 8 to 27 July 1983, he was detained in various prisons in Belgium and then deported to France. He went back to the Jamaican Consulate in Paris which, at that stage, also refused to help him and had him arrested by the French police, who kept him under detention for two days. On 18 August 1983, he flew back to Kingston, Jamaica, but he was refused entry because he did not have a passport and, allegedly, because the only documents in his possession were in French and not in English. He was then made to board an Aeroflot flight to Moscow. The following day, having landed at Moscow airport, he was put on a flight to Luxembourg, from where he flew to Paris. On 23 August 1983, he returned to Brussels and was given refuge at FEU. All his subsequent efforts during the months of August to December 1983 and in January 1984 to obtain a passport, including the intervention of a Belgian attorney, were in vain.

1.3. J. M. claims to be the victim of a violation of article 12 of the Covenant, in particular of article 12, paragraph 4.

1.4. With respect to the exhaustion of domestic remedies, it is alleged that no internal recourse could be filed because of lack of co-operation of the Jamaican

consular authorities in Paris and Brussels. J. M. reports that on 24 November 1983 he addressed a registered letter to the Ambassador of Jamaica in Brussels, to which he has received no reply.

1.5. It is stated that the same matter has not been submitted to any other procedure of international investigation or settlement.

2. By its decision of 22 March 1984, the Working Group of the Human Rights Committee, through a note verbale from the Secretary-General dated 16 May 1984, transmitted the communication by registered mail under rule 91 of the provisional rules of procedure to the Permanent Mission of Jamaica to the United Nations Office at Geneva, requesting from the State party information and observations relevant to the question of admissibility of the communication. The deadline for the State party's submission under rule 91 expired on 16 July 1984. There was no reply from the State party before the adoption of the Committee's decision on admissibility on 26 March 1985.

3. On the basis of the information before it, the Committee found that it was not precluded by article 5, paragraph 2 (*a*), of the Optional Protocol from considering the communication, as the author's indication that the same matter had not been submitted to another procedure of international investigation or settlement had remained uncontested by the State party. The Committee was also unable to conclude that in the circumstances of the case there were effective remedies available to the alleged victim which he had failed to exhaust. Accordingly, the Committee found that the communication was not inadmissible under article 5, paragraph 2 (*b*), of the Optional Protocol.

4. On 26 March 1985, the Human Rights Committee therefore decided that the communication was admissible and requested the State party, in accordance with article 4, paragraph 2, of the Optional Protocol, to submit to the Committee, within six months of the date of transmittal to it of the decision, written explanations or statements clarifying the matter and the remedy, if any, that might have been taken by it. The State party was asked to explain, in particular, why the author had been subjected to the treatment he allegedly suffered, which might raise issues under articles 7 and 12 of the Covenant.

5.1. By a note dated 23 October 1985, the State party contended that the decision of the Committee to declare the communication admissible was invalid, claiming that it had never received the Secretary-General's note of 16 May 1984 transmitting the Working Group's rule 91 decision and the text of the author's communication. The State party argued that "this non-receipt by the Jamaican Government of the Secretary-General's note of 16 May 1984 is important . . . since rule 91, paragraph 2, of the provisional rules of procedure prohibits a declaration of admissibility of a communication in circumstances where a State party concerned has not received the text of the communication and been given an opportunity to comment on it . . . The effect of non-receipt of [J. M.'s] communication was to deprive the Government of Jamaica of an opportunity to comment on the fulfilment of the preconditions set out in article 5, paragraph 2, of the Optional Protocol for the Committee's consideration of [J. M.'s] communication".

5.2. As to the substance of the author's claim, the State party explained that "although the onus would clearly be on a person claiming to be a citizen of a country to furnish evidence in support of that claim, the Government has carried out the most intensive investigations possible with a view to discovering whether [J. M.] was born in Jamaica. This search of the relevant records does not disclose the registration of the birth of [J. M.] in Jamaica. A search of relevant records does not disclose that a Jamaican passport was ever issued to [J. M.]".

5.3. The State party further explained that J. M. "arrived in Jamaica on 18 August 1983 and was refused leave to land because he was unable to substantiate his claim that he was Jamaican". The State party added "that [J. M.], who said he had lost his Jamaican passport and also told the Immigration Officers that he had lived in Jamaica up to three years prior to the date of his arrival in Jamaica, was unable to provide even the most basic information about Jamaica. For example, he could not say where he was born, where he had lived prior to leaving Jamaica, what school he had attended or give the names of anybody who knew him".

5.4. The State party submitted that the suggestion that J. M. had been subjected to treatment which, in the words of paragraph 2 of the decision "may raise issues under article 7", strained credulity since that article provided protection from cruel, inhuman or degrading treatment or punishment, and it was difficult to see how there could be any reasonable basis for even hinting that the Government of Jamaica might somehow be in breach of that article. The fact was that on one of the occasions of J. M.'s visits to the Jamaican Consulate in Paris he had behaved boisterously, installed himself in the main entrance of the building, lying on the carpet, and so conducted himself that it was necessary to call the police who took charge of him. Clearly in such circumstances there was nothing to substantiate even a suggestion that J. M. had been subjected to cruel, inhuman or degrading treatment by the Jamaican Government. On one of the occasions of J. M.'s visits to the Jamaican Embassy in Brussels, he had become noisy and aggressive and had spent several hours sitting in the reception area quarrelling boisterously. He had been abusive, had shouted and had vigorously shaken the door leading to the Embassy. After several hours of pleading with J. M. by the staff of the Embassy, who had asked him to leave quietly, it had been necessary to call in the police who came and took charge of him. In those circumstances, any suggestion of conduct on the part of the Government of Jamaica constituting a breach of article 7 would be baseless.

5.5. As far as remedies available to J. M. are concerned, the State party indicated that "he could have applied to the relevant Minister of Government under section 10 of the Jamaican Nationality Act to exercise the discretion which the law gives him to issue a certificate of citizenship in cases of doubtful citizenship. He could also have instituted proceedings in the Supreme Court for a declaration that he was a citizen of Jamaica and therefore entitled to enter Jamaica as well as for the issue of the prerogative writ of mandamus

compelling the Government to allow him to enter Jamaica on the ground that he is a citizen of Jamaica".

6.1. On 21 November 1985, the text of the State party's submission was transmitted to the author's representative for comments under rule 93, paragraph 3, of the Committee's provisional rules of procedure. In the circumstances, a copy of the Secretary-General's note of 16 May 1984, transmitting to the State party the text of the Working Group's rule 91 decision of 22 March 1984 together with the text of the communication in question, was also transmitted to the author's representative.

6.2. The deadline for the author's comments under rule 93, paragraph 3, expired on 2 January 1986. No comments have been received, despite the State party's rebuttal, in particular concerning the question of J. M.'s nationality.

7. Pursuant to rule 93, paragraph 4, of its provisional rules of procedure, the Human Rights Committee has reviewed its decision on admissibility of 26 March 1985. On the basis of the information provided by the State party, the Committee concludes that the author has failed to establish that he is a Jamaican citizen and has failed to substantiate his allegation that he is a victim of violations of the provisions of the Covenant by the State party.

8. In the light of the above considerations, the Committee finds that it is precluded under articles 2 and 3 of the Optional Protocol from considering the merits of the case and decides:

(1) The decision of 26 March 1985 is set aside;

(2) The communication is inadmissible.

B. Decisions declaring a communication inadmissible

Communication No. 67/1980*

Submitted by: E. H. P. (name deleted) on her own behalf and, as chairperson of the Port Hope Environmental Group, on the behalf of the present and future generations of Port Hope, Ontario, Canada, including 129 Port Hope residents who have specifically authorized the author to act on their behalf, on 11 April 1980
Alleged victim: The author and others
State party: Canada
Declared inadmissible: 27 October 1982 (seventeenth session)

Subject matter: Storage of radioactive waste near residential areas—Nuclear waste

Procedural issues: Standing of author—Non-exhaustion of domestic remedies—Effective remedy—Unreasonably prolonged proceedings

Substantive issues: Right to life—Threat to life—Environment

Article of the Covenant: 6 (1)
Articles of the Optional Protocol: 1, 2 and 5 (2) (b)

1.1. The author of the communication (initial letter dated 11 April 1980, and further letter dated 4 February 1981) is a Canadian citizen. She submitted the communication on her own behalf and, as Chairman of the Port Hope Environmental Group, on behalf of present and future generations of Port Hope, Ontario, Canada, including 129 Port Hope residents who have specifically authorized the author to act on their behalf. The author describes the facts as follows.

1.2. During the years 1945 to 1952, the Eldorado Nuclear Ltd., a Federal Crown Corporation and Canada's only radium and uranium refinery, disposed of nuclear waste in dumpsites within the confines of Port Hope, Ontario, a town of 10,000 inhabitants, located in an area which is planned to become among those most densely populated in North America. In 1975, large-scale pollution of residences and other buildings was discovered (unsuspecting citizens had used material from the dumpsites as fill or building material for their houses). The Atomic Energy Control Board (AECB), a Federal Government licensing and regulating agency with all responsibility regarding nuclear matters in Canada, initiated a cleaning operation and, from 1976 to 1980, the excavated waste material from approximately 400 locations was removed and relocated elsewhere (at distances ranging from 6 miles to 200 miles away from Port Hope). These new dumpsites have now been closed for further removal of radio-active waste from Port Hope. The author claims that the reasons are political, that is, that no other constituency wishes to accept the waste and that the Federal Government is unwilling to come to grips with the problem. In the meantime, approximately 200,000 tons (AECB estimate) of radio-active waste remains in Port Hope and is being stored, in the continuing clean-up process, in eight "temporary" disposal sites in Port Hope, near or directly beside residences (one approximately 100 yards from the public swimming pool). The author maintains that this temporary solution is unacceptable and points out that large "temporary" disposal sites still exist around town more than 30 years after they were licensed. The author claims that the Atomic Energy Control Board is hampered in its efforts on behalf of the inhabitants of Port Hope by the failure of the Federal Government to make alternative dumpsites available. Federal and provincial governments cannot be compelled by the AECB to provide such sites.

1.3. The author claims that the current state of affairs is a threat to the life of present and future generations of Port Hope, considering that excessive exposure to radio-activity is known to cause cancer and genetic defects, and that present health hazards for Port Hope residents include alpha, beta and gamma emissions and radon gas emissions above the approved levels of safety, that is the safety levels approved by AECB, based on the standards of safety set by the International Commission on Radiological Protection.

1.4. As regards the question of exhaustion of domestic remedies, the author states the following: Members of the Port Hope Environmental Group have drawn attention to the problem in person or through letters over a period of five years to AECB officials, legislators and ministry officials. With regard to the possibility of suing the Federal Government, the author implies that such course of action would not constitute an effective remedy: firstly, only injury would be a ground for litigation and it would be most difficult to prove such injury, because of the long lead-time of injury caused by long-term exposure to low-level radioactivity. Secondly, even if litigation were to be pursued and even if the litigants were successful, the responsibility for providing alternate dumpsites would still rest with the Government, a responsibility of which it is aware today but which it nevertheless fails to assume. Thirdly, litigation would be impossible on behalf of

* Not previously published in the annual report of the Human Rights Committee.

future generations, whose rights the Port Hope Environmental Group is seeking to protect. At any rate, litigation would be a long drawn out process, during which the radio-active waste would stay in place.

2. On the basis of the above, the author and the other signatories request the Human Rights Committee to consider the matter and to urge the Canadian Government to remove all radio-active waste from Port Hope to a permanent, properly managed, dumpsite away from human habitation.

3. By its decision of 21 July 1980, 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. The State party was also requested, if it contended that domestic remedies had not been exhausted, to give details of the effective remedies available in the particular circumstances of this case.

4.1. In its reply dated 8 December 1980, the State party objected to the admissibility of the communication on the ground that neither the author nor the persons she represents had exhausted all available domestic remedies as required by articles 2 and 5 (2) (*b*) of the Optional Protocol to the Covenant. In addition, the State party submitted that the communication, in so far as it related to "future generations", was inadmissible under article 1 of the Optional Protocol, which does not confer the right to submit a communication on behalf of future generations.

4.2. The State party further submitted that in her communication the author admitted that neither she nor the persons she represented had exhausted all available domestic remedies. It was pointed out that numerous recourses in tort were available to persons who contended that the presence of radio-active materials in various sites in Port Hope constituted a danger to the health of Port Hope residents.

4.3. The State party argued in this context that the Atomic Energy Control Board is not in law duty-bound to clean up radiation contamination and that existing recourses are against the owners of the eight remaining sites in Port Hope containing contaminated soil (seven of these being owned by private persons and one by Eldorado Nuclear Ltd., an agent of the Crown) who under Canadian law are responsible for tortious damages resulting from the use or employment of their property.

4.4. The State party contended that the fact that the Federal Government, of its own initiative, embarked upon a clean-up operation, does not relieve the owners of the eight sites from their obligations in law. It maintained that if the author of the communication was of the view that the clean-up operation was not proceeding quickly enough or did not deal with sites which she considered to constitute a threat to the life of present or future generations, she must institute proceedings against the owners of these sites. Then, if she proved that the levels of radiation found on these sites constituted a threat to the life of present and future generations and obtained an injunction ordering the owners of these sites to deal with this situation, the Federal Government would consider the possibility of providing to these persons the assistance necessary to give effect to the injunction.

4.5. The State party admitted that such legal proceedings could be lengthy, particularly if one or more parties exercised its right of appeal. However, it was the State party's position that it could not be said that "the application of the (domestic) remedies was unreasonably prolonged" since no legal proceedings had been instituted by the author. The length of proceedings should not, in the submission of the State party, be confused with "undue prolongation". Whether, in a given case, proceedings would be unduly prolonged is a question of fact, not speculation. Only after having examined the particular circumstances of a case should the Committee pronounce itself on whether or not the application of domestic remedies has been unduly prolonged.

5. On 4 February 1981 the author forwarded her comments in reply to the State party's submission of 8 December 1980. She argued that the legal remedies referred to by the State party would not be effective to achieve the removal of the waste and that the length of any legal proceedings would unreasonably prolong the application of a remedy. There were grounds to believe, she concluded, that lives may be saved by the speedy remedal action sought and that any delay in the application of such remedy would be unreasonable.

6. By a decision dated 9 April 1982, the Human Rights Committee decided to seek further clarification from the State party on the grounds on which it contended that available domestic remedies had not been exhausted. Specific questions were submitted to the State party in this regard.

7. In its additional observations dated 21 July 1982, the State party replied to the Committee's questions as follows:

Question 1: In its submission of 8 December 1980, the State party indicated that if the author proved "that the levels of radiation found (on the dumpsites) constituted a threat to the life of present and future generations and obtained an injunction ordering the owners of these sites to deal with this situation, the Federal Government would consider the possibility of providing to these persons the assistance necessity to give effect to the injunction". If such an injunction having been obtained, the owners of the sites were unable to deal with the situation without the assistance of the Federal Government or the Atomic Energy Control Board, is the Federal Government in a position to assure the Committee that the necessary assistance will be given?

Response: In its response to the communication of the author, the Government of Canada pointed out that steps were being taken, through the Atomic Energy Control Board, to remedy the situation which exists on the eight sites mentioned in the communication. Resolving the problem is a matter which necessarily involves delay due to certain practical and technical considerations. If the author of the communication is unwilling to accept the delay inherent in resolving the problem, the Government of Canada has indicated that the author could seek injunctive relief against the owners of these sites. Should Court proceedings prove successful and an injunction be issued against the owners of these sites, governmental assistance might be required. The] requirement for and the nature and extent of governmental assistance to the owners of the sites could only be ascertained in light of the precise nature of the relief granted by the Courts.

In its 8 December 1980 response to the author's communication, the Government of Canada indicated, on pages 10 and 11, that:

". . . the federal government, even though it does not consider that the radiation level found in the eight sites mentioned in the author's communication are a hazard to the life of present or future generations, has undertaken to clean them up and to that effect has taken steps to locate a disposal site."

If the Courts were to order the removal of contaminated soil from one or more contaminated sites, the Government of Canada would offer these persons every possible assistance to facilitate compliance with the order of the Court. However, the Courts might decide that these persons are only required to take steps to reduce access to their property, for example by erecting better fencing. In such a case, little or no assistance would be required. But to the extent that technical or similar assistance available only from government sources was necessary to the fulfilment of the Court order, the Government of Canada would provide the requisite assistance. The question is, however, abstract and it is therefore impossible to give an unqualified undertaking that assistance would be given in all circumstances.

Question 2: In its submission, the State party also suggests that the author could seek to obtain an injunction or a writ of mandamus to force the Atomic Energy Control Board to clean up the contamination. Does the Federal Government contend that this is a remedy which it is incumbent on the author or the persons she represents to exhaust, in the sense that it constitutes an effective remedy in the particular circumstances of the case?

Response: The Government of Canada does not share the author's view that the Atomic Energy Control Board has a legal duty under section 21 of the Atomic Energy Control Regulations, C.R.C. 1978, C.365 to clean up the eight contaminated sites mentioned in her communication. The matter being disputed, the author could seek a writ of mandamus or an injunction to ascertain the exactitude of her assertions. However, to the knowledge of the Government of Canada, she has initiated no legal proceedings to this effect. If she were to institute legal proceedings and if those proceedings upheld her view, there is no reason to think that the Court would be unable to grant an effectual remedy.

Question 3: Are there any other remedies against the Federal Government or the Atomic Energy Control Board which, in the view of the State party, it is incumbent on the author or the persons she represents to exhaust?

Response: In its response, the Government of Canada indicated that the author could seek injunctive relief against Eldorado Nuclear Ltd. an agent of Her Majesty in Right of Canada. Canadian law recognizes an action for nuisance, and in an appropriate case, a mandatory injunction can be awarded against the owner or occupant of the property from which the nuisance emanates.

Although it is customary that corporate entities which are agents of Her Majesty in Right of Canada are sued in their corporate name, the author might also sue the Crown in lieu of or in addition to Eldorado Nuclear Ltd. Under paragraph 3 (1) (*b*) of the *Crown Liability Act*, R.S.C. 1970, c. C-38, the Crown may be held liable in tort in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

Further, since Canada submitted its response to the communication of the author, the *Canadian Charter of Rights and Freedoms* has come into force on 17 April 1982. The Charter applies to the Parliament and Government of Canada in respect to all matters within the authority of Parliament (subparagraph 32 (1) (*a*)). Section 7 of the Charter states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principle of fundamental justice". Therefore, anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply, under subsection 24 (1) of the Charter, to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. If the author believes that the Government or an agency thereof, such as the Atomic Energy Control Board, is denying her the right to life in a manner contrary to the provisions of section 7, she can ask the Courts to remedy this situation.

In the present case, the Government of Canada reaffirms the views expressed in its original response that the failure of the complainant to take any proceedings constitutes a failure to exhaust domestic remedies as required by Article 2 of the Optional Protocol to the Covenant and that as a consequence the communication submitted by the author is inadmissible under Article 5 (2) (*b*) of the Optional Protocol.

8. The Committee observes that the present communication raises serious issues, with regard to the obligation of States parties to protect human life (article 6 (1)). Nonetheless, before considering the merits of the case, the Committee has to determine, (*a*) whether the author of the communication has the standing to submit the communication and (*b*) whether the communication fulfils other admissibility criteria under the Optional Protocol, in particular the condition relating to exhaustion of domestic remedies set out in article 5 (2) (*b*) of the Optional Protocol:

(*a*) *The standing of the author*

The Committee considers that the author of the communication has the standing to submit the communication both on her own behalf and also on behalf of those residents of Port Hope who have specifically authorized her to do so. Consequently, the question as to whether a communication can be submitted on behalf of "future generations" does not have to be resolved in the circumstances of the present case. The Committee will treat the author's reference to "future generations" as an expression of concern purporting to put into due perspective the importance of the matter raised in the communication.

(*b*) *Exhaustion of domestic remedies*

In the light of the State party's additional observations as to the availability of domestic remedies in order to obtain the removal of the contaminated soil from the eight dumpsites, the Committee concludes that,

(i) as to the seven privately owned dumpsites, the author could sue the owners of these sites and seek a mandatory injunction; the Committee has noted that the Government of Canada would then offer the owners every possible assistance to facilitate compliance with the court order;

(ii) as to the dumpsite owned by Eldorado Nuclear Ltd., an agent of Her Majesty in Right of Canada, the author could bring suit for compensation and a mandatory injunction either against that agency, or the Crown under the Crown Liability Act 1970, or both;

(iii) as to any legal duty of the Atomic Energy Control Board under the *Atomic Energy Control Regulations*, the author could seek a writ of mandamus or a declaration and an injunction to determine such duty.

Accordingly, all available domestic remedies have not been exhausted, as required under article 5 (2) (*b*) of the Optional Protocol. The Committee cannot conclude that these remedies, if pursued, would be unreasonably prolonged within the meaning of article 5 (2) (*b*) of the Optional Protocol. As to the effectiveness of domestic remedies, the Committee notes that the author could now also invoke the Canadian Charter of Human Rights and Freedoms which explicitly (section 7) protects the right to life.

9. The Human Rights Committee therefore decides:

(*a*) The communication is inadmissible;

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

Communication No. 78/1980

Submitted by: A. D. (name deleted) on 30 September 1980
Alleged victim: The Mikmaq tribal society
State party: Canada
Declared inadmissible: 29 July 1984 (twenty-second session)*

Subject matter: Rights of indigenous peoples in Canada—Right of self-determination

Procedural issues: Competence of the HRC—Standing of the author—Individual opinion—Inadmissibility ratione materiae*—Concept of "victim"*

Substantive issues: Concept of "people"—Right of self-determination—Minorities—Interference with family

Articles of the Covenant: 1, 23 and 27
Articles of the Optional Protocol: 1 and 2

1. The author of the communication (initial letter dated 30 September 1980; supplementary information of 9 December 1980; and further submissions dated 26 June, 3 October, 11 November, 1981, 15 July 1982, 3 August 1983, 6 January and 6 February 1984) is A. D., "Jigap'ten of Santeoi Mawa'iomi"—Grand Captain—of the Mikmaq tribal society. He submits the communication on behalf of "the Mikmaq people" who claim as their territory the lands which they possessed and governed at the time when they entered into a protection treaty with Great Britain in 1752, and which are known today as Nova Scotia, Prince Edward Island, and parts of Newfoundland, New Brunswick and the Gaspe peninsula of Quebec.

2.1. The author alleges that the Government of Canada has denied and continues to deny to the people of the Mikmaq tribal society the right of self-determination, in violation of article 1 of the International Covenant on Civil and Political Rights. It is further submitted that Canada has deprived the alleged victims of their means of subsistence and has enacted and enforced laws and policies destructive of the family life of the Mikmaqs and inimical to the proper education of their children.

2.2. It is stated to be the objective of the communication that the traditional Government of the Mikmaq tribal society be recognized as such and that the Mikmaq nation be recognized as a State.

3. Responding to a request by the Committee for clarification (decision of 29 October 1980), A. D., in a letter dated 9 December 1980, reaffirms that the communication is concerned essentially with the violation of article 1 of the Covenant (. . . "article 1 is our goal, our vision" . . .) and rejects categorically the applicability of article 27 (concerning the rights of persons belonging to minorities). He also submits that he has been authorized by the Grand Council of the Mikmaq people to represent his kinsmen before the Committee.[1]

4. By its decision of 9 April 1981, the Human Rights Committee transmitted the communication under rule 91 of the provisonal rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication.

5.1. In its submissions, dated 21 July 1981 and 17 May 1982, the State party objects to the admissibility of the communication *ratione materiae*, on the ground that article 1 of the Covenant cannot affect the territorial integrity of a State, a principle asserted in United Nations declarations such as the "Declaration on the Granting of Independence to Colonial Countries and Peoples" (General Assembly resolution 1514 (XV) of 14 December 1960), the "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" (General Assembly resolution 2625 (XXV) of 24 October 1970) and stated in a great number of legal opinions.

5.2. The State party further submits that the communication does not fulfil the requirements of articles 1 and 2 of the Optional Protocol. It is argued that, in the circumstances of the case, A. D. cannot claim either that his own rights have been violated, since according to article 1 (1) of the Covenant the right of self-determination is a collective right, or that he is duly authorized under the relevant provisions of the Optional Protocol to act on behalf of the Mikmaq nation.

5.3. The State party also maintains that the remedy sought in the case, namely the recognition of statehood, goes beyond the competence of the Committee.

5.4. Referring to allegations advanced by A. D. relating to self-government, education, enfranchising of aboriginal people, property rights, and subsistence, the State party rejects the claims, with one exception, as inadmissible, contending that these issues derive from the principal issue of the communication, the right of self-determination. The exception in this connection related to the situation of Indian women who marry non-Indians and thereby lose their status as Indians. The State party refers to the Indian Act 1970, which provides for limited self-government of the aboriginal peoples to laws and procedures governing their land claims and to the recently amended Canadian constitution, the Constitution Act 1982, which in its Charter of Rights and Freedoms envisages equal protection of the human rights of everyone and in its section 25 contains specific provisions as to the protection of rights and freedoms of the aboriginal peoples of Canada.

5.5. The State party does not consider the issues raised by the author concerning the legal aspects of the relationship between the United Kingdom, the Mikmaq tribe and Canada to be relevant in the present case, since it considers the communication inadmissible on the issue of self-determination.

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* The text of an individual opinion submitted by a Committee member is appended to the present decision.

[1] The author states that the Grand Council, whose members are the Grand Chief, the Grand Captain and the Assistant Grand Chief, constitutes "the traditional Government of the Mikmaq tribal society".

6.1. By letters, dated 3 October 1981, 11 November 1981 and 15 July 1982, A. D. submitted his comments to the State party's submissions under rule 91 of the provisional rules of procedure. He refutes the State party's contention that the communication is inadmissible. With regard to the State party's argument based on territorial integrity, he contends that this is inapplicable in the circumstances of the case "because it assumed a disputed fact, *viz.* whether the territory of the 'Mi'kmaq Nationimouw' ever lawfully became part of the territory of Canada". The author asserts in this connection that the territory never was ceded or surrendered to Great Britain and, therefore, not to Canada.

6.2. A. D. disagrees with the State party's contention that the right of self-determination constitutes only a collective right, citing in substantiation the United Nations study on the Right of Self-Determination, 1980,[2] prepared by Mr. Hector Gros-Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. A. D. submits that this study shows that the Commission on Human Rights has repeatedly invoked self-determination as the right of individuals as much as a right of peoples collectively.

6.3. The author further challenges the validity of the State party's submissions on the substance of "subsidiary violations of human rights", commenting in detail on the issues of self-government, involuntary enfranchisement, education rights, property and human rights issues relating to the Constitution Act, 1982. He sugests, however, that before more evidence is submitted on these matters, the question of the admissibility of the communication should be decided.

6.4. A. D. finally suggests that the Committee should, if it finds that the present communication falls outside its competence, bring the Mikmaq people's case to the attention of the Economic and Social Council with the recommendation that an advisory opinion be sought from the International Court of Justice.

7.1. Before considering a communication on the merits, the Committee must ascertain whether it fulfils all conditions relating to its admissibility under the Optional Protocol.

7.2. Articles 1 and 2 of the Optional Protocol provide for the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation of the rights set forth in the Covenant.

7.3. The communication poses in particular the question whether Canada has violated article 1 of the International Covenant on Civil and Political Rights. A. D. claims not to represent a minority within the meaning of article 27, but a people within the meaning of article 1 of the Covenant. In this context he also alleges that the right of parents and families provided for in article 23 in connection with article 18 has been violated, most particularly with regard to the religious education of the children.

7.4. The Committee agreed to clarify first the standing of the author in so far as he claims to represent the Mikmaq tribal society.

7.5. While seeking to clarify the standing of the author, the Committee received a "communiqué" dated 1 October 1982 from the Grand Chief of the Grand Council of the Mikmaq tribal society, D. M., stating that nobody was authorized to speak on behalf of the Mikmaq nation or on behalf of the Grand Council or the Grand Chief, unless the latter "will give this authority in writing to the person or persons for each separate correspondence". Consequently, the Committee requested the Grand Council of the Mikmaq to comment on or clarify A. D.'s authority to act on behalf of the Mikmaq tribe and to provide the relevant information not later than 1 February 1983. In response, R. B., legal counsel for A. D., informed the Committee by telegram of 31 January 1983 that the Mikmaq Grand Council had reaffirmed the authority of A. D. to pursue communication No. 78/1980 before the Committee and that a document signed to this effect by the Grand Council would be transmitted by registered mail.

7.6. Six months later, on 3 August 1983, a letter mandating the legal counsel of A. D., Mr. R. B., to represent the Grand Council was received. This "Commission" was signed by the author of the communication himself and by the Assistant Grand Chief. The content of the "Commission" shows clearly that it is not the Grand Council in its legal entity which authorizes A. D. to act but that it is the author himself who confirms his self-authorization.

7.7. Later submissions of the author dated 6 January and 6 February 1984 referred to the substance of his complaints without providing evidence on his standing in the case of the Mikmaq people.

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

8.2. The Human Rights Committee observes that the author has not proven that he is authorized to act as a representative on behalf of the Mikmaq tribal society. In addition, the author has failed to advance any pertinent facts supporting his claim that he is personally a victim of a violation of any rights contained in the Covenant.

9. The Human Rights Committee therefore decides:

The communication is inadmissible.

Appendix

INDIVIDUAL OPINION

Mr. Roger Errera, member of the Human Rights Committee, submits the following individual opinion relating to the admissibility of communication No. 78/1980 (A. D. v. Canada):

A. D.'s communication is based primarily on a violation of article 1 of the Covenant relating to the right of all peoples of self-determination. The examination of the admissibility of this communication accordingly raises the following questions:

(1) Does the right of "all peoples" of "self-determination", as enunciated in article 1, paragraph 1, of the Covenant, constitute one "of the rights set forth in the Covenant" in accordance with the terms of article 1 of the Optional Protocol?

[2] Document E/CN.4/Sub.2/405/Rev.1.

(2) If it does, may its violation by a State party which has acceded to the Optional Protocol be the subject of a communication from *individuals*?

(3) Do the Mikmaq constitute a "people" within the meaning of the above-mentioned provisions of article 1, paragraph 1, of the Covenant?

The inadmissibility decision adopted by the Committee does not answer any of these three questions, even though they are fundamental to the interpretation of article 1, paragraph 1, of the Covenant and article 1 of the Optional Protocol, and to the jurisprudence of the Committee relating to individual communications alleging violation of article 1, paragraph 1, of the Covenant. To my deep regret, therefore, I cannot endorse this decision.

Communication No. 104/1981

Submitted by: J. R. T. and the W. G. Party (names deleted) on 18 July 1981
Alleged victims: J. R. T. and the W. G. Party
State party: Canada
Declared inadmissible: 6 April 1983 (eighteenth session)*

Subject matter: Dissemination of anti-semitic material

Procedural issues: Standing of author—Standing of an organization—Compatibility of communication with the Covenant—Non-Exhaustion of domestic remedies—Non-participation of Committee member in decision—Inadmissibility ratione materiae

Substantive issues: Interference with correspondence—Freedom of expression—Racial discrimination—Denial of use of telephone—Derogation from Covenant

Articles of the Covenant: 17, 19 and 20 (2)
Articles of the Optional Protocol: 1, 2, 3 and 5 (2) (b)
Rule of Procedure: 85

1. The communication (initial letter dated 18 July 1981 and further submissions dated 22 September 1981 and 4 August 1982) is submitted by Mr. T., a 69-year-old Canadian citizen, residing in Canada, and by the W. G. Party, an unincorporated political party under the leadership of Mr. T. since 1976. It is claimed that Mr. T. and the W. G. Party are victims of infringements by the Canadian authorities of the right to hold and maintain their opinions without interference, in violation of article 19 (1) of the International Covenant on Civil and Political Rights, and the right to freedom of expression and of the right to seek, receive and impart information and ideas of all kinds through the media of their choice, in violation of article 19 (2) of the Covenant.

2.1. The W. G. Party was founded as a political party in Toronto, Ontario, Canada, in February 1972. The Party and Mr. T. attempted over several years to attract membership and promote the Party's policies through the use of tape-recorded messages, which were recorded by Mr. T. and linked up to the Bell Telephone System in Toronto, Ontario, Canada. Any member of the public could listen to the messages by dialling the relevant telephone number. The messages were changed from time to time but the contents were basically the same, namely to warn the callers "of the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles".

2.2. The Canadian Human Rights Act was promulgated on 1 March 1978. Section 13 (1) of the Act reads as follows:

> It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that the person or those persons are identifiable on the basis of a prohibited ground of discrimination.

2.3. By application of this provision in conjunction with section 3 of the Act, which enumerates "race, national or ethnic origin, colour, religion, age, sex, marital status, conviction for which a pardon has been granted and physical handicap" as "prohibited grounds of discrimination", the telephone service of the W. G. Party and Mr. T. was curtailed. It is alleged that section 13 (1) of the Human Rights Act is clearly in violation of the Canadian Bill of Rights. Section 1 (*d*) of the Bill of Rights guarantees freedom of speech, and section 2 states that it shall not be abrogated, abridged or infringed unless expressly authorized by Act of Parliament. It is claimed that the Canadian Human Rights Act contains no provision authorizing such restrictions.

2.4. Section 32 of the Human Rights Act enables any individual having reasonable grounds for believing that a person is engaging in a "discriminatory practice" to file a complaint before the Canadian Human Rights Commission. Under this provision, a number of Jewish groups and individual Jews filed letters complaining about Mr. T.'s messages. In consequence, the Canadian Human Rights Commission initiated complaint proceedings against Mr. T. and the W. G. Party on 16 January 1979 for messages recorded on 6 July, 27 September, 17 November, 14 and 19 December 1978 and 9 January 1979, and decided to appoint a Human Rights Tribunal to inquire into the complaints and to determine whether the matters communicated telephonically by the W. G. Party and Mr. T. would be likely to expose persons identifiable by race and religion

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* Mr. Walter Surma Tarnopolsky, pursuant to rule 85 of the provisional rules of procedure, did not participate in the consideration of this communication or in the adoption of the Committee's present decision.

to hatred and contempt. The hearings of the Tribunal were carried out on 12, 13, 14 and 15 June 1979 and a decision was made on 20 July 1979. The Tribunal found that "although some of the messages are somewhat innocuous, the matter for the most part that they have communicated is likely to expose a person or persons to hatred or contempt by reason of the fact that the person is identifiable by race or religion and in particular, the messages identify specific individuals by name". It held, therefore, that the complaints were substantiated and ordered the W. G. Party and Mr. T. to cease using the telephone to communicate the subject-matter which had formed the contents of the tape-recorded messages referred to in the complaints.

2.5. The Canadian Human Rights Commission sent the decision of the Tribunal to the Federal Court for the purpose of enforcement on 22 August 1979, pursuant to section 43 of the Canadian Human Rights Act, and it was filed pursuant to Federal Court Rule 201 (1 *a*) (*a*); the decision thereupon became enforceable in the same manner as an order of that Court. Section 28 (2) of the Federal Court Act requires that parties seeking judicial review of a Tribunal order initiate proceedings within 10 days of the date the decision is communicated to them. The Canadian Human Rights Act, however, provides that "an appeal lies to a Review Tribunal from a decision of a Tribunal on any question of law or fact or mixed law and fact", and section 42 (1) of the Act lays down a time-limit of 30 days for such appeal. Mr. T. was, therefore, convinced that he would have 30 days to launch an appeal and, in consequence, failed to appeal within the 10 days set out in section 28 (2) of the Federal Court Act. In these circumstances, Mr. T.'s only redress was to bring a Notice of Motion under Federal Court Rule 324 to extend the time for such appeal. He did so on 14 September 1979, but extension of time was refused on 17 October 1979, on the grounds that: "the material filed in support of the application did not disclose any serious grounds for challenging the validity of the Decision which the applicants wished to attack".

2.6. On 31 August 1979, before the appeal proceedings mentioned above took place, the Canadian Human Rights Commission recorded a new message from the telephone service of the W. G. Party, complaining that "we are now denied the right to expose the race and religion of certain people, regardless of their guilt in the destruction of Canada" and adding "those who do not believe there is a preponderance of certain racial and religious minorities involved in the corruption of our Christian way of life will never understand the simple basis of our way of life—the common denominator". In this connection, the Canadian Human Rights Commission instructed its Legal Counsel to write to Mr. T. He warned Mr. T. on 2 October 1979, that if these particular passages were not deleted from the recordings by 10 October 1979, he would make an application to the Federal Court to enforce the Tribunal order. Mr. T. responded by letter dated 10 October 1979 that, although he did not agree that the passages were in contravention of the order of the Tribunal, he would change the messages.

2.7. Subsequent to Mr. T.'s letter of reply, Mr. T. and the W. G. Party continued to use messages that were deemed to be in contravention of the Tribunal order, and therefore an *ex parte* application was made to the Federal Court, Trial Division, by the Canadian Human Rights Commission to the effect that acts had been committed by Mr. T. contrary to the order of a Human Rights Tribunal. A transcript of the allegedly offensive messages dated 7 and 31 August 1979, 12 October 1979, and 27 November 1979 was placed before the Federal Court. Mr. T. and the W. G. Party were ordered to appear before the Federal Court on 19 February 1980 to hear proof that they had disobeyed the order and to submit a defence.

2.8. The contempt of court proceedings took place before the Federal Court. After hearing the Legal Counsel for the Canadian Human Rights Commission and Mr. T., it concluded that the Commission had established beyond any doubt that Mr. T. and the W. G. Party had disobeyed the order made by the Human Rights Tribunal and had made use of the telephone services to convey the type of messages which they were prohibited from disseminating, namely, that "some corrupt Jewish international conspiracy is depriving the callers of their birthright and that the white race should stand up and fight back". The Court decided on 21 February 1980 that Mr. T. was guilty of contempt of court and sentenced him to one year imprisonment and the W. G. Party to pay a fine of $5,000. The sentences were to be suspended as long as Mr. T. and the W. G. Party did not use telephone communications for the dissemination of hate messages.

2.9. Mr. T. and the W. G. Party appealed against this decision within the required period of 30 days. The suspension of sentences was lifted on 11 June 1980 on the grounds of the nature of an additional message of 3 June 1980, and Mr. T. was committed to the Toronto jail on 17 June 1980. Early in June 1980, Mr. T. hired legal counsel, Mr. R. B., to represent him and the W. G. Party, and to continue with the appeal to the Federal Court of Appeal. On 24 June 1980, the Federal Court of Appeal ordered that the execution of sentences be stayed pending the disposition of the appeal. On 27 February 1981, the Court dismissed the appeal. The author of the communication alleges that the Court did so without written or oral reasons, and without deciding upon any of the issues raised. An application for leave to appeal to the Supreme Court of Canada was denied by the presiding judge of the Court of Appeal. An application for suspension of the operation of the sentence imposed upon Mr. T. was granted by the Federal Court of first instance on 13 April 1981. Another application by Mr. B. on behalf of Mr. T. and the W. G. Party was brought by way of Notice of Motion for leave to appeal before the Supreme Court of Canada, but was denied on 22 June 1981.

3. The author of the communication states from the foregoing that all domestic remedies have been exhausted and that the same matter has not been submitted for examination under another procedure for international investigation or settlement.

4. In a further letter, dated 22 September 1981, Mr. B. added that, following the denial of Mr. T.'s appeal by the Supreme Court of Canada, he again surrendered to the Sheriff of the Judicial District of York, Province of Ontario, on 27 July 1981, and had been serving his sentence since then. The following claim was

also made: pursuant to the provisions of section 7 of the Post Office Act (Canada), which forbids the transmission of "scurrilous material", Mr. T. had, since May 1965, been proscribed from receiving or sending any mail in Canada. The author maintains that there are no domestic recourses to exhaust in this regard under Canadian legislation, and requests that the said proscription be considered by the Human Rights Committee, together with the other claims, as a possible further violation of article 19 of the Covenant. (The author's initial submission of 18 July 1981 indicates that the proscription has also applied to the W. G. Party since 1980.)

5. By its decision of 24 October 1980, 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.

6.1. In its submission dated 10 May 1982, the State party objected to the admissibility of the communication on various grounds.

6.2. As regards the allegation that prosecution under section 13 of the Canadian Human Rights Act resulted in a breach of article 19 and, by inference, articles 2 and 26 of the Covenant, the State party submits that no breach of the Covenant occurred. It states that the impugned provision of the Canadian Human Rights Act does not contravene these provisions of the Covenant, but in fact gives effect to article 20 (2) of the Covenant. Thus, not only is the author's "right" to communicate racist ideas not protected by the Covenant, it is in fact incompatible with its provisions, and therefore this part of the communication is in this respect inadmissible under articles 1, 2 and 3 of the Optional Protocol. The State party further contends that, as regards the same allegation, the communication should be declared inadmissible because the W. G. Party and Mr. T. failed to exhaust domestic remedies. The State party, in this respect, notes that Mr. T. and the Party, by their own inaction and negligence, failed to file their application for judicial review within the time-limits prescribed by law, to seek review of the order of the Tribunal within the time frame provided by law, or to succeed in convincing the Federal Court of Appeal to extend this time by showing that their appeal had some merit; that they could have challenged the validity of the legislation which they were found to have contravened; consequently, that that negligence, as well as failure to invoke convincing grounds to justify an extension of the time for review, resulted in the loss of these remedies.

6.3. As regards the allegation that the application of section 7 of the Post Office Act resulted in an arbitrary interference with their correspondence contrary to the provisions of article 19 of the Covenant, the State party contends that the evidence shows that there occurred in this respect no breach of this article or, for that matter, of article 17, but that the impugned provision of the Post Office Act gives effect to article 20 of the Covenant, and, therefore, that this part of the communication is inadmissible under article 3 of the Optional Protocol. As regards the question of exhaustion of domestic remedies, the State party submits that Mr. T. and the W. G. Party had failed, at the time the communication was made, to challenge the validity and legality of the Minister's prohibitory order, or its extension, in judicial proceedings before the courts. The State party further states that a prohibitory order may be revoked by the Postmaster-General under certain conditions: "Formerly, section 7 of the Post Office Act and, currently, section 41 of the Canada Post Corporation Act allow for revocation of a prohibitory order if a person ceases to use the mail for a prohibited purpose. Should Mr. T. cease to distribute, personally or through the W. G. Party, scurrilous material, he could apply for the revocation of the 1965 Order."

6.4. The State party furthermore argues, on the question of admissibility, that the complaint of the W. G. Party should be declared inadmissible since under the preamble and articles 1, 2, 3 and 5 of the Optional Protocol only "individuals" may submit a written communication to the Committee for consideration, but not entities such as the W. G. Party.

7.1. Mr. B. submitted further comments, dated 4 August 1982, together with supplementary exhibits on the State party's submission of 10 May 1982. Mr. B. alleges that a prohibitory order which was made under section 7 of the Post Office Act in 1965, specifically forbidding Mr. T. and his Party (his Party was then called the "N.O.") to use the Canadian mail, is so broad that mail sent to Mr. T. or the W. G. Party (for the W. G. Party since 9 July 1980) is always returned to the sender and there has been continuous interference for 17 years. Mr. B. also states that this discriminatory policy continued even during the period of Mr. T.'s imprisonment, specifically denying him all mail privileges afforded to other prisoners. The author submits that this practice was in violation of "the Standard Minimum Rules for Treatment of Offenders". It is further alleged that Mr. T. is now disputing this matter further, but his legal counsel was personally inconvenienced thereby in his duty to represent Mr. T. at all times, since correspondence with him was rendered impossible, and that this is clearly a violation of the right to hold opinions without interference.

7.2. Mr. B. further states that, although the State party makes the points that under section 28 (2) of the Federal Court Act parties seeking a review of an order must initiate proceedings within 10 days of the date of the communication of the order to them, "or within such further time as the Court of Appeal or a judge thereof may, either before or after the expiration of those 10 days, fix or allow", and that Mr. T. was late in filing his application for a review of the order, the visit to the Federal Court Office in Toronto in connection with his affidavit supporting the application for an order extending the time-limit, was made 9 hours after the lapse of the prescribed 10 days. It is, therefore, claimed that the refusal to extend the time was in these circumstances harsh, arbitrary and a misuse of discretionary power. If the application had been granted, it might have been unnecessary to refer the present communication to the Human Rights Committee.

8. On the basis of the information before it the Human Rights Committee, after careful examination, concludes:

(*a*) The W. G. Party is an association and not an individual, and as such cannot submit a communication

to the Committee under the Optional Protocol. Therefore, the communication is inadmissible under article 1 of the Optional Protocol in so far as its concerns the W. G. Party;

(*b*) As to the author's claim that section 13 (1) of the Canadian Human Rights Act, under which his use of the telephone service has been curtailed, has been applied against him in violation of article 19 of the Covenant, the Committee notes that he failed to file his application for judicial review within the time-limits prescribed by law. It appears, however, in view of the ambiguity ensuing from the conflicting time-limits laid down in the laws in question, that a reasonable effort was indeed made to exhaust domestic remedies in this respect and, therefore, the Committee does not consider that, as to this claim, the communication should be declared inadmissible under article 5 (2) (*b*) of the Optional Protocol. However, the opinions which Mr. T. seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20 (2) of the Covenant to prohibit. In the Committee's opinion, therefore, the communication is, in respect of this claim, incompatible with the provisions of the Covenant, within the meaning of article 3 of the Optional Protocol;

(*c*) As to the author's claim that the application of section 7 of the Post Office Act resulted in arbitrary interference with his correspondence, contrary to the provisions of article 17 and 19 of the Covenant, the Committee accepts that the broad scope of the prohibitory order, extending as it does to all mail, whether sent or received, raises a question of compatibility with articles 17 and 19 of the Covenant. However, this claim is inadmissible under article 5 (2) (*b*) of the Optional Protocol. Mr. T. did not challenge the validity and legality of the Minister's prohibitory order, or its extension, before the competent Canadian courts. Moreover, a prohibitory order may be revoked under certain conditions and Mr. T. has not applied for such revocation. He has therefore failed to exhaust domestic remedies.

9. The Human Rights Committee therefore decides:

That the communication is inadmissible.

Communication No. 112/1981

Submitted by: Y. L. on 7 December 1981
Alleged victim: The author
State party: Canada
Declared inadmissible: 8 April 1986 (twenty-seventh session)*

Subject matter: Denial of disability pension to a former member of Canadian Armed Forces

Procedural issues: Inadmissibility ratione materiae—*Relevance of the Covenant's* travaux préparatoires—*Exhaustion of domestic remedies—No claim under article 2*

Substantive issues: Concept of "suit of law"—Right to fair hearing—Pension rights—Dismissal from Armed Forces

Article of the Covenant: 14 (1)
Article of the Optional Protocol: 2

1. The author of the communication (initial letter dated 7 December 1981 and further letters dated 26 June 1982, 27 February 1983, 10 June 1983, 13, 14, 19 and 20 June 1984, 9 December 1984, 6 and 30 January 1985, 8 and 14 February 1985 and 27 May 1985), Y. L., is a Canadian citizen, living at present in Cowansville, Province of Quebec, Canada, alleging that he is a victim of a breach by Canada of articles 14, paragraph 1, and 26 of the International Covenant on Civil and Political Rights. The main facts underlying the author's claims are as follows:

2.1. On 1 July 1967, at the age of 36, the author was dismissed from the Canadian Army after 19 years of service. The competent authorities alleged that he suffered from mental disorders. Requests by the author for more specific information about the medical diagnosis were repeatedly declined by the Army.

2.2. Even before he had been officially discharged, the author applied for "disability" pension. The Canadian Pension Commission rejected this request by a decision of 17 July 1967. The Commission held that the author's disability neither arose out of, nor was directly connected with, his military service, as required by the Pension Act (1952). On appeal, this decision was confirmed on 31 March 1969.

2.3. After the Pension Act was amended in 1971, the author renewed his request for a pension. Again, he was unsuccessful. Two consecutive applications to the Canadian Pension Commission were rejected. As a next step in the proceedings, the author applied to an Entitlement Board of the Commission, which, on 9 November 1977, also gave a negative decision. Finally, the author appealed to the Pension Review Board, which, after a hearing on 10 July 1979, confirmed the earlier rulings in its decision of 15 August 1979. The author, who had been represented before the Pension Review Board by Maître R. A. Pinsonnault, c.r., a member of the Bureau of Pensions Advocates (a government agency made up of civil servants), was not provided with a copy of the Board's decision. Instead, as the State party explained, a copy was transmitted to his lawyer with the indication that it was up to him to decide whether he should show the text to his client. The author did not receive the full text of the decision until January 1983.

* The text of an individual opinion submitted by Committee members Bernhard Graefrath, Fausto Pocar and Christian Tomuschat is appended to the present decision.

2.4. Since the author had never had access to his medical records, he asked to be provided with all relevant information after his appeal had been definitively rejected. On 7 December 1979, 270 pages of documents were sent to him. However, the relevant medical information had been excluded. Some elements of the medical file were later made available to the author in January 1983, after he had submitted the communication to the Human Rights Committee. To date, however, the author has not had the opportunity to see his medical dossier in its entirety. All his applications to that effect were unsuccessful.

3.1. The author now challenges the proceedings that took place before the Pension Review Board as violating guarantees under article 14, paragraph 1, of the Covenant. He maintains that for several reasons he was not granted "a fair public hearing by a competent, independent and impartial tribunal" in the sense contemplated by that provision. He claims that, first of all, he should have been informed in detail of the exact nature of the mental disease from which he was alleged to be suffering. In addition, he states that he was not allowed to attend the hearing before the Board. His lawyer, who had been appointed and paid by the Canadian Government, also refused to discuss fully with the author the medical aspects of the case. Finally, the author asserts that the Board does not qualify as an independent and impartial tribunal since it is made up of civil servants of the executive branch of government.

3.2. The author claims that the refusal to grant him access to his medical file amounts to a violation of article 26 of the Covenant.

4. The Canadian Government requests that the communication be declared inadmissible. As far as the proceedings before the Pension Review Board are concerned, it contends primarily that the complaints of the author are outside the scope of application of the Covenant *ratione materiae* because those proceedings did not constitute a "suit at law" as envisaged under article 14, paragraph 1, of the Covenant. In addition, and also with regard to the alleged violation of a right to access to the complete personal dossier, it claims that domestic remedies have not been exhausted. It states that the decision of the Pension Review Board could have been challenged before the Federal Court of Appeal, under article 28 (1) of the Federal Court Act. Finally, the Government rejects as unfounded the author's objections to the proceedings before the Pension Review Board.

5. The Working Group of the Human Rights Committee, meeting during the Committee's twenty-third session on 9 November 1984, considered that, despite the detailed information provided by the author and by the State party, the Committee did not yet have at its disposal all the legal and factual elements required for its decision on the admissibility of the communication. In particular, it considered that the decision might require a finding as to whether the claim which the author pursued in the last instance before the Pension Review Board was a "suit at law" within the meaning of article 14, paragraph 1, of the Covenant. The Working Group of the Committee therefore requested the author and the State party to respond to the best of their abilities to the following questions:

(a) How does Canadian domestic law classify the relationship between a member of the Army and the Canadian State? Are the rights and obligations deriving from such a relationship considered to be civil rights and obligations or rights and obligations under public law?

(b) Are there different categories of civil servants? Does Canada make a distinction between a statutory régime (under public law) and a contractual régime (under civil law)?

(c) Is there a distinction, in Canadian domestic law, between persons employed by private employers under a labour contract and persons employed by the Government?

(d) (i) *Has any decision of the Pension Review Board ever been challenged before the Federal Court of Appeal?*

(ii) *What has been the outcome of such proceedings, if any?*

(iii) *Do decisions rendered by the Pension Review Board explicitly mention that they may be challenged before the Federal Court of Appeal?*

(iv) *Did the decision of the Pension Review Board of 15 August 1979 in the present case contain such an indication?*

(v) *Did the counsel appointed by the Government of Canada to protect the author's interests know that the remedy provided for in article 28 (1) of the Federal Court Act could be resorted to in the proceedings under consideration?*

6.1. In its submission of 22 January 1985, in reply to the Committee's interim decision, the State party explained that within the Canadian legal system the relationship between a member of the armed forces and the Crown was classified as a matter of public law. Soldiers were placed under a statutory régime as opposed to a contractual arrangement. This meant, *inter alia*, that members of the armed forces could not recover their pay through the ordinary courts.

6.2. In regard to the actual exercise of the remedy granted under article 28 (1) of the Federal Court Act, the State party points out that, since 1970, 10 decisions of the Pension Review Board have been the subject of applications for review. Six of those appeals had been referred to the Federal Court of Appeal in 1984 and were still pending, but in one case (*War Amputations of Canada* v. *Pension Review Board* [1975] C.F. 447) a decision had been handed down in 1975.

6.3. In addition, the State party states that Maître R. A. Pinsonnault, c.r., who was representing the author in the proceedings before the Pension Review Board, was well aware of the remedy under article 28 (1) of the Federal Court Act. As to the reason why Maître Pinsonnault had not suggested that the author avail himself of that remedy, the State party points out that the members of the Bureau of Pensions Advocates are not entitled to represent parties before the Federal Court of Appeal.

7.1. Responding to the interim decision of the Committee, the author transmitted a letter from the National Defence Headquarters, dated 7 February 1985, in which it was indicated that the rights and obligations of the members of the armed forces "relate to public law as opposed to private civil law".

7.2. Concerning the remedy provided for under article 28 (1) of the Federal Court Act, the author furnished the Committee with the letter dated 15 August 1979, by which the Pension Review Board itself informed him of the outcome of the proceedings before that body. As to the legal force of the decision of 15 August 1979 and as to available remedies, the letter contained a paragraph which read as follows:

It is to be noted that the decisions of the Board are final and enforceable for the purposes of the Pension Act. However, the Pension Review Board may, if new facts are brought to its attention or if it discovers an error in the exposition of the facts or in the interpretation of a rule of law, quash or amend that decision.

7.3. In letters which the author received from Maître Pinsonnault (dated 22 August 1979) and which his lawyers received from the Chief Pension Advocate of the Bureau of Pensions Advocates (dated 17 September 1979) after the final decision of Pension Review Board, no mention was made of the possibility of an appeal to the Federal Court of Appeal. Both of these letters confined themselves to discussing the possibilities of reopening the proceedings before the Pension Review Board.

8. Before considering the merits of any claim contained in a communication, the Human Rights Committee must determine whether the communication is admissible under the Optional Protocol to the Covenant.

9.1. With regard to the alleged violation of the guarantees of "a fair and public hearing by a competent, independent and impartial tribunal established by law", contained in article 14, paragraph 1, of the Covenant, it is correct to state that those guarantees are limited to criminal proceedings and to any "suit at law". The latter expression is formulated differently in the various language texts of the Covenant and each and every one of those texts is, under article 53, equally authentic.

9.2. The *travaux préparatoires* do not resolve the apparent discrepancy in the various language texts. In the view of the Committee, the concept of a "suit at law" or its equivalent in the other language texts is based on the nature of the right in question rather than on the status of one of the parties (governmental, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law, and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review. In this regard, each communication must be examined in the light of its particular features.

9.3. In the present communication, the right to a fair hearing in relation to the claim for a pension by the author must be looked at globally, irrespective of the different steps which the author had to take in order to have his claim for a pension finally adjudicated.

9.4. The Committee notes that the author pursued his claim successively before the Canadian Pension Commission, an Entitlement Board of the Commission and, finally, the Pension Review Board. It is clear from the observations made by the State party on the author's communication that the Canadian legal system subjects the proceedings in those various bodies to judicial supervision and control, because the Federal Court Act does provide the possibility of judicial review in unsuccessful claims of this nature. It would be hazardous to speculate on whether that Court would or would not have, first, quashed the decision of the Board on the grounds advanced by the author and, secondly, directed the Board to give the author a fair hearing on his claim. The fact that the author was not advised that he could have resorted to judicial review is irrelevant in determining the question whether the claim of the author was of a kind subject to judicial supervision and control. It has not been claimed by the author that this remedy would not have complied with the guarantees provided in article 14, paragraph 1, of the Covenant. Nor has he claimed that this remedy would not have availed in correcting whatever deficiencies may have marked the hearing of his case before the lower jurisdictions, including any grievance that he may have had regarding the denial of access to his medical file.

9.5. In the view of the Committee, therefore, it would appear that the Canadian legal system does contain provisions in the Federal Court Act to ensure to the author the right to a fair hearing in the situation. Consequently, his basic allegations do not reveal the possibility of any breach of the Covenant.

10. The Committee, therefore, concludes that the author has no claim under article 2 of the Optional Protocol and decides:

The communication is inadmissible.

Appendix

INDIVIDUAL OPINION

Submitted by Messrs. Bernhard Graefrath, Fausto Pocar and Christian Tomuschat concerning the admissibility of communication No. 112/1981, Y. L. v. Canada.

1. We concur in the view expressed by the majority of the Committee that the communication is inadmissible. But we do not share the reasons on which that view is based.

2. The majority view stresses in paragraph 9.4 that the Canadian legal system, in accordance with article 14, paragraph 1, of the Covenant, provides sufficient protection for a claim of the kind pursued by the author, because an appeal could be made to the Federal Court of Appeal. However, the availability of this legal remedy cannot be held against the author. In the letter by which the Pension Review Board informed the author of its decision as being final and enforceable, no mention was made of the possibility of such an appeal to a judicial body. Moreover, the lawyers who acted for the author and who are civil servants specifically appointed to represent claimants before the Pension Review Board did not advise the author accordingly. Under these circumstances, Canada is estopped from asserting that either, procedurally, the author has failed to exhaust local remedies or that, substantively, the requisite guarantees under article 14, paragraph 1, of the Covenant have been complied with.

3. However, the dispute between the author and Canada does not come within the purview of article 14, paragraph 1, of the Covenant. The guarantees therein contained apply to the determination both of any criminal charge and of rights and obligations in a suit at law. Whereas this phrase in its English and Russian versions refers to proceedings, the French and the Spanish texts rely on the nature of the right or obligation which constitutes the subject-matter of the proceedings concerned. In the circumstances of the present case, there is no need to clarify the common meaning to be given to the different terms used in the various languages which, under article 53 of the Covenant, are equally authentic. It is quite clear from the submissions of both the State party and the author that in Canada the relationship between a soldier, whether in active service or retired, and the Crown has many specific features, differing essentially from a labour contract under Canadian law. In addition, it has emerged that the Pension Review Board is an administrative body functioning within the executive branch of the Government of Canada, lacking the quality of a court. Thus, in the present case, neither of the two criteria which would appear to determine conjunctively the scope of article 14, paragraph 1, of the Covenant is met. It must be concluded, therefore, that proceedings before the Pension Review Board, initiated with a view to claiming pension rights, cannot be challenged by contending that the requirements of a fair hearing as laid down in article 14, paragraph 1, of the Covenant have been violated.

Bernhard Graefrath
Fausto Pocar
Christian Tomuschat

Communication No. 117/1981

Submitted by: The family of M. A., later joined by M. A., as co-author [names deleted], on 21 September 1981
Alleged victim: M. A.
State party: Italy
Declared inadmissible: 10 April 1984 (twenty-first session)

Subject matter: Conviction of civilian for involvement in reorganization of forbidden political party—Fascism

Procedural issues: Events prior to entry into force of Covenant—Competence of the HRC—Inadmissibility ratione temporis—*Inadmissibility* ratione materiae

Substantive issues: Freedom of association—Freedom of expression—Extradition order—Activities not covered by the rights and freedoms guaranteed by the Covenant—Compatibility of communication with the Covenant—Derogation from Covenant

Articles of the Covenant: 5, 19, 22 (2) and 25
Articles of the Optional Protocol: 1 and 3

1.1. The authors of the communication (initial letter dated 21 September 1981 and three subsequent letters) are the parents, brother and sister of M. A., a 27-year-old Italian citizen and right-wing political militant and publicist, who joined as submitting party by letter of 16 February 1982 and numerous further letters.

1.2. The alleged victim is M. A. who at the time of submission was serving a sentence upon conviction of involvement in "reorganizing the dissolved fascist party", which is prohibited by an Italian penal law of 20 June 1952. By order of the Court of Appeals of Florence, M. A., was conditionally released and placed under mandatory supervision on 29 July 1983.

1.3. The authors do not specify which articles of the Covenant have allegedly been violated. It is generally claimed that M. A. was condemned to prison solely for his ideas and that he has been deprived of the right to profess his political beliefs.

2.1. In his communication of 16 February 1982 M. A. stated, *inter alia*, that, although he had had contacts with some of the organizers of the Fronte Nazionale Rivoluzionario (FNR), he had not participated in the constitutive meeting of 22 January 1975. He disputed the accusation that he was one of the organizers of FNR and challenged the fairness of the trial against him.

2.2. In their letter of 27 January 1982 the family of M. A. stated that he was born in Lucca, Italy, on 14 July 1956 and was 15 years old when he joined the Movimento Politico Ordine Nuovo, which was dissolved by order of the Italian Ministry of the Interior on 23 November 1973. Thereafter, M. A. participated in the cultural organization of Movimento Sociale Italiano (right-wing party represented in the Italian Parliament, MSI). In May 1977 he founded the "Committee against repression and for the defence of the civil rights of anti-Marxist political prisoners". In June 1977 he founded the monthly newspaper *Azione Solidarietà* and in October 1977 he became the cultural organizer of MSI in Bologna. He went into exile in France in October 1978.

2.3. Court proceedings against M. A. were initiated in 1974, when he was 17 years of age and he was sentenced to four years' imprisonment on 11 May 1976 by the Arezzo Court of Assizes. He was detained from September 1976 to April 1977, when he was released on mandatory daily supervision. The Florence Court of Appeals confirmed the sentence on 30 November 1977 and the Rome Court of Cassation confirmed the judgement on 1 December 1978. In the meantime, however (October 1978 according to the authors), M. A. went into exile in France. There is no indication as to whether the mandatory daily supervision had been lifted or other information explaining the circumstances in which he left Italy. (The French "*Carte de séjour*" indicates that he entered France on 6 January 1979). All these events, based on the information furnished by the authors, took place prior to the entry into force for Italy of the Covenant and Optional Protocol on 15 December 1978. Subsequent to this date, on 6 September 1980, M. A. was extradited from France and imprisoned at the Casa Circondariale di Ferrara in Italy. He claims that the extradition order violated his rights, because he had been convicted of a political offence.

3. On 28 January 1982 the M. A. family stated that the same matter had not been submitted to another procedure of international investigation or settlement.

4. The authors do not specify which articles of the Covenant have allegedly been violated. It is generally claimed that M. A. was condemned to prison solely for his ideas, and that he has been deprived of the right to profess his political beliefs.

5. Various documents submitted with the communication include copies of the judgements of the Court of Assizes of Arezzo and Court of Appeals of Florence; a request for amnesty directed to the President of the Republic of Italy; original of a memorandum commenting on the evidence before the courts and the original of a brief challenging the constitutionality of the Italian law of 20 June 1952.

6. By its decision of 16 July 1982, the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party, requesting information and observations relevant to the question of admissibility of the communication, in particular in so far as it may raise issues under articles 19 (right to hold opinions and freedom of expression), 22 (freedom of association) and 25 (right to take part in the conduct of public affairs) of the International Covenant on Civil and Political Rights.

7.1. By a note dated 17 November 1982, the Italian Government objected to the admissibility of the com-

munication, *inter alia*, because the author "did not specify in any way the violation of which he claims to be a victim . . . but is merely asking for a review of his trial, since he believes that the Human Rights Committee would have competence to declare him 'not guilty'. In these terms, it is obvious that, so far as the 'request' of the authors of the communication is concerned, the Committee is not competent to review the sentence passed by the Italian courts".

7.2. The State party notes, however, that:

when the Human Rights Committee examined the documents received in the light of the relevant provisions of the Covenant and, in so doing, acted "*ex officio*", it considered that it would be advisable to obtain information regarding such connection as might exist between the legal proceedings instituted against M. A. and articles 19, 22 and 25 of the Covenant.

In this connection, the Italian Government, while considering that the conclusions referred to in the preceding paragraph make any further comment superfluous, does not challenge the examination carried out *ex officio* by the Committee and, in a spirit of co-operation, wishes to make the following observations regarding the admissibility of the communication on the basis that the latter does have some bearing on the above-mentioned articles of the Covenant.

...

The legal proceedings against M. A. led to the decision of the Arezzo Court of Assizes dated 28 April 1976, confirmed by the decision of the Florence Court of Appeals dated 30 November 1977 and made final when the appeal to the Court of Cassation was dismissed by decision of 1 December 1978.

The chronological order of events, together with the legal decisions, show unequivocally that, at the said periods, Italy was not bound by the United Nations Covenants or by the Optional Protocol which came into force for Italy on 15 December 1978, that is, after the decision of the Court of Cassation.

Accordingly, in the opinion of the Italian Government, it follows that the communication is inadmissible on the ground of lack of competence "*ratione temporis*".

The Italian Government is aware, however, that the Committee, while stressing the communications will be inadmissible if the facts which are subject of the complaint occurred before the entry into force of the Covenant, deems itself competent, by virtue of its earlier decisions, to take such facts into account if the author asserts that the alleged violations had not ceased after the date of entry into force of the Covenant. But in the present case it is clear from the dossier that the author of the communication has not alleged any violation, nor has he asserted that the alleged violations did not cease after 15 December 1978.

. . . The author of a complaint, communication or even request addressed to an international body can only invoke the same violations as those already alleged in national proceedings and for which he has not obtained satisfaction.

Accordingly, with a view to ensuring that this aspect of the matter is properly reviewed, it is necessary to consider the alleged violations referred to in the communication in the light of the action taken in his defence by M. A. and his lawyer in the proceedings before the Arezzo and Florence courts, and also before the Court of Cassation.

On the basis of the papers submitted in connection with the dossier, the reply is clearly in the negative. . . . If, on the other hand, it is decided to follow the course adopted by the Human Rights Committee and to assume that the applicant is in fact alleging violations of articles 19, 22 and 25 of the Covenant, it is necessary to determine whether the author invoked the same rights before the Italian courts.

In this connection, although the said provisions of the Covenant could not be invoked by M. A.—because the Covenant was not in force for Italy—it must be recognized that corresponding provisions are to be found in articles 9, 10 and 11 of the European Convention on Human Rights.

As is well known, the latter Convention, which was ratified by Act No. 848 of 4 August 1955, forms an integral part of Italian law. The application of these provisions can therefore be referred directly to the Italian courts.

If M. A. considered in the present case that his rights had been violated by the application of the Act No. 645 of 20 June 1952, he should have asked for the relevant articles of the European Convention to be applied immediately at first instance or, failing that, on appeal to the Court of Cassation.

M. A. never invoked the said provisions and never complained of the violation of rights which, according to the Human Rights Committee, are the subject of the communication under consideration.

The Italian Government therefore considers that the communication is also inadmissible on the ground indicated above.

Lastly, if it is none the less intended to invoke the said articles of the Covenant, it may be noted that paragraph 3 of article 19 contains an explicit provision whereby certain restrictions, which must, however, be expressly stipulated by law and which are necessary (*a*) for respect of the rights or reputations of others and (*b*) for the protection of national security or of public order, or of public health or morals, are deemed to be lawful. Similar restrictions are also provided under articles 22 and 25.

However, an examination of the indictment against M. A. shows that it is for "reorganizing the dissolved fascist party" that is, for organizing a movement which has as its object the elimination of the democratic freedoms and the establishment of a totalitarian régime.

It is clearly a case of restrictions "expressly stipulated by law (Scelba Law) and "which are necessary . . . in a democratic society for the protection of national security, public order . . .".

In light of the foregoing considerations, the Italian Government considers that M. A.'s communication, being inadmissible on the grounds referred to above, should also be deemed inadmissible, by virtue of the restrictions provided for under article 19, paragraph 3, article 22, paragraph 2, and article 25, since it is manifestly devoid of foundation.

8. In response to the State party's submission under rule 91, the author forwarded the following comments dated 6 January 1983:

In its reply dated 17 November 1982, the Italian Government considers that the communication which I submitted to you should be "inadmissible" because:

(*a*) ". . . the Human Rights Committee is not competent to review the sentence passed by the Italian courts".

The Human Rights Committee should, however, be deemed to *have the competence and the power* to do so, inasmuch as it is the judicial organ which has to ensure that the provisions of the Covenant are implemented by the Governments that are signatories to it.

(*b*) ". . . the legal proceedings against M. A. took place between 1971 and 1978" at which time "Italy was not bound by the United Nations Covenants or by the Optional Protocol".

However, the Italian Government knows that the legal proceedings against M. A. did not end in 1978, but continued until 6 August 1980 (on which date I was being held in prison in Nice, France) when the French Government was asked by the Italian Government to arrest M. A. (the Italian Government then applied for his extradition on a charge of "reorganizing the dissolved fascist party" and other charges).

It thus follows ". . . that the alleged violations did not cease following the date of entry into force of the Covenant", but, in the present case, as is clear from the communication which I have submitted to you, they continued beyond the entry into force of the Covenant and the Protocol since, on 6 August 1980, after the arrest of M. A., the Italian Government applied for his extradition, under Act No. 645 of 20 June 1952, article 2 (1), in respect of the charge for which he had been sentenced in Italy to four years' imprisonment (as can be seen from the decision of the Aix-en-Provence Court (*Chambre d'accusation*), France, dated 5 September 1980).

The timing of events makes it quite clear that the violations of one or more provisions of the Covenant and subsequently the unlawfulness of his detention extend beyond the entry into force of the Covenant and the Protocol.

(*c*) According to the Italian Government, I "should have asked for the relevant articles of the European Convention to be applied immediately at first instance, or, failing that, on appeal to the Court of Cassation".

It is, however, a well known fact that, under articles 2 and 3 of the Italian Criminal Code it is for the court itself to apply the law that is most favourable to the accused.

It is stated: "Nobody may be punished for an act which, under a subsequent law, does not constitute an offence; and, in the event of a conviction, it shall not be enforceable nor have penal effects."

Consequently, it was not for M. A. to request that the relevant articles of the European Convention be applied; it was for the judges of the Arezzo Court of Assizes or of the Florence Court of Appeals or, in the final instance, of the Court of Cassation to apply them . . . .

9. On 10 January 1983, the legal representative of M. A. submitted further comments, noting that:

(*a*) The violations did not come to an end prior to 15 December 1978, which is obvious since he is currently serving the sentence for which he was tried. Thus, the law applied is still in force and the sentence against M. A. is being carried out;

(*b*) The restrictions in the law applied in M. A.'s case are themselves based on a law which was purportedly enacted in order to protect public safety, but which in reality does not permit the expression of one particular ideology even by democratic and non-violent means. Therefore it is a law that persecutes or discriminates on the basis of ideology and as such is in violation of article 18 of the Covenant. It is also inherently discriminatory because it is aimed not at all allegedly "anti-democratic" movements (anarchistic, Leninist, etc.) but solely at movements with fascist leanings;

(*c*) These facts were also put forward by legal counsel in proceedings brought before the Italian Courts . . .

10. In a further letter, dated 25 June 1983, the author informed the Committee of a decision taken by the French Conseil d'Etat, dated 3 June 1983, published on 17 June 1983, annulling the French extradition decree of 5 September 1980. The author appealed to the Committee for assistance in obtaining his immediate release from imprisonment, recalling that he has been detained in Italian prisons since 6 September 1980. In an annex to this letter M. A. encloses the text of the annulment decision, which was taken on the grounds of administrative irregularities, in particular because the extradition decree was issued without taking due account of the Law No. 79-387 of 11 July 1979 relative to administrative acts in France.

11.1. In a letter of 16 May 1983, M. A. informed the Committee that his legal counsel Mr. M. B. [name deleted] had been arrested. There is no indication, however, that this has any bearing on or relevance to the present case. In a further letter, dated 6 September 1983, the author in reply to a Secretariat request for information informed the Committee that following the arrest of his attorney, he has not taken a new legal representative. He also points out that no further submissions on his behalf will be made in response to the observations of the Italian Government.

11.2. The author also indicates that, upon his application, the Court of Appeals of Florence on 29 July 1983 ordered his release from imprisonment and placed him under mandatory supervision, prohibiting him from leaving the town of Lucca or Italian territory and further restricting his political activity. The author thus appeals to the Committee to intercede on his behalf in order to end his state of "detention in liberty".

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

13.1. The Human Rights Committee observes that in so far as the author's complaints relate to the conviction and sentence of M. A. for the offence, under Italian penal law, of "reorganizing the dissolved fascist party" they concern events which took place prior to the entry into force of the International Covenant on Civil and Political Rights and the Optional Protocol for Italy (i.e. before 15 December 1978) and consequently they are inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant, *ratione temporis.*

13.2. In so far as the authors' complaints relate to the consequences, after the entry into force of the Covenant and the Optional Protocol for Italy, of M. A.'s conviction and sentence, it must be shown that there were consequences which could themselves have constituted a violation of the Covenant. In the opinion of the Committee there were no such consequences in the circumstances of the present case.

13.3. The execution of a sentence of imprisonment imposed prior to the entry into force of the Covenant is not in itself a violation of the Covenant. Moreover, it would appear to the Committee that the acts of which M. A. was convicted (reorganizing the dissolved fascist party) were of a kind which are removed from the protection of the Covenant by article 5 thereof and which were in any event justifiably prohibited by Italian law having regard to the limitations and restrictions applicable to the rights in question under the provisions of articles 18 (3), 19 (3), 22 (2) and 25 of the Covenant. In these respects therefore the communication is inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant, *ratione materiae.*

13.4. M. A.'s additional claim that the extradition proceedings, initiated by Italy while he was living in France, constitute a violation of the Covenant, is without foundation. There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country. The claim is therefore inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant, *ratione materiae.*

14. The Human Rights Committee therefore decides:

The communication is inadmissible.

Communication No. 118/1982

Submitted by: J. B., P. D., L. S., T. M., D. P., D. S. (names deleted) on 5 January 1982
Alleged victims: The authors
State party: Canada
Declared inadmissible: 18 July 1986 (twenty-eighth session)*

Subject matter: Prohibition to strike for public employees in Canadian province

Procedural issues: Exhaustion of domestic remedies —Investigation by ILO—Examination of "same matter"—Relevance of travaux préparatoires *of Covenant—Interpretation of Covenant provision —Inadmissibility* ratione materiae*—Individual opinion*

Substantive issues: Freedom of association—Right to strike—Trade Union activities—Civil Service

Article of the Covenant: 22
Article of the Optional Protocol: 3

1.1. The authors of the communication (initial letter dated 5 January 1982 and seven subsequent letters) are J. B., P. D., L. S., T. M., D. P. and D. S., in their personal capacities and as members of the executive committee of the Alberta Union of Provincial Employees, Canada. They are represented by the Alberta Union of Provincial Employees through legal counsel.

1.2. The authors refer to the prohibition to strike for provincial public employees in the Province of Alberta under the Alberta Public Service Employee Relations Act of 1977 and claim that such prohibition constitutes a breach by Canada of article 22 of the International Covenant on Civil and Political Rights.

2.1. The facts of the claim have been described as follows. In 1977, the Legislature of the Province of Alberta, Canada, adopted the Public Service Employee Relations Act, mainly with a view to consolidating a number of existing legislative enactments covering provincial public employees. The Act, which entered into force on 22 September 1977, prohibits persons within its scope from striking and imposes penalties in cases of contravention (sections 93 and 95 of the Public Service Employee Relations Act, 1977). The 40,000 members of the Union are said to be adversely affected by these provisions.

2.2. In November 1977, the Canadian Labour Congress, on behalf of the Alberta Union of Public Employees, lodged a complaint with the Committee on Freedom of Association of the International Labour Organisation (ILO) that the general prohibition of strikes for public employees contained in the Alberta Public Service Employee Relations Act was not in harmony with article 10 of ILO Convention No. 87[1] ". . . since it constituted a considerable restriction on the opportunities open to trade unions to further and defend the interests of their members". The complaints added that "such a limitation is an impairment of articles 3 and 8 of Convention No. 87 . . .". In its report as approved by the ILO Governing Body in November 1978 (case No. 893), the Committee on Freedom of Association suggested that . . . the Government [of Alberta] consider the possibility of introducing an amendment to the Public Service Employee Relations Act so that in cases where strikes are prohibited, this be confined to services which are essential.

2.3. In 1979, a second complaint was lodged with ILO by the same complainant, on behalf of the Union. In its observations, submitted by the Government of Canada, the Government of Alberta voiced disagreement with the ILO recommendation of 1978 arguing that ". . . although some services might to more essential than others, the public service generally provides to the people of Alberta services for which, in the main, there is no reasonable alternative . . .". In its second report the Committee on Freedom of Association repeated its recommendation contained in its first report, with the following reasoning: "The Committee has taken note of this information. Under article 3 of Convention No. 87, trade-union organizations, as organizations of workers for furthering and defending their occupational interests (art. 10), have the right to formulate their programmes and organize their activities. It is on the basis of the right which trade unions are thus recognized as possessing that the Committee has always considered their right to strike as a legitimate—and indeed essential—means by which workers may defend their occupational interests. The Committee has recognized that strikes may be restricted, and even prohibited, in the public service, essential service or a key centre of a country's economy because—and to the extent that—a work stoppage may cause serious harm to the national community. Accordingly, the Committee holds the view that it is inappropriate in the present case to place all public establishments covered by the Public Service Employee Relations Act of 1977 on the same footing as regards the prohibition of the right to strike. To take only the example quoted by the complainants, the Alberta Liquor Board is not a service in which strikes should be prohibited . . .".

2.4. In 1980, a third complaint in the matter was submitted to the ILO Committee on Freedom of Association by the Canadian Labour Congress. The Committee on Freedom of Association again recommended to the Governing Body that it suggest to the Government of Canada that the Government of Alberta

consider the possibility of introducing an amendment to the Public Service Employee Relations Act in order to confine the prohibition of strikes to services which are essential in the strict sense of the term.[2]

* The text of an individual opinion submitted by five Committee members is appended to the present decision.

[1] *International Labour Organisation, International Conventions and Recommendations, 1919-1981* (Geneva, 1982).

[2] International Labour Office; "Complaint presented by the Canadian Labour Congress against the Government of Canada (Alberta): Case No. 893" in *Reports of the Governing Body Committee on Freedom of Association* (203rd, 204th and 205th) (1980) LXIII Official Bulletin, Series B, No. 3, p. 28, para. 134 (*b*).

In 1983, as a result of this decision, the Public Service Employee Relations Act was amended to exclude from its ambit the Alberta Liquor Board, the only publicly-owned undertaking to which express reference was made by the Committee on Freedom of Association in its examination of the above-mentioned Act.[3]

2.5. The Union also commenced court action in Edmonton, Alberta, at an unspecified date, in 1979 or in the beginning of 1980. The Union filed an application with the Alberta Court of the Queen's Bench, with a view to having certain sections of the Public Service Employee Relations Act of 1977 held to be contrary to international law and to be thus void and of no effect. This application was introduced by way of an Originating Notice of Motion for the determination mainly of the following questions:

(*a*) Whether the Public Service Employee Relations Act S.A. 1977 was, in whole or in part, in violation of Canada's international legal obligations;

(*b*) Whether the Province of Alberta was empowered to legislate in violation of Canada's international legal obligations;

(*c*) Whether the Public Service Employee Relations Act was *ultra vires* the legislature of the Province of Alberta.

2.6. During hearings preceding the judgement, the representatives of the Union and of the Government of Alberta presented their arguments in the case. On 25 July 1980, judgement was rendered by the Learned Trial Judge of the Court of the Queen's Bench of Alberta in answer to the questions raised by the Originating Notice of Motion. It was determined by the Judge that the Public Service Employee Relations Act was neither in whole nor in part in violation of Canada's international obligations; that the Act was not *utra vires* the legislature of the Province of Alberta; and that in view of the foregoing it was not necessary to answer the question whether Alberta was empowered to legislate in violation of Canada's international obligations. The Union appealed the decision of the Learned Trial Judge to the Alberta Court of Appeal. The appeal was dismissed on 21 September 1981. The Union then sought leave to appeal the decision of the Alberta Court of Appeal to the Supreme Court of Canada. On 23 November 1981 the Supreme Court of Canada refused leave to appeal.

2.7. The Alberta Union of Provincial Employees maintained (at the time of the submission of the communication on 5 January 1982) that all available domestic remedies had been exhausted.

3. By its decision of 8 July 1983, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party, requesting information and observations relevant to the question of admissibility of the communication.

4.1. Under cover of the note dated 6 August 1984, the State Party, *inter alia*, submitted that:

the Human Rights Committee must consider a communication inadmissible if:

(*a*) It is incompatible with the provisions of the Covenant;

(*b*) The same matter as that dealt with is being examined under another procedure of international investigation or settlement; or

(*c*) The communicant has not exhausted all available domestic remedies.

The Government of Canada, after consultation with the Government of the Province of Alberta, is of the view that the present communication fails to meet these requirements and should therefore be found inadmissible by the Committee.

4.2. With respect to the compatibility of the communication with the provisions of the Covenant, the State party argued:

Article 3 of the Optional Protocol to the International Covenant on Civil and Political Rights provides that the Human Rights Committee "shall consider inadmissible any communication under the present Protocol . . . which it considers . . . to be incompatible with the provisions of the Covenant". The Government of Canada is of the view that article 22, paragraph 1, of the International Covenant on Civil and Political Rights does not guarantee the right to strike and that as a result the present communication is inadmissible *ratione materiae*.

No mention of the right to strike is made in article 22, paragraph 1, of the International Covenant on Civil and Political Rights. The Government of Canada considers that this silence is of import, especially in light of article 8, paragraph 1 (*d*), of the International Covenant on Economic, Social and Cultural Rights which does recognize the right to strike. . . .

. . . Thus, so long as a State party meets its basic requirements under article 22, paragraph 1, of the Covenant, which is to permit and make possible trade-union action aimed at protecting the occupational interests of trade-union members, there is no breach of the Covenant. In giving effect to this obligation, a State party is free to choose the means which it considers appropriate. Therefore, if a State party meets its basic obligations under article 22, paragraph 1, any communication which aims at forcing it to accept a given method of compliance in preference to another would clearly be incompatible with the Covenant.

In the present case. the communicant's sole argument is that the Public Service Employee Relations Act enacted by the legislature of the Province of Alberta violates article 22, paragraph 1, of the Covenant by forbidding strikes in the provincial public service. It makes no argument as to why, apart from prohibiting strikes, the Alberta scheme would fail adequately to safeguard the occupational interest of trade-union members. It is asking the Committee to recognize that article 22, paragraph 1, of the Covenant confers a right to strike and as a result does away with the discretion which States possess to choose the means they consider the most appropriate to implement article 22, paragraph 1. In this respect, the communication is incompatible with the provisions of article 22, paragraph 1, of the Covenant. Not only does this article not recognize a right to strike, it allows a State party to choose how it will give effect to the "right [of everyone] to form and join a trade union for the protection of his interest". Therefore, the Government of Canada considers the present communication inadmissible on the basis of incompatibility with the Covenant.

4.3. With respect to the issue of *lis pendens*, the State party argued:

Article 5, paragraph 2 (*a*), of the Optional Protocol to the International Covenant on Civil and Political Rights provides that "the Committee shall not consider any communication from an individual unless it has ascertained that . . . the same matter is not being examined under another procedure of international investigation or settlement". The Government of Canada considers that the proceedings initiated on behalf of the Alberta Union of Pubic Employees before the Committee on Freedom of Association of the International Labour Organisation result in *lis pendens* since proceedings before that Committee imply the use of another procedure of international complaint or settlement and since the matter dealt with by the Committee is the same as that on which the Human Rights Committee is asked to express its views. . .

For article 5, paragraph 2 (*a*), of the Optional Protocol to apply a communication to the Committee on Freedom of Association of the International Labour Organisation must be considered to be another procedure of international investigation or settlement. In the view of the Government of Canada, the special machinery for the protection of freedom of association established by the International Labour Organisation (or ILO) in 1950 following an agreement with the United Nations Economic and Social Council is such a procedure . . .

[3] Public Service Employee Relations Act, Schedule, section 6 as added by the Labour Statutes Amendment Act, 1983, S.A. 1983, c. 34, subsect. 5 (13).

. . . This procedure, like that under which the Human Rights Committee operates, implies that complaints are received, investigations made and recommendations issued. There are differences between the two systems but these do not affect the nature of the International Labour Organisation's special procedure. . . .

Even if proceedings are being carried on before two international investigative bodies, a communication is only inadmissible under article 5, paragraph 2 (*a*), of the Optional Protocol if these two bodies are examining the same matter. It is the view of the Government of Canada that this is the situation in the present case. . . .

In its complaint now before the Committee on Freedom of Association [see para. 5.2 below], the communicant is alleging that the Public Service Employee Relations Act in force in the Province of Alberta fails to set up an impartial conciliation and arbitration procedure as an alternative to strikes and that as a consequence the Government of Canada is in breach of the obligations under Convention No. 87. In its communication in respect to article 22, paragraph 1, of the Covenant, it seeks a recognition that this article confers a right to strike and that therefore the Public Service Employee Relations Act is in breach of Canada's international obligations. The aims of these two communications are identical. In both cases, the communicant seeks a recognition of the right to strike although in one case, its method is direct and in the other indirect. . . .

In the view of the Government of Canada, if the issue raised by the communicant were debated before the Human Rights Committee, it would in fact be dealing with the same matter as is currently before the Committee on Freedom of Association. As previously indicated, it is the view of the Government of Canada that the Covenant does not recognize the right to strike. If the Committee did not dismiss the present communication on the ground of incompatibility with the Covenant, the communicant would have to show why and how the Public Service Employee Relations Act contravened article 22, paragraph 1, of the Covenant. To do this, it would almost inevitably have to resort to the same arguments it is invoking in the other forum. For this reason, the Government of Canada, after consultation with the Government of the Province of Alberta, considers that there is in this case *lis pendens* and that the communication should be found inadmissible under article 5, paragraph 2 (*a*), of the Optional Protocol.

4.4. With respect to the issue of exhaustion of domestic remedies, the State party argued:

The communicant, before it made the present communication, had challenged the constitutional validity of the no-strike provisions of the Public Service Employee Relations Act of the Province of Alberta before the Court of the Queen's Bench of the Province of Alberta.[4] A reading of the decision of Sinclair C.J.Q.B. in *Re Alberta Union of Provincial Employees* et al., *and the Crown in Right of Alberta* shows that this challenge was based on the notion of division of powers between the federal and provincial levels of government within the Canadian federation. Basically, the plaintiff was arguing that international law recognized to all persons employed in the public service save those employees engaged in essential services the right to strike and that under the Canadian Constitution only the Federal Government could legislate in breach of international law.[5] No mention is made of the provision of the Alberta Bill of Rights which protects freedom of association. . . .

When the communicant sought leave to appeal to the Supreme Court of Canada the decision of the Court of Appeal, it should be noted that it did invoke the freedom of association provisions of the Alberta Bill of Rights as one of the grounds of appeal. It argued that the Alberta Bill of Rights ought to be interpreted in light of Canada's international obligations which, in its view, recognized to employees of non-essential publicly-owned undertakings the right to strike. It did not argue that freedom of association as recognized in the Bill conferred by itself the right to strike.[6] Further, in its pleadings, the communicant also narrowed the focus of its appeal. It no longer challenged the no-strike provisions of the Public Service Employee Relations Act as they applied to the entire public service, but rather it limited its challenge to their application to the non-essential employees of the Crown-owned undertakings.[7] Clearly when the communicant made its communication it had not exhausted local remedies. . . .

The Government of Canada has indicated that the communicant is currently proceeding with a challenge against the no-strike provisions of the Public Service Employee Relations Act under subsection 2 (*d*) of the Canadian Charter of Rights and Freedoms [see para. 5.3 below]. This provision reads as follows:

"2. Everyone has the following fundamental freedoms:

". . .

"(*d*) Freedom of association."[8]

The issue of whether freedom of association confers to trade unions and their members a right to strike is a matter which was not litigated before the Supreme Court of Canada and which does not appear to have been dealt with by lower courts under the Canadian Bill of Rights or the Alberta Bill of Rights. However, under the Charter the relationship between freedom of association and the right to strike is a question which has been submitted to the courts for adjudication at both the federal and provincial levels.[9] Because of the importance of the matter and of conflicting judicial interpretation, it is likely that the Supreme Court of Canada, which is in the Canadian federation the court of last resort for both the federal and provincial jurisdictions, will be given an opportunity to render judgement on this question.

Since the Alberta Union of Public Employees failed to exhaust domestic remedies before it submitted a communication to the Human Rights Committee and since it is currently pursuing proceedings before the Alberta Court of Queen's Bench on the same matter, the Government of Canada considers that its communication should be found inadmissible under article 5, paragraph 2 (*b*), of the Optional Protocol to the International Covenant on Civil and Political Rights.

5.1. In their comments under rule 91, dated 2 June 1986, the authors address the three main objections of the State party with regard to the admissibility of the communication. First, they submit that the communication is indeed compatible with the provisions of the Covenant, and refer to the relevance of article 22, paragraph 3, which provides that "Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize [Convention No. 87] to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention". It is implied, they argue, that a denial of the right to strike would prejudice the guarantees of ILO Convention No. 87. Moreover, an interpretation of article 22, paragraph 1, of the Covenant would also have to take into consideration other

[4] When this challenge was initiated, there existed no constitutional protection of freedom of association in Canada. Such a protection came into existence only on 17 April 1982 with the coming into force of the Canadian Charter of Rights and Freedoms. However, the Alberta Bill of Rights, R.S.A. 1980, c. A-16, did protect various basic rights and freedoms including freedom of association. The Bill was, however, not constitutionalized.

[5] *The Alberta Union of Provincial Employees* et al., *and the Crown in Right of Alberta*, 120 Dominion Law Reports, pp. 592-622. See, in particular, p. 592 for a summary of the matters in litigation, p. 609 for the employees covered by the plaintiff's arguments and pp. 621-622 for the conclusion of Sinclair C.J.Q.B.

[6] *The Alberta Union of Provincial Employees* et al., v. *The Crown in Right of Alberta*: Motion for leave to appeal, 25 November 1981, pp. 10, 20 and 21.

[7] *Ibid.*, pp. 10 and 21.

[8] Rights protected by the Canadian Charter of Rights and Freedoms are not absolute. Section 1 provides that the rights and freedoms set out in the Charter are guaranteed subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[9] Apart from the proceedings initiated by the communicant, mention ought to be made of *Re Service Employees' International Union, Local 204, and Broadway Manor Nursing Home* et al., *and two other applications* (1984), 44 O.R. 392 (Ontario High Court of Justice, Divisional Court), *Public Service Alliance of Canada* v. *The Queen* et al., Federal Court of Canada, Trial Division, 21 March 1984 (unreported) and *Dolphin Delivery Ltd.* v. *Retail, Wholesale and Department Store Union, Local 580* et al., 5 March 1984 (unreported). All of the decisions have been appealed, the last one to the Supreme Court of Canada.

international instruments, including ILO Convention No. 87, which is an elaboration of the principles of freedom of association in international law. It is submitted that in a series of decisions the Committee on Freedom of Association of ILO has determined that the right to strike derives from article 3 of ILO Convention No. 87 and that it is an essential means by which workers can promote and defend their occupational interests. In particular, the authors point out that, in four cases, the Committee on Freedom of Association has considered the provisions of the Alberta Public Service Employee Relations Act and has found that the statute does not comply with the guarantee of freedom of association contained in Convention No. 87. The Committee on Freedom of Association has accordingly requested the Canadian Government "to re-examine the provisions in question in order to confine the ban on strikes to services which are essential in the strict sense of the term". The ILO Committee of Experts on the Application of Conventions and Recommendations, it is argued, has also reaffirmed the importance of the right to strike in the non-essential public service.

5.2. With regard to the State party's objection that the matter is being examined under another procedure of international investigation or settlement (para. 4.3 above), the authors submit that the complaint submitted by the Canadian Labour Congress, on behalf of the Alberta Union of Provincial Employees, to ILO is no longer under examination since the ILO investigation was concluded in 1985 and recommendations for resolving the differences have been made by the Committee on Freedom of Association and affirmed by the Governing Body of the International Labour Office. These recommendations, the authors add, have been ignored by the Government of the Province of Alberta.

5.3. With regard to the question of exhaustion of domestic remedies, the authors submit that all available domestic remedies have indeed been exhausted. In particular, the authors dispute the relevance of the State party's contention (para. 4.4 above) that their argument before the Canadian courts was narrower than that before the Human Rights Committee, explaining that "since the Canadian courts decided that there was no right to strike [for public employees in the Province of Alberta], the question of the entitlement of persons like the complainants was never reached". With regard to the State party's contention that the Alberta Union of Provincial Employees is pursuing this matter under the Canadian Charter of Rights and Freedoms, the authors point out that, at the time of submission of the present communication to the Human Rights Committee on 5 January 1982, the Charter of Rights and Freedoms had not come into force. After the Charter was proclaimed on 17 April 1982, the Alberta Union of Provincial Employees, however, commenced an action in the Court of Queen's Bench of Alberta for a declaration that certain provisions of the Public Service Employee Relations Act, including the strike prohibition, were contrary to the guarantee of freedom of association contained in section 2 (*d*) of the Charter. On 29 February 1984, the Province of Alberta referred certain questions to the Court of Appeal of Alberta for an advisory opinion and obtained a stay of the proceedings that had been launched by the Alberta Union. On 17 December 1984, the Court of Appeal of Alberta certified its opinion on a number of points, while declining to issue an opinion on the question here in dispute. The Alberta Union therefore appealed to the Supreme Court of Canada, which heard argument on the appeal on 28 and 29 June 1985. After argument, the Supreme Court of Canada reserved judgement on the appeal and to date has not rendered judgement. The authors conclude that, "while the Human Rights Committee may wish to postpone further consideration of this complaint until the Supreme Court of Canada has made its decision, it is respectfully submitted that the complaint should not be ruled inadmissible for the reason that some domestic remedy has not been exhausted".

6.1. Before considering any claim contained in a communication, the Human Rights Committee shall, in accordance with rule 87 of its provisional rules of procedure, decide whether the communication is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

6.2. The question before the Committee is whether the right to strike is guaranteed by article 22 of the International Covenant on Civil and Political Rights. Article 22, paragraph 1, provides:

> Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

Since the right to strike is not *expressis verbis* included in article 22, the Committee must interpret whether the right to freedom of association necessarily implies the right to strike, as contended by the authors of the communication. The authors have argued that such a conclusion is supported by decisions of organs of the International Labour Organisation in interpreting the scope and the meaning of labour law treaties enacted under the auspices of ILO. The Human Rights Committee has no qualms about accepting as correct and just the interpretation of those treaties by the organs concerned. However, each international treaty, including the International Covenant on Civil and Political Rights, has a life of its own and must be interpreted in a fair and just manner, if so provided, by the body entrusted with the monitoring of its provisions.

6.3. In interpreting the scope of article 22, the Committee has given attention to the "ordinary meaning" of each element of the article in its context and in the light of its object and purpose (article 31 of the Vienna Convention on the Law of Treaties).[10] The Committee has also had recourse to supplementary means of interpretation (article 32 of the Vienna Convention on the Law of Treaties) and perused the *travaux préparatoires* of the Covenant on Civil and Political Rights, in particular the discussions in the Commission on Human Rights and in the Third Committee of the General Assembly. The Committee notes that in the course of drafting the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, the Commission on Human Rights based itself on the Universal Declaration of Human Rights. The Universal Declaration, however, does not refer to the right to strike. At its seventh session in 1951, the Commission adopted the text of a single "draft covenant on human

[10] *Official Records of the United Nations Conference on the Law of Treaties, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969* (United Nations publication, Sales No. E.70.V.5), p. 287.

rights" comprising 73 articles (E/1992, annex). The relevant draft articles 16 ("the right of association") and 27 ("the right of everyone, in conformity with article 16, to form and join local, national and international trade unions") did not provide for the right to strike. In the course of the discussions of these articles at the Commission's eighth session in 1952, article 27 was dealt with first. An amendment to article 27 providing for the inclusion of the right to strike was rejected by 11 votes to 6, with 1 abstention. Three weeks later, the Commission discussed article 16 and adopted it with minor amendments, without, however, any proposal or amendment being tabled with a view to including the right to strike in that article. Pursuant to General Assembly resolution A/543 (VI), the single draft covenant on human rights was split into a draft covenant on civil and political rights and a draft covenant on economic, social and cultural rights. Article 16 was assigned to the draft covenant on civil and political rights, eventually being renumbered as article 22. Article 27, on the other hand, was assigned to the draft covenant on economic, social and cultural rights, eventually being renumbered as article 8. Five years after the adoption of draft articles 16 and 27 by the Commission on Human Rights, the Third Committee of the General Assembly again discussed the draft covenants. Whereas an amendment to the new draft article 8 of the Covenant on Economic, Social and Cultural Rights was adopted, including "the right to strike, provided that it is exercised in conformity with the laws of the particular country", no similar amendment was introduced or discussed with respect to the draft covenant on civil and political rights. Thus the Committee cannot deduce from the *travaux préparatoires* that the drafters of the Covenant on Civil and Political Rights intended to guarantee the right to strike.

6.4. The conclusions to be drawn from the drafting history are corroborated by a comparative analysis of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Article 8, paragraph 1 (*d*), of the International Covenant on Economic, Social and Cultural Rights recognizes the right to strike, in addition to the right of everyone to form and join trade unions for the promotion and protection of his economic and social interests, thereby making it clear that the right to strike cannot be considered as an implicit component of the right to form and join trade unions. Consequently, the fact that the International Covenant on Civil and Political Rights does not similarly provide expressly for the right to strike in article 22, paragraph 1, shows that this right is not included in the scope of this article, while it enjoys protection under the procedures and mechanisms of the International Covenant on Economic, Social and Cultural Rights subject to the specific restrictions mentioned in article 8 of that instrument.

6.5. As to the importance which the authors appear to attach to article 22, paragraph 3 (para. 5.1 above), of the Covenant on Civil and Political Rights, the Committee observes that the State party has in no way claimed that article 22 authorizes it to take legislative measures or to apply the law to the detriment of the guarantees provided for in ILO Convention No. 87.

7. In the light of the above, the Human Rights Committee concludes that the communication is incompatible with the provisions of the Covenant and thus inadmissible *ratione materiae* under article 3 of the Optional Protocol. In the circumstances, the Committee does not have to examine further the question of the admissibility of the communication under article 5, paragraph 2 (*a*) and (*b*), of the Optional Protocol, or the question whether an alleged breach of a collective right, such as the right to strike, can be the subject of a claim submitted by individuals pursuant to articles 1 and 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides: That the communication is inadmissible.

Appendix

INDIVIDUAL OPINION

Submitted by Ms. Rosalyn Higgins and Messrs. Rajsoom Lallah, Andreas Mavrommatis, Torkel Opsahl and S. Amos Wako concerning the admissibility of communication No. 118/1982, J. B *et al.* v. Canada

1. In its decision the Committee states that the issue before it is whether the right to strike is guaranteed by article 22 of the International Covenant on Civil and Political Rights; and, finding that it is not, it declares the communication inadmissible.

2. We regret that we cannot share this approach to the issues in this case. We note that in Canada, as in many other countries, there exists, in principle, a right to strike, and that the complaint of the authors concerns the general prohibition of the exercise of such right for public employees in the Alberta Public Service Employee Relations Act. We believe that the question that the Committee is required to answer at this stage is whether article 22 alone or in conjunction with other provisions of the Covenant necessarily excludes, in the relevant circumstances, an entitlement to strike.

3. Article 22 provides that "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." The right to form and join trade unions is thus an example of the more general right to freedom of association. It is further specified that the right to join trade unions is for the purpose of protection of one's interests. In this context we note that there is no comma after "trade unions", and as a matter of grammar "for the protection of his interests" pertains to "the right to form and join trade unions" and not to freedom of association as a whole. It is, of course, manifest that there is no mention of the right to strike in article 22, just as there is no mention of the various other activities, such as holding meetings, or collective bargaining, that a trade-unionist may engage in to protect his interests. We do not find that surprising, because it is the broad right of freedom of association which is guaranteed by article 22. However, the exercise of this right requires that some measure of concerted activities be allowed; otherwise it could not serve its purposes. To us, this is an inherent aspect of the right granted by article 22, paragraph 1. Which activities are essential to the exercise of this right cannot be listed *a priori* and must be examined in their social context in the light of the other paragraphs of this article.

4. The drafting history clearly shows that the right of association was dealt with separately from the right to form and join trade unions. The *travaux préparatoires* indicate that in 1952 the right to strike was proposed only for the draft article on trade unions. This is what we would have expected. It was at that time rejected. They show also that in 1957, when the right to strike (subject to certain limitations) was accepted as an amendment to the draft article on the right to form and join trade unions, such an amendment was neither introduced nor discussed with respect to the draft covenant on civil and political rights. The reason seems to us both clear and correct—namely, that because what is now article 22 of the Covenant on Civil and Political Rights deals with the right of association as a whole, concerning clubs and societies as well as trade unions, mentioning particular activities such as strike action would have been inappropriate.

5. We therefore find that the *travaux préparatoires* are not determinative of the issue before the Committee. Where the intentions of the drafters are not absolutely clear in relation to the point at hand, article 31 of the Vienna Convention also directs us to the object and purpose of the treaty. This seems to us especially important in a treaty for the promotion of human rights, where limitation of the exercise of rights, or upon the competence of the Committee to review a prohibition by a State of a given activity, are not readily to be presumed.

6. We note that article 8 of the International Covenant on Economic, Social and Cultural Rights, having spoken of the right of everyone to form trade unions and join the union of his choice, goes on to speak of "the right to strike, provided that it is exercised in conformity with the laws of the particular country". While this latter phrase gives rise to some complex legal issues, it suffices for our present purpose that the specific aspect of freedom of association which is touched on as an individual right in article 22 of the Covenant on Civil and Political Rights, but dealt with as a set of distinctive rights in article 8, does not necessarily exclude the right to strike in all circumstances. We see no reason for interpreting this common matter differently in the two Covenants.

7. We are also aware that the ILO Committee on Freedom of Association, a body singularly well placed to pronounce authoritatively on such matters, has held that the general prohibition of strikes for public employees contained in the Alberta Public Service Employee Relations Act was not in harmony with article 10 of ILO Convention No. 87 ". . . since it constituted a considerable restriction on the opportunities open to trade unions to further and defend the interests of their members." While we do not at this stage purport to comment on the merits, we cannot fail to notice that the ILO finding is based on the furtherance and defence of interests of trade-union members; and article 22 also requires us to consider that the purpose of joining a trade union is to protect one's interests. Again, we see no reason to interpret article 22 in a manner different from ILO when addressing a comparable consideration. In this regard we note that article 22, paragraph 3, provides that nothing in that article authorizes a State party to ILO Convention No. 87 to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

8. We cannot see that a manner of exercising a right which has, under certain leading and widely ratified international instruments, been declared to be in principle lawful, should be declared to be incompatible with the Covenant on Civil and Political Rights.

9. Whereas article 22, paragraph 1, deals with the right of freedom of association as such, paragraph 2 deals with the extent of the exercise of the right which necessarily includes the means which may be resorted to by a member of a trade union for the protection of his interests.

10. Whether the right to strike is a necessary element in the protection of the interests of the authors, and if so whether it has been unduly restricted, is a question on the merits, that is to say, whether the restrictions imposed in Canada are or are not justifiable under article 22, paragraph 2. But we do not find the communication inadmissible on this ground.

11. It is therefore necessary for us to see whether the communication is rendered inadmissible on other grounds. With regard to the State party's objection that the matter is being examined under another procedure of international investigation or settlement (see para. 4.3 of the Committee's decision), we note that the ILO investigation is concluded. Without pronouncing upon whether reference to the ILO Committee on Freedom of Association and to its Governing Body constitutes examination under another procedure of international investigation or settlement within the terms of article 5, paragraph 2 (*a*), of the Optional Protocol, we note that the terms of article 5, paragraph 2 (*a*), cannot be applicable to the facts before us.

12. With regard to the issue of exhaustion of local remedies, we find that all relevant local remedies available to the authors at the time of the submission of the present communication have been exhausted.

13. We would therefore consider the communication admissible.

Communication No. 127/1982

Submitted by: C. A. (name deleted) on 26 June 1982
Alleged victim: The author
State party: Italy
Declared inadmissible: 31 March 1983 (eighteenth session)

Subject matter: University degree—Equivalence—Teaching qualifications

Procedural issues: Exhaustion of domestic remedies—Election of remedy—Failure to state a claim

Substantive issues: Fair trial—Concept of "suit at law"

Article of the Covenant: 14 (1)
Article of the Optional Protocol: 5 (2) (b)

1. The author of the communication, dated 26 June 1982, is C. A., an Italian citizen living in Italy.

2. The author complains of a violation of article 14 (1) of the Covenant which reads, in part, as follows:

> 1. . . . In the determination of . . . his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law . . .

3.1. The author has a university degree in "naval mechanical engineering". In 1972-1973, he took a special course to qualify as a teacher in a number of fields relating to his academic qualifications. He was successful in the final examinations. However, he received from the Interregional Education Office for Lazio and Umbria a certificate, dated 16 November 1973, authorizing him to teach "mechanical technology" only. The author felt that the certificate, as formulated unduly restricted his professional activities and that this caused him considerable prejudice.

3.2. On 20 May 1976, he appealed to the Interregional Education Office in order to have his certificate changed, but his appeal was rejected by an administrative decision in accordance with Presidential Decree No. 1199 of 24 November 1971. A second appeal made through official channels on 9 June 1976 remained unanswered.

3.3. On 9 September 1976, he appealed to the President of the Republic through an exceptional (administrative) recourse procedure. By Presidential Decree of 26 January 1979, the appeal was rejected.

3.4. On 20 July 1979, he appealed again to the President of the Republic, through the Ministry of Public Education, in order to obtain the repeal of the Presidential Decree of 26 January 1979. By Presidential Decree of 8 July 1981, this second appeal was rejected

and the Ministry of Public Education provided the author with a copy of the Decree on 1 March 1982.

3.5. The author submits that domestic remedies have thus been exhausted. There is no indication that the same matter has been submitted to another procedure of international investigation or settlement.

4.1. The author states that the objective of his communication is not to seek a remedy for the prejudice caused to him by the decisions of the administrative authorities to limit the scope of this professional activities. On the other hand, he requests the Committee to consider first the claim that Presidential Decree No. 1199 of 24 November 1971 is not in conformity with article 14 (1) of the Covenant and also violates article 113 of the Italian Constitution. This Decree establishes recourse procedures in administrative matters, including the exceptional procedure by way of appeal to the President of the Republic. The author claims that the Decree excludes the possibility for those who choose to appeal through the exceptional procedure to have their rights determined in a suit at law before a judicial tribunal. (Article 8 of Presidential Decree No. 1199 lays down that when an appeal is made against an administrative decision through a jurisdictional procedure (*"ricorso giurisdizionale"*), the same appeal cannot be dealt with under the exceptional procedure.)

4.2. Secondly, the author claims that Decree No. 1199 does not guarantee the competence, the independence and the impartiality of the organ called upon to decide on the legitimacy of an administrative decision which, in the case of the exceptional procedure, is the Council of State. (The Council of State is, according to article 100 of the Italian Constitution, "an advisory organ on judicial-administrative matters and ensures the legality of public administration".)

4.3. Thirdly, the author claims that the exceptional procedure to appeal to the President of the Republic does not respect the right of everyone to be entitled to a fair and public hearing.

4.4. Finally, the author claims that, in general, legal provisions dealing with exceptional recourse procedures in the field of administration are not in conformity with the provisions of the Covenant.

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

6. The Human Rights Committee observes that, according to the author's own submission, it was open to him to pursue his case by means of proceedings before domestic courts. Instead, he chose to avail himself of the procedure by way of appeal to the President of the Republic. In these circumstances, the author cannot validly claim to have been deprived of the right guaranteed under article 14 (1) of the Covenant to have the determination of "rights . . . in a suit at law" made by a competent, independent and impartial tribunal. Without having to determine whether article 14 (1) is at all applicable to a dispute of the present nature, the Human Rights Committee therefore decides:

That the communication is inadmissible.

Communication No. 128/1982

Submitted by: L. A. (name deleted) on 7 October 1982
Alleged victim: U. R.
State party: Uruguay
Declared inadmissible: 6 April 1983 (eighteenth session)

Subject matter: Detention of Uruguayan citizen by military authorities

Procedural issue: Standing of the author

Articles of the Covenant: 1 and 2

1. The author of the communication, dated 7 October 1982, is L. A., a Swedish medical doctor residing in Sweden. He submits the communication to the Human Rights Committee, on behalf of U. R., a Uruguayan medical student, who is presently detained in Libertad prison, Uruguay, and is unable to present the communication on his own behalf.

2. The author alleges that U. R. is a victim of a breach by Uruguay of articles 9, 10 and 14 of the International Covenant on Civil and Political Rights. L. A. indicates that, as a member of a Swedish branch of Amnesty International, he has been working on the case, without avail, since 27 March 1980. He claims to have the authority to act on behalf of U. R. because he believes "that every prisoner treated unjustly would appreciate further investigation of his case by the Human Rights Committee".

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

4. Articles 1 and 2 of the Optional Protocol to the International Covenant on Civil and Political Rights provide that individuals who themselves claim to be victims of violations of any of the rights set forth in the Covenant may submit communications to the Human Rights Committee. The Human Rights Committee has established through a number of decisions on admissibility that a communication submitted by a third

party on behalf of an alleged victim can only be considered if the author justifies his authority to submit the communication. With regard to the present communication, the Committee cannot accept on the basis of the information before it that the author has any authority to submit the communication on behalf of the alleged victim.

5. The Human Rights Committee therefore decides:

That the communication is inadmissible.

Communication No. 129/1982

Submitted by: I. M. (name deleted) on 25 October 1982
Alleged victim: The author
State party: Norway
Declared inadmissible: 6 April 1983 (eighteenth session)

Subject matter: Taxation of Norwegian citizen

Procedural issues: Unsubstantiated allegations—Inadmissibility ratione materiae

Substantive issues: Racial discrimination—Taxation

Article of the Covenant: 26
Article of the Optional Protocol: 3

1. The author of the communication, dated 25 October 1982, is I. M., a naturalized Norwegian citizen, born in South Africa on 6 July 1934 and at present living in Moss, Norway. The author is a medical doctor who claims that the town of Oslo, and particularly its tax office, has perpetrated against him various acts and omissions which allegedly were based on racial discrimination and which all led to his being overtaxed in the years 1974 to 1979. He states that all his efforts before the Oslo tax authorities to have the alleged excess taxes rescinded or reduced have remained without avail and that he, therefore, requests the Human Rights Committee to consider the matter, in order to obtain for him the review sought.

2. The author complains that, owing to the failure of the tax authorities to assist him in completing his tax forms for income tax, these forms were incomplete and, as a consequence, his tax deductible income was not adequately taken into account. He specifies that too little tax deduction was accorded for car expenses in connection with house calls. He claims that his Norwegian-born colleagues received more assistance than he did and that they had to complete their forms each year by 15 February, whereas he was requested to complete his forms by 31 January each year. He maintains that this put him at a serious disadvantage, because he did not have the additional two weeks to fill out the complex tax forms. The author also complains that the town of Oslo did not provide him with low-rent housing when he applied for it in 1974-1975 and that he was only offered such housing in 1979. The author claims that the failure of the Oslo authorities to provide him with low-rent accommodations contributed to his paying high taxes. There is no explanation as to how the author arrives at that conclusion.

3. The author does not specify the provisions of the Covenant alleged to have been violated. He claims that domestic remedies have been exhausted and states that the same matter has not been submitted to another procedure of international investigation or settlement.

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

5. The Human Rights Committee, after careful examination of the communication, is of the opinion that the communication does not reveal any evidence of violation of any of the civil and political rights referred to in the Covenant. In particular, the Committee would point out that the assessment of taxable income and allocation of houses are not in themselves matters to which the Covenant applies; nor is there any evidence in substantiation of the author's claim to be a victim of racial discrimination.

6. In the light of the above, the Human Rights Committee concludes that the communication is incompatible with the provisions of the Covenant and, in accordance with article 3 of the Optional Protocol, decides:

That the communication is inadmissible.

Communication No. 130/1982

Submitted by: J. S. (name deleted) on 14 December 1982
Alleged victim: The author
State party: Canada
Declared inadmissible: 6 April 1983 (eighteenth session)

Subject matter: Denial of legal aid to Canadian citizen

Procedural issues: Exhaustion of domestic remedies—Unsubstantiated allegations

Substantive issues: Right to legal aid—Right to choose own counsel

Article of the Covenant: 14 (3) (d)
Article of the Optional Protocol: 5 (2) (b)

1. The communication, dated 14 December 1982, is submitted by J. S., a resident of Canada, through her legal representative, C. R. It is alleged that J. S. has been denied the right to have legal assistance without payment, in violation of article 14 (3) (*d*) of the International Covenant on Civil and Political Rights.

2. On 17 June 1980, J. S. was sentenced to life imprisonment for second degree murder in British Columbia. Pending her appeal to the British Columbia Court of Appeal, Ms. S. was incarcerated in Vancouver, British Columbia. Her appeal was dismissed in August 1981 and she was transferred to the Prison for Women in Kingston, Ontrario. She had not lived in Ontario before. Ms. S. retained C. R. of Toronto, Ontario, to act as her counsel before the Supreme Court of Canada. The appeal was heard in the Supreme Court of Canada in November 1982, with Mr. R. acting as counsel for Ms. S.

3. The claim concerning the alleged breach of article 14 (3) (*d*) of the Covenant relates to J. S.'s efforts to obtain legal aid for the purpose of her appeal to the Supreme Court of Canada. In August 1981, she applied for a legal aid certificate from the legal aid authority in Ontario (Ontario Legal Aid Plan). The application was rejected, as Ms. S. was not considered to be "a person ordinarily resident" in Ontario and also because the legal aid authority in British Columbia (Legal Services Society of British Columbia) had already offered to pay Mr. C. R., as legal counsel for Ms. S. before the Supreme Court of Canada. Mr. R. maintains that, notwithstanding the offer of the legal aid authority in British Columbia, it would, in his opinion, both be illegal for the Legal Services Society of British Columbia to offer him payment and for him to accept, as he is not entitled to practise law in British Columbia.

4. J. S. then applied to the Supreme Court of Ontario for judicial review of the decision of the Ontario Legal Aid Plan to refuse to issue a certificated for legal aid to her. The application was heard in September 1982 and was successful. The Supreme Court of Ontario set aside the decision of the Ontario Legal Aid Plan and ordered that Ms. S.'s application for a legal aid certificate be reconsidered. However, the author of the communication indicates that the present status of this matter is that the Ontario Legal Aid Plan "is applying for leave to appeal to the Court of Appeal".

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

6. As to the question whether legal aid should have been granted by the Ontario Legal Aid Plan, the Human Rights Committee notes that the matter is still, according to the information before it, *sub judice.* Domestic remedies have therefore not yet been exhausted as required by article 5 (2) (*b*) of the Optional Protocol. The Human Rights Committee further notes that Ms. S. was in fact represented by legal counsel of her own choosing in the proceedings before the Supreme Court of Canada and that the legal aid authority in British Columbia had offered to pay the counsel chosen by her. Consequently, the Committee is unable, in any event, to find that there are grounds substantiating the allegation of violation of article 14 (3) (*d*) of the Covenant.

7. The Human Rights Committee therefore decides:

That the communication is inadmissible.

Communication No. 136/1983

Submitted by: X (a non-governmental organization) (name deleted) on 5 February 1983
Alleged victim: S. G. F.
State party: Uruguay
Declared inadmissible: 25 July 1983 (nineteenth session)

Subject matter: Action by an NGO on behalf of imprisoned Uruguayan citizen

Procedural issues: Standing of the author—Actio popularis

Articles of the Optional Protocol: 1 and 2

1. The author of the communication (initial letter dated 5 February 1983 and further submission dated 16 June 1983) is X (a non-governmental organization). It submits the communication on behalf of S. G. F., a Uruguayan national at present living in Sweden. The organization states that the request of S. G. F. for it to act on her behalf was made through close friends living in France whose identity, however, it felt unable to disclose. No written evidence with regard to the authority of the organization to act on behalf of the alleged victim has been provided. The author alleges that S. G. F. is a victim of a breach by Uruguay of articles 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights.

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

3. Articles 1 and 2 of the Optional Protocol to the International Covenant on Civil and Political Rights provide that individuals who themselves claim to be victims of violations of any of the rights set forth in the Covenant may submit communications to the Human Rights Committee. The Human Rights Committee has established through a number of decisions on admissibility that a communication submitted by a third party on behalf of an alleged victim can only be considered if the author justifies his authority to submit the communication. With regard to the present communication, the Committee cannot accept on the basis of the information before it that the author has the necessary authority to submit the communication on behalf of the alleged victim.

4. The Human Rights Committee therefore decides: That the communication is inadmissible.

Communication No. 137/1983*

Submitted by: X (a non-governmental organization) (name deleted) on 5 February 1983
Alleged victim: J. F.
State party: Uruguay
Declared inadmissible: 25 July 1983 (nineteenth session)

Subject matter: Action by an NGO on behalf of imprisoned Uruguayan citizen

Procedural issues: Standing of the author—Actio popularis

Articles of the Optional Protocol: 1 and 2

1. The author of the communication (initial letter dated 5 February 1983 and further submission dated 16 June 1983) is X (a non-governmental organization). It submits the communication on behalf of J. F., a Uruguayan national at present detained at Libertad prison in Uruguay. The organization states that the communication is submitted at the request of J. F.'s wife, S. G. F., a Uruguayan national living at present in Sweden, and that this request has been made through close friends whose names it is unable to reveal. No written evidence with regard to the authority of the organization to act at the request of S. G. F. on behalf of J. F. has been provided. The author alleges that J. F. is a victim of a breach by Uruguay of articles 7, 9, 10, 14 and 15.

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

3. Articles 1 and 2 of the Optional Protocol to the International Covenant on Civil and Political Rights provide that individuals who themselves claim to be victims of violations of any of the rights set forth in the Covenant may submit communications to the Human Rights Committee. The Human Rights Committee has established through a number of decisions on admissibility that a communication submitted by a third

* Not previously published in the annual report of the Human Rights Committee.

party on behalf of an alleged victim can only be considered if the author justifies his authority to submit the communication. With regard to the present communication, the Committee cannot accept on the basis of the information before it that the author has the necessary authority to submit the communication on behalf of the alleged victim.

4. The Human Rights Committee therefore decides:

That the communication is inadmissible.

Communication No. 158/1983

Submitted by: O. F. (name deleted) on 2 August 1983
Alleged victim: The author
State party: Norway
Declared inadmissible: 26 October 1984 (twenty-third session)

Subject matter: Trial of Norwegian citizen for traffic violation

Procedural issues: Reservation by State party—Examination of "same matter" by European Commission—Inadmissibility ratione materiae*—Unsubstantiated allegations*

Substantive issues: Fair trial—Equality of arms—Right to legal aid—Right to choose own counsel—Denial of defence facilities—Examination of witnesses

Article of the Covenant: 14 (3)
Articles of the Optional Protocol: 3 and 5 (2) (a)

1.1. The author of the communication (initial letter dated 2 August 1983 and six subsequent letters) is O. F., a Norwegian national, born in 1939, residing in Norway and claiming to be a victim of violations by Norway of article 14, paragraph 3 (*a*), (*b*), (*d*) and (*e*), of the International Covenant on Civil and Political Rights. In particular, O. F. claims that the prosecuting authorities and the courts have not respected his right adequately to prepare his defence, to be assisted by legal counsel and to obtain and have examined witnesses on his behalf as laid down in the Covenant.

1.2. Following a radar control undertaken by the police on a State road for measuring traffic speed, O. F. was in July 1982 charged with having driven his car at a speed of 63 km per hour in a 50 km per hour zone in violation of the traffic law. O. F. states that he requested details from the police concerning the conduct of the radar control, but that he did not receive any. The case was taken up in the district court (Bodø byrett) on 22 October 1982, together with another unrelated charge, concerning an alleged failure by O. F. in 1981 to furnish information to an official register about a business firm which he operated. O. F. claims to have requested a postponement of the case, so that he could adequately prepare his defence, but that such postponement was denied. He claims that he was denied adequate access to the documents of the court, that he was not given an opportunity to assess whether it would be necessary to engage a lawyer or to have witnesses called on his behalf. Further, he claims that the method of the court to deal in one case with two totally unrelated charges unjustly affected his possibilities to defend himself.

1.3. By a judgement of the court delivered on 29 October 1982, O. F. was found guilty on both charges and sentenced to a fine of NKr 1,000 or 10 days' imprisonment. He was also sentenced to pay the costs of the case, NKr 1,000. O. F. appealed to the Supreme Court, which rejected the appeal on 17 December 1982. He maintains that a request for a renewed handling of the case was also rejected. O. F. also states that by a letter from the Supreme Court dated 26 November 1982, he was informed that "a suspected person does not have a legal right to borrow case documents".

1.4. In a further letter dated 27 October 1983, the author stated that he had submitted the same matter to the European Commission of Human Rights on 1 August 1983. However, the Secretariat of the European Commission informed him by letter of 12 August 1983 that the European Commission would not be able to consider his case, since it had not been submitted within six months of the date of exhaustion of domestic remedies.

2. By its decision of 9 November 1983, the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party, requesting information and observations relevant to the question of admissibility of the communication.

3.1. By a note dated 12 March 1984, the State party, *inter alia*, explained the following with respect to the facts of the case:

On 27 July 1982 the police issued an *ordinary* writ of optional fine, comprising the count under the Road Traffic Act as well as the one relating to the Act on Statistics. The author did not accept to pay the fine. In a letter of 19 July 1982 the author asked the police for technical information about the control. By letter of 26 July the police informed the author that information would be collected from the police officers operating the radar during the traffic control. It would then be submitted to him as soon as it was available. On 26 August the author was contacted by a police officer and informed that he could come to the police station and examine all documents of the two cases there in order to prepare his defence. The author answered that he did not want to meet at the police station and asked for *copies* of all documents. The police informed him that this request would not be met.

On 6 October 1982 the author was summoned to the main hearing, which took place on 21 October in Bodø District Court. He met without a counsel for his defence. At the beginning of the hearing he requested that the case be temporarily dismissed so that he could properly prepare his defence. He also submitted that if the main hearing was nevertheless to take place, a counsel should be appointed at the expense of the State. The Court did not accept the requests made by

the author. It ruled that the Criminal Procedure Act did not give the accused the right to obtain copies of the documents and there was no reason for a temporary dismissal of the case. From the author's appeal of 25 November 1982 to the Supreme Court . . . it follows, however, that the hearing was suspended for a quarter of an hour to enable him to read the documents of the case. Moreover, the Court was of the opinion that the joinder of the two counts was in conformity with the material legislation. Finally, under the Criminal Procedure Act he was not entitled to a defence counsel paid by the State.

3.2. With respect to the relevant domestic legislation, the State party submits that

[a]ccording to the Road Traffic Act of 18 June 1965 section 5 everyone is obliged to observe prohibitions and injunctions in pursuance of traffic signs. Under section 31 violations of the Act are punishable with fines or imprisonment up to one year. A violation is regarded as a minor offence . . . Under section 31 *b* the police may issue *summary* writs of optional fine on the spot to persons having committed minor traffic offences. This is a simplified procedure; for instance, a brief reference to the applicable penal provision and the facts is sufficient. The summary writ of optional fine must be accepted on the spot. If this is not done the case will be reported to the police station and an *ordinary* writ of optional fine will normally be issued (under the Criminal Procedure Act section 287), describing the facts of the offence with reference to the provisions applicable. Again the procedure is optional. If the accused refuses to accept, judgement in the Court of first instance is normally requested by the prosecuting authorities.

Under the Act of 25 April 1907 relating to the procurement of specifications to the Official Statistics section 1 private employers are obliged to submit information requested by the authorities in conformity with a decision of Parliament. Anyone who without valid reason fails to submit such information is subject to fines (section 4). In the present case the question at issue was the duty of the employer to fill in a form . . . requesting information about the firm and send it to the register of enterprises of the Central Bureau of Statistics.

The General Penal Code of 22 May 1902 section 63 regulates the situation when somebody has committed more than one offence and fines are applicable for both or all offences. The court shall then impose one single fine which has to be more severe than the one applicable as a result of each offence.

3.3. With respect to the Norwegian Reservation to the Optional Protocol to the International Covenant on Civil and Political Rights, the State party points out that

Norway when ratifying the Optional Protocol entered a reservation to article 5 (2) "to the effect that the Committee shall not have competence to consider a communication from an individual if the same matter has already been examined under other procedures of international investigation or settlement". Accordingly, whereas article 5 (2) (*a*) prevents simultaneous duplicating procedures (*pendente lite*), . . . the reservation sets forth the principle of *non bis in idem*.

Before forwarding his communication to the Committee the author submitted an application to the European Commission of Human Rights, which is clearly another procedure of international investigation . . . The application related to "the same matter" as the present communication, as it was based on the same facts and referred to provisions of the European Convention corresponding to article 14 (3), (*a*), (*b*), (*d*) and (*e*) of the Covenant. The question arises therefore whether the communication should be declared inadmissible as incompatible (*ratione materiae*) under Article 3 of the Optional Protocol, given the Norwegian reservation.

The answer depends on the interpretation of the words "has been examined" in the reservation. In the opinion of the Government one can hardly argue that the author's case has been *examined* by the European Commission of Human Rights. In fact, the Secretariat of the Commission merely informed him that he had failed to comply with the six months time-limit under article 26 of the Convention . . . Given the fact that in the present case there was not even a decision on inadmissibility the Government will not argue that the communication should be declared inadmissible because of its reservation. It was, however, thought useful to draw the attention of the Committee to the question.

3.4. On the question of admissibility, the State party, *inter alia*, observes:

In relation to *article 14 (3) (a)* the Government are unable to see that the author was not informed "promptly and in detail in a language which he understands of the nature and the cause of the charge against him". The author's communication with enclosures contains no facts implying a violation of this provision. In connection with the traffic control the author was immediately informed by the two police officers that he had driven at 63 km/h. A summary writ of optional fine on the spot, which he did not accept, also contains material information relating to the offence . . . The ordinary writ of optional fine referred to the provisions of the Road Traffic Act and the Act on Statistics and gave a brief description of the facts of the two cases. Also when the author was summoned to (6 October 1982) and appeared in court (21 October 1982) he was informed of the nature and cause of the charge against him. Consequently, it is the opinion of the Government that the facts of the case do not raise any issue under article 14 (3) (*a*) of the Covenant.

Article 14 (3) (e) gives the individual the right to "examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

As to the first part of this provision the facts of the case cannot possibly disclose a violation of the Covenant. During the main hearing the two police officers carrying out the traffic control met as witnesses. The author has stated himself (see e.g., his appeal to the Supreme Court of 25 November 1982, p. 4) that he asked several questions concerning the operation of the radar equipment, to which the witnesses responded. It is a matter of fact therefore that the author examined the witnesses against him as required by the first part of article 14 (3) (*e*).

As regards the second part of that provision it should first be noted that in his appeal of 25 November 1982 . . . the author considers the evidence relating to the traffic signs, given by the third witness (an engineer), as militating strongly in his favour.

Secondly, during the preparation of the main hearing the author had the right under Norwegian law (as required by the Covenant) to request that witnesses be summoned on his behalf. It is a matter of fact that he never used this right. Consequently, in this respect he cannot allege that article 14 (3) (*e*) was violated.

With regard to *article 14 (3) (b)*, it seems from the enclosures that the only allegation of a violation made by the author is based on the fact that his request for copies of all documents was refused by the local police, and that he consequently was denied "adequate time and facilities for the preparation of his defence".

Subparagraph (*b*) does not explicitly provide for a right of the accused to copies of documents in a criminal investigation. A general right for the accused to obtain copies in all circumstances would be outside the wording and beyond the purpose of the provision, i.e., to secure that the individual has a real opportunity to defend himself and hence get a fair trial, cf. article 14 (1) . . .

The question therefore must be—as stated in the text of article 14 (3) (*b*) itself—whether the accused in a given case has had adequate time and facilities for the preparation of his defence. In the present case the Government is of the opinion that the requirements of article 14 (3) (*b*) were met. As stated above the author was offered to come to the police station to see the documents on 26 August 1982. He did not accept this offer. For almost two months he refrained from using this possibility. The author was working about 1 km from the police station. A visit would have caused no practical difficulties. With his car he could also easily have come from his home, a distance of 20-30 km. There is nothing to suggest that his right to see the documents at the police station would have been ineffective. The access of accused persons to documents is a well established practice with which the police are familiar. Moreover, in the present case the documents were uncomplicated and their number limited. Furthermore, the facts relevant to the two penal provisions at issue (non-compliance with the duty to fill in a form and exceeding the speed limit) were easy to assess for the purpose of preparing the defence.

If the author had examined the documents at the police station he would have had a precise picture of the information available and an adequate basis for the further preparation of his defence. If deemed necessary after having read the documents, he could have contacted a lawyer . . . and requested for additional witnesses . . . In addition, he was also informed about the charge when he was interrogated by the police and later summoned to court.

Taking all these elements into consideration it should also be noted that the hearing was suspended (although for a short time) to enable the author to read the documents when he raised the issue at the beginning of the main hearing in the District Court. . . .

Even if the Criminal Procedure Act does not provide for a right of the accused to obtain copies of the documents during the inves-

tigation, unless a court meeting in the case takes place, it is general practice, as described above, that the documents are available for examination by the accused at the police station before the main hearing. This practice probably amounts to a binding legal principle.

An overall evaluation of all the elements of the present case leads to the conclusion that the author had adequate time and facilities for the preparation of his defence. . . . The Government are of the opinion therefore that the facts of the case do not raise any issue under article 4 (3) (*b*).

As far as *article 14 (3) (d)* is concerned, it is beyond dispute that the author was tried in his presence, defended himself in person and was aware of his right to be defended through legal assistance. Consequently, it is presumed that the author's reason for invoking this provision must be that the interest of justice required that he should have been assigned free legal assistance. The fact that the author was not assigned free legal assistance must be seen in the light of the nature of the offences with which the author was charged. Both charges were trivial and ordinary and could in practice only lead to a small fine . . .

Even if the accused usually has no right to *free* legal assistance in minor cases, he is of course (section 99 of the Criminal Procedure Act) entitled to be assisted by a counsel of his own choice—paid by himself—at any stage of the prosecution, including the main hearing. . . .

Consequently, the Government are of the opinion that the facts of the case do not raise any issue under article 14 (3) (*d*).

3.5. For the reasons explained above the State party submits that the author's communication should be declared inadmissible under article 3 of the Optional Protocol.

4.1. In response to the State party's submission under rule 91, the author, *inter alia*, forwarded the following comments dated 8 April 1984:

In the Government's reply, it is asserted that I could go to the police station and obtain the information which I had requested and needed for my defence. The Government knows that is untrue. On 5 April 1984 the necessary information on the radar's field of action was not yet available. This was confirmed by Police Sergeant E., by telephone, on 5 April 1984; he also said that the Police Chief, W., was opposed both to this information being obtained from the police officers operating the radar and to my being given this information, obviously from fear of losing face if the police should once again lose a court case involving radar control brought against me and other drivers. E. added that there was strong antagonism on the part of the superior officers of Bodø police station . . .

It is stated that I asked for the case to be postponed, but not why I did so. I wanted a postponement firstly because I had not been able to prepare my defence without the necessary information and documents, although these had been promised me on 26 July 1982, and also because during the brief adjournment of about 15 minutes which was granted in order to allow me to study the photocopies of some documents which had just been distributed, I noticed that I had received copies which were so dark (overexposed) that it was quite impossible to see what they represented. . . . Without documents, I did not have much material to give a lawyer in order to get him to help me. It is only when I saw some of the documents, just before the hearing, that I received confirmation of the shortcomings of the police's case, and became aware of my small possibilities of defence. I then invoked paragraph 99 (1) of the Criminal Procedure Act: "the accused has the right to be assisted by counsel at every stage of the proceedings". This too was refused, without the judge recording anything in this connection.

It is stated, under point 2, that "anyone who without valid reason fails to submit such information (to the official statistical services) is subject to fines (article 4)". . . .

It is stated that the Penal Code provides for the joinder of several offences. This is true, *but* it is also presumed that the sentence should not exceed by more than 50 per cent the maximum penalty applicable to any of the individual offences: this was not observed in my case. See Penal Code, paragraph 62 (1).

The maximum sentence (on condition of having been found liable to a penalty) should have been "only" a fine of NKr. 900, or, in case of non-payment of the fine, three days' imprisonment. The sentence was a fine of NKr. 1,000 or 10 days' imprisonment. This is contrary to Norwegian law, and, strangely enough, this was accepted by the courts concerned! Furthermore, I was sentenced to pay the State NKr. 1,000 legal costs (when I was unable to defend myself satisfactorily). . . .

Mention is made of article 14 (3) (*e*) concerning the right to examine the witnesses of both parties. I wished to hear the statements of the witnesses of the State Motor Vehicle Office/Motor Vehicle Inspector Service and the State Highway Office, concerning the traffic signs on the spot (the Highway Office has since acknowledged that the signposting was defective and has changed it) and to obtain an opinion, in particular, from the Defence Research Institute (FFI) concerning the possible reflection of the radar waves on a bus shelter located further on. For this purpose, it was necessary to have a reply or photocopies of the police documents of the case, as well as the technical data (which have still not been provided) of the Radar Control Service concerning the radar's field of action. . . .

To excuse itself, the Government then argued that article 14 (3) (*d*) would have been respected if the accused had had a lawyer. No reference is made to the following problem: not everyone can obtain the help of a lawyer, which is difficult either for economic reasons, or because of the large distances in the remote regions of Norway, or finally because private individuals usually do not know how to obtain the assistance of a lawyer. . . .

It is stated that on 26 August 1982 I was invited to go to the police station to see the (incomplete) documents of the case, but that I did not accept that invitation. This is only part of the truth. In fact, it was I who telephoned the police; first of all, I spoke to Police Chief W. and asked him if the information I wanted was now available; he did not answer this question, but merely transferred the call to Deputy Chief B., who later represented the Public Prosecutor during the trial. B. told me that W. had decided that I should *not* receive the information I requested, despite the promise that had been made me in writing by Sergeant E. on 26 July 1982. . . .

It is then asserted that this was a simple case and that if I had examined the documents at the police station I would have had a better idea of the information available and therefore a better basis for preparing my defence; if I deemed it necessary, I could have contacted a lawyer and asked him to have witnesses appear. In my opinion, this is an inadmissible attempt to wriggle out of a situation in which human rights have been violated.

4.2. The author concludes:

It cannot be denied that it will be of great significance both for me and for countless Norwegians if the Committee considers that there have been violations of United Nations conventions and if it criticizes this situation. It is absolutely unjust, for example, that a police chief can fail to reply to important requests from persons against whom he wishes to institute proceedings before the courts and that such behaviour should be accepted. As recently as March 1984, W. did everything he could to have me serve the term of 10 days' imprisonment and rejected all my requests to have the prison sentence suspended until a decision had been taken concerning my request of 22 December 1983 for the reopening of the case on the one hand, and until the United Nations Human Rights Committee had considered my communication, on the other.

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

5.2. The Committee concurs with the State party (see para. 3.3 above) that the reservation of Norway with regard to article 5, paragraph 2 (*a*), of the Optional Protocol does not apply in the present case. The European Commission of Human Rights has not "examined" the facts of the case. Its Secretariat merely pointed out to the author that the period of six months, within which applications may be made to the European Commission in accordance with article 26 of the European Convention on Human Rights, had already expired. As a consequence the case was not even registered by the European Commission of Human Rights.

5.3. The Committee has carefully considered the material submitted by the author, but is unable to find that there are grounds substantiating his allegations of violations of the Covenant.

5.4. With regard to article 14, paragraph 3 (*a*), no evidence has been submitted indicating that the author was not "informed promptly and in detail in a language which he understands of the nature and cause of the charge against him."

5.5. With regard to article 14, paragraph 3 (*b*), the submissions indicate that from 26 August to the date of the hearing on 21 October 1982, the author could have examined, personally or through his lawyer, documents relevant to his case at the police station. He chose not to do so, but requested that copies of all documents be sent to him. The Committee notes that the Covenant does not explicitly provide for a right of a charged person to be furnished with copies of all relevant documents in a criminal investigation, but does provide that he shall "have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing." Even if all the allegations of the author were to be accepted as proven, there would be no ground for asserting that a violation of article 14, paragraph 3 (*b*), occurred.

5.6. With regard to article 14, paragraph 3 (*d*), the only disputed issue in this case is whether the author should have been assigned free legal assistance. The Covenant foresees free legal assistance to a charged person "in any case where the interests of justice so require and without payment by him in any such case if he does not have sufficient means to pay for it." The author has failed to show that in his particular case the "interests of justice" would have required the assignment of a lawyer at the expense of the State party.

5.7. With regard to article 14, paragraph 3 (*e*), the submissions indicate that the author was able to question witnesses against him and to adduce favourable witness testimony. The Committee cannot see that there was any miscarriage of justice in this respect.

6. In the light of its observations set out in paragraphs 5.1 to 5.7 above, the Human Rights Committee concludes that no facts have been submitted in substantiation of the author's claim that he is a victim of violations of any provisions of the International Covenant on Civil and Political Rights.

7. The Human Rights Committee therefore decides:

The communication is inadmissible.

Communication No. 163/1984

Submitted by: A group of associations for the defence of the rights of disabled and handicapped persons in Italy, and persons signing the communication, on 9 January 1984
Alleged victims: Disabled and handicapped persons in Italy
State party: Italy
Declared inadmissible: 10 April 1984 (twenty-first session)

Subject matter: Legislation affecting employment of disabled and handicapped persons

Procedural issues: Standing of the author—Concept of "victim"—Examination of law in abstracto—Actio popularis—*Unsubstantiated allegations*

Substantive issues: Discrimination—Right to work

Article of the Covenant: 26
Articles of the Optional Protocol: 1 and 2

1. The authors of the communication, dated 9 January 1984, are a group of associations for the defence of the rights of disabled and handicapped persons in Italy (a non-governmental organization hereinafter referred to as the "Coordinamento") and the representatives of those associations, who claim that they are themselves disabled or handicapped or that they are parents of such persons. Although the representatives are primarily acting for the Coordinamento, they also claim to act on their own behalf.

2. The authors challenge article 9 of the Italian law decree of 12 September 1983, No. 463, which was later confirmed by Parliament and enacted as article 9 of law No. 638 of 11 November 1983.* They contend that this provision infringes article 26 of the International Cov-

* Article 9 of law No. 638 of 11 November 1983 reads as follows:

"Article 9

"1. Pending amendment of the compulsory employment régime, the provincial offices concerned with labour and promoting full employment shall, prior to the assignment to work of persons entitled to the benefits provided under Act No. 482 of 2 April 1968 and subsequent amendments thereto, ensure that such persons *whose degree of disability is less than 50 per cent* undergo a medical examination to be conducted by the competent health authority in order to verify whether their state of disability is unchanged. *Arrangements shall be made for the examination to be given within fifteen days from the date of the decision to assign them to work. Otherwise, in every case they shall be assigned, subject to later confirmation.*

"2. The names of persons failing to present themselves for the examination referred to in the foregoing paragraph shall be deleted from the relevant lists in article 19 of Act No. 482 of 2 April 1968.

"3. *Persons employed under the regular placement procedure and subsequently found to be suffering from disabilities not incurred in their work or service and having a degree of disability of less than 60 per cent shall be considered for the purposes of the aggregate compulsory work percentage referred to in article 11, paragraph 1, of Act No. 482 of 2 April 1968.*

"4. The provisions concerning them in article 9, last paragraph, of Act No. 482 of 2 April 1968 shall not apply."

enant on Civil and Political Rights in that it violates the right to work of disabled and handicapped persons. No submissions have been made regarding individual cases. The authors apparently seek a pronouncement of the Human Rights Committee that article 9 of law No. 638 was enacted in violation of Italy's commitments under the Covenant.

3. Article 9 contains a modification of the legal régime providing for the compulsory employment of disabled and handicapped persons laid down in law No. 482 of 2 April 1968. According to articles 11 and 12 of that law, private as well as public undertakings whose force exceeds 35 persons are obliged, in principle, to employ 15 per cent disabled or handicapped persons, a percentage which may rise to 40 per cent for "auxiliary personnel" in the case of public undertakings. At the same time, article 9 of the 1968 law divided the total number of disabled and handicapped persons to be employed compulsorily into different categories, reserving, in particular, 25 per cent for military war victims and 10 per cent for civilian war victims, while 15 per cent were allotted for victims of labour accidents and 15 per cent for ordinary disabled or handicapped persons ("invalidi civili"). To the extent that any particular category could not be filled by persons within that category, the entitlement was transferred to persons in the other categories. Considering that few war victims remain, the redistribution scheme significantly benefited disabled and handicapped persons in other categories. By virtue of paragraph 4 of the impugned article 9, this redistribution scheme was abolished. As a consequence, the authors allege that the amendment has considerably reduced the number of work posts available to ordinary disabled or handicapped persons ("invalidi civili"). Furthermore, they criticize paragraph 3 of the same article which permits employers to take into account, for the purpose of demonstrating their compliance with the compulsory element of 15 per cent of the work force, also those workers whom they have hired outside the special procedure for the employment of disabled and handicapped persons, provided that their disability or handicap exceeds 60 per cent.

4. Before proceeding to the merits of a case, the Human Rights Committee must ascertain whether the conditions of admissibility as laid down in the Optional Protocol to the International Covenant on Civil and Political Rights are met.

5. According to article 1 of the Optional Protocol, only individuals have the right to submit a communication. To the extent, therefore, that the communication originates from the Coordinamento, it has to be declared inadmissible because of lack of personal standing.

6.1. As far as the communication had been submitted on their own behalf by the representatives of the different associations forming the Coordinamento it fails to satisfy other requirements laid down in articles 1 and 2 of the Optional Protocol.

6.2. The author of a communication must himself claim, in a substantiated manner, to be the victim of a violation by the State party concerned. It is not the task of the Human Rights Committee, acting under the Optional Protocol, to review *in abstracto* national legislation as to its compliance with obligations imposed by the Covenant. It is true that, in some circumstances, a domestic law may by its mere existence directly violate the rights of individuals under the Covenant. In the present case, however, the authors of the communication have not demonstrated that they are themselves actually and personally affected by article 9 of law No. 638 of 11 November 1983. Consequently, the Committee is unable, in accordance with the terms of the Optional Protocol, to consider their complaints.

7. The Human Rights Committee therefore decides: The communication is inadmissible.

Communication No. 168/1984

Submitted by: V. Ø. (name deleted) on 27 March 1984
Alleged victim: The author
State party: Norway
Declared inadmissible: 17 July 1985 (twenty-fifth session)*

Subject matter: Allegations of bias in divorce proceedings before Norwegian courts—Award of child custody

Procedural issues: Competence of the HRC—Reservation of State party—Examination of "same matter" by European Commission—Non-participation of Committee member in decision

Substantive issues: Interference with family—Divorce proceedings—Child custody—Visiting rights—Parental Rights

Articles of the Covenant: 17 and 23
Article of the Optional Protocol: 5 (2) (a)
Rule of Procedure: 85

1. The author of the communication (initial letter dated 27 March 1984 and subsequent letters of 1 July and 27 September 1984 and 17 March 1985) is V. Ø., a Norwegian national living in Norway. He claims that,

* Pursuant to rule 85 of the Committee's provisional rules of procedure, Mr. Torkel Opsahl did not participate in the consideration of this communication or in the adoption of this decision on admissibility.

with regard to the custody of his daughter by marriage, one-sided and biased decisions in divorce proceedings conducted before Norwegian courts make him a victim of violations of various provisions of the International Covenant on Civil and Political Rights.

2.1. The author describes the facts as follows: In August 1976 his marriage broke up and his wife returned to her home country, Sweden, together with their daughter (born in August 1975). The author initiated divorce proceedings in Norway and, on 26 November 1979, the District Court pronounced the divorce and granted custody of the child to the mother and visiting rights to the father. It is alleged that the mother has denied to the author the right of orderly contacts with his daughter. The author appealed the question of custody to the Court of Appeal which, on 23 April 1982, decided that custody of the child should remain with the mother. The Court of Appeal also granted visiting rights to the father and laid down detailed rules as to when and how visits should take place both in Sweden and in Norway. The Court emphasized in that connection the mother's special responsibility for ensuring the effective enjoyment of visiting rights. As a result of continued non-compliance by the mother, the author applied for leave to appeal to the Supreme Court of Norway and presented in that connection additional evidence concerning the constant refusal of the mother to honour his visiting rights. On 6 October 1982, the Appeals Committee of the Supreme Court decided that leave to appeal should not be granted. The author contends that dometic remedies have therefore been exhausted.

2.2. The author alleges that as a result of these court decisions a *de facto* separation between himself and his daughter has taken place. He contends that the court decisions were ill-founded since they were based on the unreasonable assumption that the mother would somehow co-operate while the issue of continuous obstruction of the visiting rights was allegedly never properly considered by the Court of Appeal. The author claims that, by not granting leave to appeal, the Supreme Court has in effect sanctioned a decision of the Court of Appeal which allegedly runs counter to the Supreme Court's own decision in another case. He adds that for all practical purposes it is impossible in Norway to enforce visiting rights if the parent who has custody of the child does not co-operate. He claims that the present state of affairs makes him a victim of violations of articles 3, 14, 17, paragraph 1, 23, paragraphs 1 and 4, and 26 of the International Covenant on Civil and Political Rights.

2.3. On 20 November 1982, the author submitted an application to the European Commission of Human Rights, claiming to be a victim of violations by Norway of various provisions of the European Convention on Human Rights, including article 6 (1), because he allegedly did not get a fair hearing with regard to the court decisions concerning the custody of his daughter; article 8 (1), because his right to respect for his family life was allegedly violated by the same court decisions; and article 14, because he has allegedly been discriminated against by reasons of sex, considering that the Supreme Court, allegedly in a similar case, had transferred custody of a child to a mother from a recalcitrant father. As far as can be seen, the facts, in so far as they concern the above allegations of violations of the provisions of the European Convention on Human Rights, are the same as those presented by the author to the Human Rights Committee in substantiation of his claim that he is a victim of violations of articles 14, paragraph 1, 17, paragraph 1, and 26 of the International Covenant on Civil and Political Rights.

2.4. The European Commission of Human Rights decided on 15 March 1984 that the application was inadmissible. In a detailed decision (19 pages), it found that the allegations of violations of article 6 (1), both as regards to the right to a fair hearing and the right to determination "within a reasonable time", of article 8 concerning the right to respect for family life and of article 14 prohibiting discrimination on any ground, including the ground of sex, were manifestly ill-founded on all accounts.

2.5. With regard to his prior application to the European Commission of Human Rights, the author submits in his communication to the Human Rights Committee (*a*) that the European Commission focused mainly on the question of the alleged tardiness of the court procedures, to the detriment of the main issues complained of and (*b*) that the provisions of the European Convention invoked before the European Commission of Human Rights differ in several areas from those of the Covenant invoked in the present communication to the Human Rights Committee. He maintains that the relevant provisions of the Covenant are better suited to protect his rights in the matter complained of than those earlier invoked before the European Commission of Human Rights.

2.6. In the author's subsequent submission of 1 July 1984 he further explained that his application to the Human Rights Committee is no "appeal" over the decision by the European Commission, but concerns only the Norwegian court decision. "The European Convention for the Protection of Human Rights and Fundamental Freedoms, article 6, reads that 'everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law'. It follows from this that the European Convention has a limited mandate with respect to the issue of equality before the law. Furthermore, the European Convention does not cover the areas which come under articles 23 and 26 of the Covenant. Thus, in the case of the applicant, the International Covenant is of considerably more interest than the European Convention."

2.7. The author further argues that "the *same matter* has not already been properly examined under any other procedures of international investigation or settlement. Certainly, the same matter has not been examined anywhere with regard to the International Covenant, articles 3, 14, 23 and 26."

2.8. On 27 September 1984, the author forwarded to the Committee a copy of the decision of the European Commission of Human Rights dated 15 March 1984, which he claims contains false allegations, unfair assumptions and ill-founded conclusions.

3. By its decision of 2 November 1984, the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to

the State party, requesting information and observations relevant to the question of admissibility of the communication in so far as it may raise issues under article 23, paragraphs 1 and 4, of the Covenant.

4.1. In its submission dated 27 February 1985, the State party restated the facts and examined at length the proceedings before the European Commission of Human Rights. In this connection the State party specifically indicated that when ratifying the Optional Protocol Norway entered a reservation to article 5 (2) "to the effect that the Committee shall not have competence to consider a communication from an individual if the same matter has already been examined under other procedures of international investigation or settlement." Thus, whereas article 5, paragraph 2 (*a*), of the Protocol precludes simultaneous consideration of the "same matter" by the Committee and another international instance, the reservation sets forth the principle of *non bis in idem*.

4.2. The State party argues that its reservation under article 5, paragraph 2 (*a*), is applicable in the present case, because the European Commission "has clearly examined the application lodged at the European level . . . all aspects of the case were considered, and the Commission then declared it inadmissible as manifestly ill-founded within the meaning of article 27 (2). This involves an examination of the substance of the application." Moreover, a comparison of the author's application submitted to the European Commission on 19 November 1982 with his communication to the Human Rights Committee, dated 27 March 1984, shows that "the two letters are almost identical", since they refer to the same facts, no new events being submitted to the Committee, and because the legal arguments in the two proceedings are the same.

4.3. With respect to the provisions invoked by the author before the European Commission and the Human Rights Committee, the State party advances various arguments designed to show that although the European Convention does not contain a provision identical to article 23, paragraphs 1 and 4, of the Covenant, various articles in the European Convention—notably articles 8 and 12, in conjunction with article 14—offer in substance the same protection. It also contends that article 6 of the European Convention is comparable, for the purposes of examining the facts of the present case, to article 14 of the Covenant, notwithstanding the absence in the latter of the requirement that a fair hearing be "within a reasonable time".

4.4. The Committee notes that the Norwegian reservation to article 5, paragraph 2, of the Optional Protocol stipulates that the Committee shall lack competence to consider a communication if "the same matter" has already been examined under other international procedures. This phrase in the view of the Committee refers, with regard to identical parties, to the complaints advanced and facts adduced in support of them. Thus the Committee finds that the matter that is before the Committee now is in fact the same matter that was examined by the European Commission.

4.5. While fully understanding the circumstances which have led the author to submit a communication under the Optional Protocol to the Covenant, the Committee finds that the State party's reservation operates to preclude it from examining the communication.

5. The Human Rights Committee therefore decides:

The communication is inadmissible.

Communication No. 170/1984

Submitted by: E. H. (name deleted) on 16 April 1984
Alleged victim: The author
State party: Finland
Declared inadmissible: 25 October 1985 (twenty-sixth session)

Subject matter: Judge's discretion to determine length of criminal sentence

Procedural issues: Unsubstantiated allegations—No claim under article 2 of the Optional Protocol

Substantive issue: Racial discrimination

Article of the Covenant: 26
Article of the Optional Protocol: 2

1. The author of the communication, dated 16 April 1984, is Mrs. E. H., a member of the 4,000 strong Romany minority in Finland. She is represented by Mr. E. W., a journalist and magazine editor.

2. It is alleged that Mrs. E. H. is a victim of racial discrimination in violation of article 26 of the International Covenant on Civil and Political Rights, because she received a heavier sentence for a criminal offence than that meted out to another Finnish woman in a similar case. It is submitted that the offence for which the other woman was found guilty was graver than that for which Mrs. E. H. was convicted. Both cases concerned tax evasion and usury and were concluded in 1983 before different trial courts. On 25 May 1983, the Supreme Court of Finland upheld the decision of the lower court in the case of Mrs. E. H.

3. The author has not furnished the Committee with copies of any judicial decisions relevant to the matter complained of, although repeatedly given an opportunity to do so.

4. Before considering any claims contained in a communication, the Human Rights Committee shall, in accordance with rule 87 of its provisional rules of pro-

cedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5. A thorough examination of the communication has not revealed any facts in substantiation of the author's claim that on the ground of belonging to the Romany minority in Finland she received a heavier sentence than another accused person in a similar case in violation of the rights protected by the Covenant. The Committee, accordingly, concludes that the author has no claim under article 2 of the Optional Protocol.

6. The Human Rights Committee therefore decides:

The communication is inadmissible.

Communication No. 173/1984

Submitted by: M. F. (name deleted) on 13 April 1984
Alleged victim: The author
State party: The Netherlands
Declared inadmissible: 2 November 1984 (twenty-third session)

Subject matter: Denial of request for residence permit and refugee status for Chilean citizen

Procedural issues: Unsubstantiated allegations—No claim under article 2

Substantive issues: Right to asylum—Refugee status—Expulsion—Alien

Article of the Covenant: 13
Article of the Optional Protocol: 2

1. The author of the communication, dated 13 April 1984, is M. F., a national of Chile, born 1960, at present residing in the Netherlands. He is represented before the Committee by a Dutch lawyer.

2.1. The author states that after political persecution and detention in Chile, he left the country on 26 July 1980 on a valid passport and flew to Spain, where he resided until March 1981, when he travelled to Belgium and subsequenly to Den Helder, in the Netherlands. On 1 June 1981, he filed an application for political asylum in the Netherlands. On 15 September 1982, his requests for a residence permit and refugee status were turned down by administrative decree on the grounds that he had not belonged to an opposition party, had been able to leave Chile without objection from the authorities, and has sojourned in Spain and Belgium prior to entering the Netherlands. The author's lawyer appealed against the administrative decree on 22 October 1982, contending that the author had been a member of a resistance group and that the Chilean Government had a practice of inducing "undesirable elements" to leave the country. On 16 June 1983, a hearing took place before a Standing Consultative Committee for Alien Affairs of the Ministry of Justice, and on 16 September 1983, the Deputy Minister of Justice by administrative decree rejected the request for asylum. An appeal was lodged against the decree on 14 October 1983, before an "independent judge" (name of court not given), but it appears that this procedure has not been concluded. The Deputy Minister of Justice, bypassing the appeal, ordered the expulsion of the author by 3 November 1983 at the latest. Thereupon, the author initiated a separate court procedure against the State of the Netherlands, seeking an injunction against the expulsion order, at least until the appeal was decided. On 17 January 1984, in an interim judgement, the President of the Court in the Hague stated that the author did not qualify for refugee status. On 15 March 1984, the Court ruled that the author's submission that he suffered from a mental illness and that this should be considered in his favour did not constitute a ground barring expulsion. Therefore, on 29 March 1984, the Deputy Minister of Justice instructed the local police to expel the author, stipulating that an appeal against the judgement of the president of the Court could not delay the process of expulsion. A further appeal against the judgement of 15 March 1984 was lodged on 24 May 1984 at a Superior Court in the Hague. It appears that this appeal is still pending.

2.2. The author claims that the following provisions of the International Covenant on Civil and Political Rights have been violated: article 6 in connection with an earlier suicide attempt (it is unclear how this claim is to be understood but it appears that the life of the author was at one time in danger, because he had taken an overdose of pills. He maintains, however, that it was never his intention to put an end to his life and that he had merely taken the drugs in an attempt to temporarily forget his misery); article 7, because the author's expulsion would now constitute cruel and inhuman treatment; article 9, because of the risk of being rearrested in Chile, if he is not granted asylum elsewhere; article 14, paragraph 1, because there is still a procedure pending (appeal lodged on 14 October 1983) and the author's expulsion would deprive him of equality status before the court; article 17, paragraph 1, because the author lives in common-law marriage with his pregnant girl-friend, an Israeli national, who would not be admitted to Spain or Chile, so that expulsion would be tantamount to interference with his privacy and family life.

2.3. It appears that two proceedings in the author's case (on separate issues) are still pending before the Dutch courts, namely (*a*) the appeal lodged on 14 October 1983 before an independent judge against the decision of the Deputy Minister of Justice (of 16 September 1983) to reject the request for asylum and (*b*) the appeal lodged on 24 May 1984 before a Superior

Court in The Hague against the decision of the Court of The Hague (of 15 March 1984) that the author's claim that he suffers from a mental illness does not constitute a ground barring his explusion.

2.4. The author does not indicate whether the same matter is being examined by another procedure of international investigation or settlement.

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

4. A thorough examination of the communication has not revealed any facts in substantiation of the author's claim that he is a victim of a breach by the State party of any rights protected by the Covenant. In particular, it emerges from the author's own submission that he was given ample opportunity in formal proceedings, including oral hearings, to present his case for sojourn in the Netherlands. The Committee, accordingly, concludes that the author has no claim under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides: The communication is inadmissible.

Communication No. 174/1984

Submitted by: J. K (name deleted) on 7 May 1984
Alleged victim: The author
State party: Canada
Declared inadmissible: 26 October 1984 (twenty-third session)

Subject matter: Conviction of Canadian citizen for arson—Long-term consequences

Procedural issues: Events prior to entry into force of the Covenant—Inadmissibility ratione temporis—*Unsubstantiated allegations—No claim under article 2—Competence of the HRC.*

Substantive issues: Fair trial—Negligence of legal counsel—Review of conviction and sentence—Review of domestic court decision

Article of the Covenant: 14 (1) and (3)
Article of the Optional Protocol: 2

1. The communication, dated 7 May 1984, is submitted (through a Swiss lawyer) by J. K., a Canadian citizen living in Canada, born in 1925 in Yugoslavia.

2. The author states that on 12 December 1970, his house at Port Alberni, County of Nanaimo, British Columbia, Canada, burned down and that he was accused and convicted of committing arson with the motive of collecting the insurance on the property, and that on 2 April 1971 he was sentenced to a term of 18 months' imprisonment. An appeal before the Court of Appeals of Vancouver was rejected on 24 November 1971. A petition to the Supreme Court of Canada for leave to appeal was denied in February 1973.

3. The author alleges that he is innocent and submits a number of affidavits purporting to show that he was in the United States on 12 December 1970 and that therefore he could not have committed the crime imputed to him. He contends that his first defence lawyer failed to prepare an adequate defence and to present all the evidence available and necessary for acquittal. He further alleges that the Court of Appeal erred in not considering or not properly evaluating the new evidence submitted on appeal.

4. Although all the events took place prior to the entry into force of the International Covenant on Civil and Political Rights and the Optional Protocol for Canada (19 August 1976), the author maintains that the stigma of the allegedly unjust conviction and the social and legal consequences thereof, including the general prejudice in society against convicted persons, make him a victim today of article 14, paragraphs 1 and 3 (*a*) to (*c*), and article 25 of the Covenant—of article 14 because he was allegedly denied a fair trial and of article 25, because his conviction bars him from equal access to public service and from running for public office, and because his criminal record puts him at a disadvantage, particularly in the field of employment.

5. The author requests the Committee to invite the State party to ensure an annulment of the conviction, to take all necessary measures to rehabilitate him and to pay him an equitable indemnity for the injuries suffered as a consequence of his conviction.

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

7.1. The Committee notes that in so far as the communication relates to events that occurred prior to 19 August 1976, the date when the Covenant and the Optional Protocol entered into force for Canada, the communication is inadmissible *ratione temporis.*

7.2. The Committee further observes that it is beyond its competence to review findings of fact made by national tribunals or to determine whether national tribunals properly evaluated new evidence submitted on appeal.

7.3. As to the author's contention that the continuing consequences of his conviction make him a victim

today of violations of the Covenant, the Committee observes that in the circumstances referred to in paragraph 7.1 and 7.2 above, the consequences as described by the author do not themselves raise issues under the International Covenant on Civil and Political Rights in his case. The Committee, accordingly, concludes that the author has no claim under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

The communication is inadmissible.

Communication No. 175/1984

Submitted by: N. B. (name deleted) on 21 March 1984
Alleged victim: The author
State party: Sweden
Declared inadmissible: 11 july 1985 (twenty-fifth session)

Subject matter: Award of child custody—Implementation of custody order—Visiting rights

Procedural issues: Non-exhaustion of domestic remedies—No claim under article 2—Available remedy

Substantive issues: Interference with family—Child custody—Divorce proceedings—Parental Rights—Expulsion—Refugee

Articles of the Covenant: 17 and 23 (4)
Articles of the Optional Protocol: 2 and 5 (2) (b)

1. The author of the communication (initial letter dated 21 March 1984 and further letters dated 9 July and 28 November 1984 and 15 February 1985) is N. B., an Argentinian national who enjoyed political asylum in Sweden from 1978 to 1984. He has now returned to Argentina. While in Sweden he married an Argentinian woman with whom he already had two children. Divorce proceedings were initiated in December 1981 and custody of the children was awarded to the mother.

2.1. The author lodges his complaint against Swedish authorities, who allegedly conspired to ruin his family life because they did not like his political ideas, claiming that on three occasions his two children were "kidnapped" by the authorities. He gives the following details:

In January 1980, the social welfare service in Malmö, Sweden, without a judicial order, allegedly "obliged" his wife and children to leave their home. They were allegedly kept 25 days in a hotel. The author sees this event as an arbitrary and illegal interference in his private life.

In 1981, the author and his family travelled to Spain. The author's intention was to request asylum at the UNHCR office in Spain in order not to live any longer in Sweden. On 20 October 1981, his family allegedly "disappeared" while staying at the office of the Red Cross in Barcelona. The author believes that they were kidnapped by an ex-policeman from Argentina (name is given) who took them back to Sweden.

In Malmö, they were put under the supervision of the Swedish welfare service. The author alleges that this second event amounts to violations of articles 17, paragraphs 1 and 2, 23, paragraphs 1 and 4, and 24, paragraph 1, of the Covenant. He further alleges that in 1982, despite an interim court decision stipulating that he could see his children for two hours every 15 days, the local Swedish welfare service never allowed him to do so.

On 16 September 1983, the tribunal in charge of the divorce proceedings decided to give the children's custody exclusively to their mother. On 21 December 1983, the author took his two children to the Argentinian Embassy in Denmark. There he renounced his status as a political refugee in Sweden and requested to be sent back with his children to Argentina. He alleges that on the same day, his children were "kidnapped" by the Swedish police, taken to the Embassy in Denmark and returned to Sweden, where they are living at present.

2.2. On 22 December 1983, the author was arrested by the Danish police and extradited to Sweden. There he allegedly remained incommunicado for 15 days without any judicial order. He was tried at first instance and sentenced to four months' imprisonment for acting in an unlawful and arbitrary manner in relation to his children. Article 14, paragraph 3 (*a*), (*c*) and (*e*), of the Covenant was allegedly disregarded, but no further details are given in that respect. On 8 May 1984, on appeal, the Court of Trelleborg confirmed the judgement of first instance and ordered that the author be expelled from Sweden and excluded from re-entering the country at any time before 1 May 1987. The decision was allegedly taken in violation of the following articles of the Covenant:

Article 2, paragraph 3 (*a*), (*b*) and (*c*), because the author was allegedly denied an effective remedy;

Article 16, because he was allegedly not recognized as a person before the law;

Article 14, paragraph 3 (*d*), because he was allegedly obliged against his will to choose an *ex officio* lawyer;

Article 14, paragraph 3 (*e*); no details are given.

The author adds that his *ex officio* lawyer refused to appeal against the expulsion order.

3. By its decision of 16 October 1984, 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.

4.1. Apart from disputing the author's description of the facts and rejecting the allegations as unfounded, the State party in its rule 91 submission, dated 14 January 1985, objects to the admissibility of the communication on the ground that the author has failed to exhaust domestic remedies with respect to decisions

made by the Swedish Courts and other authorities. The State party summarizes the facts as follows:

N. B. and S. C. arrived in Sweden in 1978 from Argentina as political refugees together with their children, N. J. and S. V., who were minors. After a short time, problems arose in the relations between the couple and S. C wanted them to separate. She "disappeared" together with the children on one ocasion in January 1980, staying with the children at a hotel.

Despite the dissension between the parties, S. C. and N. B. married in April 1980. On 14 December 1981, the wife, however, applied to the District Court of Malmö (Malmö tingsrätt) for a divorce. On 2 February 1982, the Court issued a provisional order that the mother should have the custody of the children and that the father was to have the right to see them once a fortnight at the office of the Malmö social welfare service in the presence of social welfare personnel. However, on some occasions, the mother did not allow the children to see their father.

In this situation, the Administrative Court of the Province of Malmö, considering that the wife had no acceptable grounds for her refusal, ordered her in its ruling of 12 October 1982 to bring the children to see their father in accordance with the order issued by the Malmö District Court in its ruling of 2 February 1982.

On 19 October 1982, the Malmö District Court granted the application for the divorce of the spouses. As no appeal was lodged, the Court's ruling gained legal force. Later on, in a ruling issue on 16 September 1983, the Court ordered that the mother be given the custody of the children, as N. B. had consented to her claim in that respect. This ruling, against which no appeal was lodged, also gained legal force.

Following an agreement between the mother and N. B., the father collected the children at Trelleborg on 20 December 1983 in order to have them with him for part of the Christmas holiday. The children were to be returned to their mother on 25 December 1983. However, N. B. took the children with him to Denmark, where he went to the Embassy of Argentina with a view to obtaining visas for his children to travel to Argentina. The Embassy informed the mother about this request, since she had the custody of the children under the Court ruling. The mother reported this to the police authorities in Sweden who, in turn contacted the Danish police.

On 22 December 1983, N. B. was arrested by the Danish police. On the following day he was remanded in custody by a decision of the District Court of Copenhagen. He was extradited to Sweden on 1 February 1984, and on 2 February 1984, a detention order was issued by the District Court of Trelleborg. On 15 February 1984, N. B. was sentenced to four months' imprisonment for having committed child abduction in a manner considered as grave.

The District Court also decided that the time during which N. B. had been deprived of liberty (as from 22 December 1983; 55 days) was to be deducted from the term of imprisonment. The Prosecutor's petition that N. B. be expelled from Sweden was dismissed by the District Court.

However, the Prosecutor appealed against this judgement to the Court of Appeal of the Province of Skane and Blekinge. The Court of Appeal confirmed the judgement of the District Court as to the sentence and also granted the Prosecutor's petition for expulsion. N. B. did not appeal against this judgement to the Supreme Court, a course he was entitled to take. Consequently, the judgement of the Court of Appeal gained legal force.

4.2. As regards the author's assertion that the Swedish welfare service had obliged the mother and her children to leave their and N. B.'s home in January 1980, the State party contends that the real situation was that the mother had left the home on her own initiative due to dissension between her and N. B. and had been staying for some time with the children at a hotel. The Swedish authorities had certainly not obliged the mother to act in this way. Moreover, the Swedish authorities had made considerable efforts to persuade the mother to let the children see their father. It was thus not the authorities but the mother who did not allow the children to see their father. In that situation, the Administrative Court of the Province of Malmö ordered the mother to give N. B. access to his children.

With regard to N. B.'s arrest in Denmark on 22 December 1983, it should be noted that he was detained by a Danish Court on 23 December 1983. Thus, there was an appropriate judicial order effective already on the day after the arrest. After N. B.'s extradition to Sweden on 1 February 1984, he was immediately—on 2 February—brought before a Swedish judge (the District Court of Trelleborg). It should be noted that although N. B. had the possibility to appeal against the detention order at all times, he did not do so.

4.3. As regards the expulsion of N. B. from Sweden, the State party recalls in the first place that he did not appeal to the Supreme Court against the judgement of the Court of Appeal, and furthermore, that it is possible in Sweden to appeal through administrative channels against the actual enforcement of an expulsion order. The State party notes in this context that N. B. had stated in writing that he was no longer a political refugee.

5.1. In his further letters of 28 November 1984 and 15 February 1985, the author contends that the reason why the Swedish welfare service allegedly violated his rights "was to destroy me as a political agent and the purpose of prohibiting me from living with or even seeing my own children was to attempt, through constant mental torture, to 'neutralize' my political activities and to prevent me from following my usual, human approach of always trying to solve mankind's problems and of fighting for the right of all persons to live a better life."

5.2. The author also encloses a statement signed by two Swedish social workers, indicating that they assisted the author's ex-wife to settle in Trellebord, away from him. The social workers describe the reason for the separation in detail: the wife believed that her husband suffered from an acute persecution complex, which had worsened since 1981; she allegedly endured physical abuse from her husband and feared for her safety. The author rejects the social workers' description, which, he claims, depicted him as being mentally ill.

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

7. The Human Rights Committee has carefully reviewed the communication submitted by N. B., including the supporting documentation, and finds that the author has failed to exhaust domestic remedies that were available to him under Swedish law.

8. As the communication fails to fulfil the requirements of article 2 and article 5, paragraph 2 (*b*), of the Optional Protocol, the Human Rights Committee decides:

The communication is inadmissible.

Communication No. 178/1984

Submitted by: J. D. B. (name deleted) in June 1984
Alleged victim: The author
State party: The Netherlands
Declared inadmissible: 26 March 1985 (twenty-fourth session)

Subject matter: Inability of radio- and TV-repairman to exercise his profession without a licence

Procedural issues: unsubstantiated allegations—Competence of the HRC to examine communication concerning rights also set out in ICESCR

Substantive issues: Discrimination—Right to work—Scope of application of article 26—Authorization to exercise a profession

Article of the Covenant: 26

Article of the Optional Protocol: 2

1. The author of the communication, dated June 1984, is J. D. B., a Dutch citizen living in the Netherlands. He claims to be the victim of a violation by the Dutch Government of article 26 of the International Covenant on Civil and Political Rights.

2.1. He describes the facts of the case as follows: He has been trained as a radio- and TV-repairman, but does not have a licence from the Chamber of Commerce. As he has been unemployed for a long period of time, he has endeavoured to maintain his working capacity by taking on occasional jobs as a TV-repairman. Because of this activity, however, he has been subjected to criminal prosecution before the Appellate Court of Arnhem, which rendered a judgement against him on 13 October 1983 and fined him 300 Dutch Guilders. This judgement was upheld by the Supreme Court of the Netherlands on 8 May 1984.

2.2. The author considers himself to be discriminated against by Dutch legislation which prevents him from gainful employment and which punishes him for seeking an alternative to being unemployed. In this connection, he also refers to article 6 of the International Covenant on Economic, Social and Cultural Rights, which guarantees the right to work.

2.3. Since final judgement has been rendered by the Supreme Court of the Netherlands, the author contends that all domestic legal remedies have been exhausted. He also states that the same matter has not been submitted for examination to another procedure of international investigation or settlement.

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

4. The Human Rights Committee, after careful examination of the communication, concludes that no facts have been submitted in substantiation of the author's claim that he is a victim of a violation of any of the rights guaranteed by the International Covenant on Civil and Political Rights.

5. The Human Rights Committee therefore decides: The communication is inadmissible.

Communication No. 183/1984

Submitted by: D. F. (name deleted) on 9 April 1984
Alleged victim: The author *et al.*
State party: Sweden
Declared inadmissible: 26 March 1985 (twenty-fourth session)

Subject matter: Actio popularis *on behalf of ethnic and religious groups*

Procedural issues: Standing of author—Concept of "victim"—Actio popularis—*Examination of "same matter" by European Commission—Unsubstantiated allegations*

Substantive issue: Racial discrimination

Article of the Covenant: 26
Articles of the Optional Protocol: 2 and 5 (2) (a)

1.1. The author of the communication dated 9 April 1984, D. F., is a Swedish citizen, born in Austria on 23 April 1942. He claims to submit the communication on his own behalf and, it appears, on behalf of Arabs and Muslims (not further specified) who allegedly have constantly been the targets of discrimination and abuse in Sweden. The author submits that his communication reveals breaches by Sweden of the following articles of the International Covenant on Civil and Political Rights: article 2, paragraph 1, article 5, paragraph 1, article 7, article 14, paragraphs 1, 2, 3 (*d*), (*e*) and (*g*), article 15, paragraph 1, article 17, article 25 (*a*), and article 26.

1.2. As to steps taken to exhaust domestic remedies, the author submits the text of a reply addressed to him on 12 July 1983 by the Office of the Attorney-General,

in response to his request that the Attorney-General bring to trial those responsible for a cartoon which appeared in a Stockholm newspaper and which the author considered to reveal racial hatred against Arabs. The reply informed D. F. that the Attorney-General did not intend to take any action on the basis of his complaint.

2. As it is obliged to do, under article 5, paragraph 2 (*a*), of the Optional Protocol, the Human Rights Committee has ascertained that D. F. has also filed an application with the European Commission of Human Rights, which is pending for consideration before that body.

3. The Human Rights Committee has carefully reviewed the communication submitted by D. F., including a dossier of various enclosures purporting to substantiate his claims. Apart from being barred from considering a communication, if the same matter is being examined under another procedure of international investigation or settlement (art. 5, para. 2 (*a*), of the Optional Protocol), such as the procedure implemented by the European Commission of Human Rights, the Human Rights Committee has reached the conclusion that the communication does not in any manner substantiate the author's claim that he is personally a victim of any alleged violation of the International Covenant on Civil and Political Rights. In addition, the communication does not reveal that the author has any authority to speak on behalf of other persons, whose rights he purports to protect.

4. As the communication fails to fulfil the requirements of articles 2 and 5, paragraph 2 (*a*), of the Optional Protocol, the Human Rights Committee decides:

The communication is inadmissible.

Communication No. 184/1984

Submitted by: H. S. (name deleted) on 4 September 1984
Alleged victim: The author
State party: France
Declared inadmissible: 10 April 1986 (twenty-seventh session)

Subject matter: Determination of citizenship of immigrant from former French colony

Procedural issues: Non-exhaustion of domestic remedies—Unsubstantiated allegations—Jurisdiction of State—Available remedy

Substantive issues: Delay in proceedings—Discrimination—Immigration—Citizenship

Articles of the Covenant: 12 and 26
Article of the Optional Protocol: 5 (2) (b)

1. The author of the communication (initial letter dated 4 September 1984 and further letters of 23 and 24 April, 24 June, 20 August and 21 November 1985) is H. S., who currently resides in France. He submitted the communication on his own behalf.

2.1. In his initial letter (dated 4 September 1984), the author alleged that he had been arbitrarily deprived of his French nationality. He stated that he had been born in Mauritania in 1944, at that time a French colony; that he had entered France in 1959 as a French national, and that he had lived there ever since. When Mauritania became independent in 1960, the author claimed to have requested that he retain his French nationality in accordance with the French Nationality Code (Law No. 60-752 of 28 June 1960). Many years later (the author claimed that this took place in 1979), he had allegedly been informed by the relevant French authorities that, pursuant to a decision of the Ministry of Justice, he was no longer regarded as a French national and that consequently he was required to return his French identity papers. In August 1979, the author initiated proceedings before the Tribunal de grande instance of Bobigny with a view to securing recognition of his French nationality. These proceedings were, however, still pending at the time of the submission of the communication.

2.2. The author stated that his wife (born in Mali) and his six children were suffering from the situation. He mentioned that on 18 November 1983, the authorities had declined to renew his wife's residence permit and that they had no place to live.

2.3. The author enclosed a copy of his French identity card (No. 3531769, issued by the Prefect of Police of Paris on 22 October 1973) and a copy of his card as reservist in the French army (issued on 5 December 1983).

3. By its decision of 17 October 1984, 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. The Working Group also requested the State party to provide the Committee with copies of any court orders or decisions relevant to this case.

4.1. In a submission dated 26 March 1985, the State party provided information on the existing legislation and regulations concerning French nationality, in particular in respect of individuals from the former French overseas territories. It further submitted information, including a detailed chronology of legal decisions, concerning the author's legal status and objected to the admissibility of the communication on the ground that domestic remedies had not been exhausted. It also noted that the author had not invoked any specific provision of the International Covenant on Civil and Political Rights in support of his allegations and that his com-

munication therefore did not meet the requirements of article 1 of the Optional Protocol.

4.2. Regarding the principles established by the French Nationality Code in respect of persons from former overseas territories (Mauritania had the status of an overseas territory of the French Republic on 31 December 1946 and became independent on 28 November 1960), the State party submitted that:

The Act of 28 July 1960 and the subsequent Act of 9 January 1973 make a distinction between persons who are automatically French and persons whose French nationality is subject to recognition in accordance with the criterion of geographical origin. To this end, the legislator differentiated between those who are from and those who are not from the territory of the French Republic.

(*a*) French persons from the territory of the French Republic, as it was constituted on 28 July 1960, and domiciled, on the date on which a State previously having the status of overseas territory of the French Republic attained independence, in the territory of that State retained French nationality (art. 152);

(*b*) French persons not from the territory of the French Republic, on the other hand, lost French nationality when their country of origin gained its independence.

However, persons were entitled to retain French nationality:

(*a*) Automatically, if on the date on which a former overseas territory became independent they were not domiciled in that territory. The solution derives *e contrario* from the new article 153, which subjects to a formal procedure only persons who were not from the territory of the Republic and who were domiciled at the time of independence in the territory of the State that became independent;

(*b*) In other cases, by the making of a statement of recognition of French nationality after their domicile was transferred to France. The Act of 9 January 1973 subsequently removed this option and replaced it by an authorization for the making of a statement to restore French nationality, which is regulated by the new articles 153, 156 and 157. Restoration of nationality may be denied on the ground of unworthiness (*indignité*) or failure to be assimilated.

Minor children under 18 years of age on the date of independence of the territory where their parents were domiciled take the nationality of the parents.

Consequently, the persons to which these texts apply, in order to establish their French nationality, must:

(*a*) Prove that they were French prior to independence;

(*b*) Show that they have retained French nationality in the aforementioned conditions.

4.3. The State party further submitted that the following rules were applicable regarding proof and contentious proceedings:

French nationality is evidenced in cases of difficulty by a certificate issued by the *juge d'instance* of the place of domicile of the applicant. The *juge d'instance* draws up the certificate in the light of the applicant's civil status, which attests to the date and place of birth and the parentage (art. 149).

If the *juge d'instance* refuses to issue the certificate, the person concerned may apply in a non-contentious procedure to the Minister of Justice (art. 151).

He may also "institute proceedings before the Tribunal de grande instance with the primary and direct object of obtaining a judgement as to whether or not he possesses French nationality" (art. 129). The judgement of that court is appealable to the Cour d'appel, then to the Cour de Cassation.

Moreover, French persons who have lost their French nationality and who wish to recover it must, under the procedure established in 1973, make a statement before the *juge d'instance* of their place of domicile after receiving authorization to do so from the Minister responsible for naturalization (currently the Minister of Social Affairs and National Solidarity; in 1977, the Minister of Labour) (art. 153).

The Minister's refusal to authorize the making of a statement can be contested in non-contentious or contentious proceedings.

In the former case, the party concerned may request the Minister to reconsider his decision and to authorize the making of a statement for the restoration of nationality.

In the case of contentious proceedings, the party concerned may bring the matter of the Minister's refusal before the *tribunal administratif*, and may subsequently appeal to the Conseil d'état.

4.4. The State party observed that the determination of the author's nationality was a problem that had been rendered complex by the fact that he had given two different dates of birth:

Up until 1973, [H.S.] claimed to have been born in 1923. As he would thus have been 37 years of age when Mauritania became independent, and as he was domiciled in France in 1960, he could originally have been considered to be French.

From 1973 onwards, however, he has claimed that he was born in 1944. This would mean that he was a minor in 1960. If so, he could have retained French nationality only if his parents had themselves retained it but he apparently has not submitted proof thereof.

Furthermore, the inquiries that were conducted during the various proceedings revealed that there were doubts, not only as to [H.S.'s] civil status (date and place of birth, parentage), but with regard to his actual identity in relation to other individuals having the same name. These questions had of necessity to be settled before a decision could be taken in respect of this applicant's nationality.

4.5. The State party lists the following decisions and other measures concerning the author's legal status:

23 February 1959. A decision having the legal validity of a birth certificate was issued by the Tribunal de premier degré at Sélibaby, at the oral request of [H. S.], stating that he had been born at Massi-Chaggor, Mauritania, in 1923.

21 February 1967. In the light of the above decision, a certificate of French nationality was issued to [H. S.] by the Tribunal d'instance du 20e arrondissement de Paris on the ground that he had been domiciled in France in 1960 (art. 13, para. 1, of the ordinance of 19 October 1945, in the 1960 version: ". . . persons domiciled in the ceded territories lose French nationality unless they effectively establish their domicile outside those territories").

3 March 1967. A French national identity card, No. 1513223-YN 7707, was issued by the Prefect of Police of Paris.

24 August 1973. At [H. S.'s] request, the *Procureur de la République*, in Paris, had the birth certificate amended to state that [H. S.] was born in 1944, not 1923.

5 October 1973. The *Juge d'instance du 19ème arrondissement de Paris* issued [H. S.] a new certificate of French nationality in the light of the change in the date of his birth.

22 October 1973. A new identity card, No. 353 1769-BU 668 H, was issued by the Prefect of Police of Paris.

1975. [H. S.] again applied to the *Juge d'instance du 19ème arrondissement* for a certificate of nationality.

23 March 1976. The *Garde des Sceaux,* Ministry of Justice, sent a notice to the *Juge d'instance du 19ème arrondissement de Paris*, stating that [H. S.] was to be considered a foreigner. In fact, if the party concerned had been born in 1944, as he claims, he would have been only 16 years old when Mauritania became independent and could not, under those circumstances, be considered domiciled in France for purposes of nationality, since his status was dependent on that of his father or surviving mother and he had at no time submitted evidence of their living in France at that time.

28 October 1976. At the request of the Ministry of Justice [H. S.] returned the two certificates which had been wrongfully issued, in accordance with the official statement prepared by the Tribunal d'instance at Aulnay-sous-Bois on 28 October 1976.

Late 1976. [H. S.] applied to the Ministry of Labour for the statement of restoration of French nationality provided for in article 153 of the Nationality Code.

8 March 1977. The Ministry of Labour rejected the application on the ground that [H. S.] had provided false information.

1979. [H. S.] applied to the *Juge d'instance* at Aulnay-sous-Bois for a new certificate of nationality.

25 May 1979. [H. S.] returned his national identity card to the Blanc-Mesnil police station.

26 June 1979. The Minister of Justice sent a notice identical to that of 23 March 1976 to the *Juge d'instance*, stating that the certificate of nationality should be withheld.

3 July 1979. [H. S.] was notified of the refusal to issue a certificate of nationality.

August 1979. [H. S.] applied to the Tribunal de grande instance of Bobigny with a view to securing recognition of his French nationality (arts. 128-136 of the Nationality Code).

9 August 1979. As required under the Code of Civil Procedure [H. S.'s] lawyer forwarded a copy of the summons to the Ministry of Justice.

12 October 1979. The lawyer again notified the Chancellerie, the form of the first summons having been irregular.

19 December 1979. The Ministry of Justice gave the following instructions to the *Procureur* of the Tribunal de grande instance of Bobigny:

(*a*) The lawyer was to be informed that the new and currently prepared summons had been filed with the Ministry of Justice;

(*b*) Since [H. S.] had successively provided two birth dates in the documents which he had submitted for the proceedings, the court was to be requested to rule on the applicant's civil status.

29 January 1980. [H. S.] was given a hearing by the *Procureur* at Bobigny concerning the authenticity of the documents that he had placed in the file. It became apparent that the testimony submitted to the Parquet de Paris in support of the change of date of birth under the decision of 24 August 1973 had been prepared by [H. S.] himself because the witnesses were unable to write. This renders spurious the certificate issued on 5 October 1973.

12 March 1980. The Minister of the Interior consulted the Minister of Justice with regard to the status of an individual named [A. S.], who purportedly was born at Sokodiandi, Mali, in 1936, but whose birth certificate had never been transmitted.

14 August 1980. Since comparison of the files of [H. S.] and [A. S.] gave ground for assuming that these two individuals were using the same certificates and documents, the Minister of Justice then asked the Minister of the Interior to order a thorough inquiry in order to identify each of the persons concerned and to investigate if they were making use of certificates or documents belonging to another person.

2 December 1980, 30 January 1981, 6 and 17 February 1982. Several telegrams were sent to INTERPOL (Nouakchott) about the identity of [H. S.].

9 December 1982. Request by the Ministry of Justice for an inquiry into a third individual, also called [A. S.]. In this connection, INTERPOL (Bamako) was likewise asked several times to state whether this third individual was a twin brother of the previous one.

14 September 1983. Hearing of the detainee [H. S.], by an investigator of the Poissy police department.

10 October 1983. Application by the wife of [H. S.], born in Mali, for permission to stay in France.

18 November 1983. Notification to Mrs. [H. S.] that her application was refused.

29 March 1984. Preparatory hearing. The judge responsible for preparing the proceedings of the Bobigny tribunal ordered Maître Eugène B. Yesse, [H. S.'s] new lawyer, to establish his client's physical identity with the individual said to have entered France in 1959 and to have been there on 28 November 1960, the date on which Mauritania attained independence.

2 June 1984. [H. S.'s] application for the restoration of his French nationality addressed to the President of the French Republic. This application was transmitted to the Minister of Social Affairs and National Solidarity for action.

28 August 1984. Request by the Ministry of Social Affairs and National Solidarity to the Prefect of Seine and Marne (where [H. S.] was detained) for an inquiry under article 153.

7 August 1984. Report of the inquiry by the Ministry of the Interior communicated to the Ministry of Justice.

13 August 1984. Transmission of the above report to the *Procureur* at Bobigny.

16 October 1984. Transmission of the report of the inquiry by the Prefecture of Seine and Marne to the Ministry of Social Affairs.

7 November 1984. New preparatory hearing for the case before the Tribunal de grande instance of Bobigny.

9 November 1984. Order to [H. S.'s] lawyer renewed.

6 February 1985. Further preparatory hearing at the request of [H. S.] who had chosen another counsel; postponement until 24 April 1985. Order renewed.

4.6. The State party also mentioned that since May 1980, the author had been serving a seven-year term of imprisonment for a breach of the legislation on narcotic drugs.

4.7. The State party contended that the author had not exhausted all available domestic remedies before the competent French administrative and judicial authorities, not only with regard to the issuing of a certificate of French nationality by the *juge d'instance* (art. 149 of the Nationality Code), but also with regard to the procedure for the restoration of French nationality (art. 153 of the Nationality Code), because, first, the author had failed to pursue certain courses of action within the time-limits allowed to him and, secondly, because several remedies were still available to him. In that connection, the State party gave the following details:

(*a*) With regard to the issuing of a certificate of French nationality by the *juge d'instance* (art. 149), H. S. was refused the certificate on 3 July 1979. He started legal proceedings in August 1979 before the Tribunal de grande instance of Bobigny. The proceedings proved to be extremely complicated because of the doubts concerning the author's person and civil status. In the course of 1984, the judge responsible for preparing the case at Bobigny ordered H. S.'s lawyer, without success, to establish his client's identity (orders dated 29 March 1984, 9 November 1984 and 6 February 1985). The matter was subsequently postponed until the hearing on 24 April 1985, at the request of the applicant himself. In these circumstances, the prolongation of the procedural period was the responsibility of the author. In any event, it was for the Tribunal de grande instance of Bobigny to pronounce on the application of H. S. for recognition of French nationality. H. S. would be able to appeal against the judgement and then, if there was occasion, to submit his case to the Cour de cassation.

(*b*) With regard to the procedure for the restoration of French nationality (art. 153 of the Nationality Code): first, H. S. neither applied to the competent Minister, nor instituted proceedings before the administrative tribunals with a view to the overturning of the negative decision of the Minister of Labour, dated 8 March 1977. Those remedies could have been sought simultaneously, as mentioned above. Secondly, a new application was currently under examination at the Ministry of Social Affairs and National Solidarity, H. S. having again, in 1984, requested authorization to make a declaration of French nationality before the competent *juge d'instance*. Should the Minister of Social Affairs and National Solidarity turn down the application, again all of the aforementioned remedies could be sought by H. S. by contentious and non-contentious means alike.

5.1. In further submissions dated 23 and 24 April 1985 the author commented on the State party's submission and reiterated that he had been arbitrarily deprived of his French nationality in 1979 and that since then, despite all his efforts and the procedures to which he had applied, he remained in the same situation.

5.2. Concerning his date of birth, the author stated that he had been born in Mauritania in 1944, that his father had died during the Second World War fighting for France, that his mother had died in 1958, that in 1959 he had decided to travel to France. In order to obtain a birth certificate, he had gone to the Tribunal de premier degré at Sélibaby, Mauritania. A decision, having the legal validity of a birth certificate, had been issued by the tribunal on 23 February 1959 stating that he had been born at Massi-Chaggor, Mauritania, in 1923. The author further stated that the Haut Commissariat de l'Afrique occidentale française, on the basis of that decision, had issued to him an identity card with which he had travelled to France. He had used the card for employment purposes, to pay his social insurance, etc., until 21 February 1967. On that day he had been issued a certificate of French nationality by the Tribunal d'instance du 20ème arrondissement de Paris and on 3 March 1967, he had been given a French national identity card by the Prefect of Police of Paris. He

stressed that at no time had he submitted false information and that he could not be held responsible for an error (concerning his date of birth) made in the decision taken by the tribunal of Sélibaby. The author mentioned, however, that in 1983 he had requested a change in his date of birth because he had been born in 1944 and not in 1923. On 5 October 1973, he had been issued a new certificate of French nationality by the competent judge and on 22 October 1973 he had received a new identity card.

5.3. The author contested the whole process by which he had been deprived of his French nationality. In particular he contested the reasoning of the *Garde des Sceaux* on 23 March 1976 (see para. 4.5) because he had been domiciled in France since 1959. He argued that even if, in 1960, he had been a minor, his status could not have been dependent on that of his parents. He recalls that they both died prior to the independence of Mauritania in 1960. Therefore, he saw himself as a victim of discrimination. The author claimed that the State party's assertions that "the proceedings have proved to be extremely complicated because of the doubts concerning the author's person and civil status" (see above para. 4.7 (*a*)) were not valid and that the application of domestic remedies in that regard had been unreasonably prolonged within the meaning of article 5, paragraph 2 (*b*) of the Optional Protocol. He argues that there could be no doubt about his person and status, since he had lawfully lived and worked in France since 1959, he had no brothers and he did not know of any person having his name. He added that there were approximately 1 million individuals with his family name in West Africa. With regard to the procedure for the restoration of French nationality (art. 153 of the Nationality Code), he argued that he had never applied to the competent minister nor initiated proceedings before the administrative tribunals for the simple reason that he was French and had always been French. In particular, he denied that on 2 June 1984 he had written to the President of the French Republic "for the restoration of his French nationality" (see para. 4.5). He had written a letter merely to request due process of law in his case.

5.4. Regarding his detention, the author reiterated that in 1979 he had been obliged to return his national identity card. He stated that at that time he had become afraid that he might be dismissed from his job at Air France because of lack of legal documents. Believing that his situation was precarious, he had felt that he had no choice but to agree, when approached in the presence of his supervisor, to be involved in drug trafficking. That had brought about his arrest in March 1980. He alleged discrimination because his supervisor, a white man, had never been tried while he himself and three other black colleagues had been sentenced to several years of imprisonment. He mentioned that he had been sentenced by a French tribunal as "French" and that during his trial for drug trafficking the question of his nationality had not been put into question. However, subsequently—as shown in a copy of a letter dated, it appears, in June 1983, addressed by the Préfecture des Yvelines (Foreigners Department) to the Director of the Poissy prison—the prison authorities were informed that H. S., "who has declared that he is a French national, is in fact Mauritanian", and that the criminal record of this "foreigner" should be forwarded to the Préfecture.

5.5. Regarding his family, the author enclosed copies of birth certificates of his six children (one born in Mali, the others in France). It appears that he has three wives (two from Mali, one from Senegal). He submitted copies of certificates of French nationality regarding three of his children. His wife, M. M., mother of these three children, was allowed, in January 1985, to stay in France, but according to the author, she is not allowed to work or to receive social security allowances. He recalled that in 1983 she had been requested to leave France and enclosed a copy of a letter dated 18 November 1983 from the Préfecture de Police to that effect.

6. At the twenty-fifth session of the Human Rights Committee in July 1985, the State party was requested to submit further information concerning the author's legal situation and, in particular, the State party was asked to indicate when a final decision concerning the author's nationality might be expected, if he pursued the matter in a timely fashion. At the same time, the author was requested to specify which provisions of the Covenant had allegedly been violated in his case.

7.1. By a further letter dated 20 August 1985, the author claimed to be a victim of violations of the following provisions of the International Covenant on Civil and Political Rights: articles 2, paragraphs 1 and 3 (*b*); 5, paragraph 2; 7; 9, paragraph 4; 15, paragraph 1; 16; 17, paragraphs 1 and 2; 23; 24 and 26. He offered the following clarifications in substantiation of his claims:

(*a*) That articles 2, paragraph 3 (*b*); 9, paragraph 4; and 16 had been violated because a complaint which he had lodged against two judges of the Bobigny jurisdiction in February 1985, for allegedly acting against his interests and rights, had not been properly considered;

(*b*) That articles 7; 9, paragraph 4; and 15, paragraph 1, had been violated because he had been allegedly unjustly convicted and sentenced to seven years of imprisonment in 1981, and because the French authorities, in general, and the judges, in particular, were bent on harming him;

(*c*) That articles 2, paragraph 1; 5, paragraph 2; 17; 23; 24 and 26 had been violated because he has suffered discrimination in the sense that, despite all his efforts, the case concerning his nationality has been pending before the courts since 1979 and because his honour and reputation had been undermined, his family had not received social security allowances and his children had been deprived of proper education.

7.2. By a further letter dated 21 November 1985, the author transmitted to the Human Rights Committee a copy of submissions dated 15 and 23 October 1985 from his lawyer, Maître Tourrette, to the Tribunal de grande instance of Bobigny. In his submissions, the lawyer, after a lengthy description of his client's case, requested that the court:

(*a*) Take note that his client had proven that he was the H. S. born in 1944 and present in France before 28 November 1960, the date when Mauritania had acceded to independence;

(*b*) State that H. S., born in 1944, orphaned in 1959, the date of his arrival in France, retained nationality by filiation and also because of his presence on the territory in the Republic of France prior to the independence of Mauritania;

(*c*) Recognize that H. S. had possessed French status for more than 10 years. He considered it of lesser importance that, if the Court considered the application to be insufficiently well-founded, it should order any additional information or any hearing of witnesses ready to furnish information both on the family of H. S. and his presence in France before the independence of Mauritania.

8.1. By way of additional observations, submitted under cover of a letter from the Permanent Representative of France to the United Nations dated 2 December 1985, the State party noted that, in the legal proceedings instituted before the Tribunal de grande instance of Bobigny (Court of Major Jurisdiction) by the author with a view to securing recognition of his French nationality, he had recently changed his lawyer once again. He had also applied for full legal aid, which had been granted to him. The State party confirmed that Maître Tourrette, the author's new lawyer, had made his written submission on 23 October 1985, and it stated that the pre-trial judge at Bobigny had been obliged to refer the papers in the case for final consideration on 4 December 1985. The State party added that following this hearing, the case could be brought before the Tribunal on 19 December 1985 (see para. 8.7).

8.2. The State party reiterated that the prolongation of time-limits continued to be, as was the case earlier, the responsibility of the author and that he had not exhausted all the remedies available under domestic law. For the State party it seemed obvious that his communication ought to be rejected in accordance with the provisions of article 5, paragraph 2 (*b*), of the Optional Protocol.

8.3. The State party observed that the author, in his further letter of 20 August 1985 (see para. 7.1), had referred to proceedings instituted by himself after he had submitted his communication relating to the question of his nationality to the Human Rights Committee and it stated that those proceedings concerned other issues than that of his nationality. It further stated that the proceedings consisted of an interim relief procedure instituted following imprisonment for non-payment of a customs fine and of complaints filed against judges of the Tribunal de grande instance of Bobigny. Those proceedings, according to the State party, could be summarized as follows:

(*a*) *The proceedings concerning imprisonment for debt*

On 15 July 1985, [H. S.] made an application to the President of the Tribunal de grande instance of Bobigny challenging the imprisonment for debt.

On 31 July 1985, the President issued an interim relief order referring the case to the competent criminal court for a final decision.

On 13 September 1985, the order was served on him by a bailiff.

On 30 August 1985, a declaration of lack of jurisdiction was issued, after the author had made a further application to the President of the Tribunal which virtually repeated the arguments adduced in his application of 15 July 1985.

In conclusion, since the Customs Administration is currently considering a settlement with [H. S.], he might be released.

(*b*) *Complaints against judges*

On 27 March 1985, [H. S.] filed a complaint against the senior examining magistrate of Bobigny together with a proposed civil action for damages, couched in terms that did not specify the precise nature of the grievances he intended to develop and that he refused to clarify. The Public Prosecutor of Bobigny nevertheless made an application to the Criminal Chamber of the Cour de Cassation for a court to be appointed to investigate the matter, since the Bobigny tribunal did not have jurisdiction to investigate a case against one of its own judges.

On 3 August 1985, the Court de Cassation made an order stating that there was no ground for appointing such a court, since it was not in a position to determine whether one or several persons were liable to be charged.

H. S. was notified of this decision on 24 September 1985.

On 6 October 1985 [H. S.] made further complaints to the senior examining magistrate of the Tribunal de grande instance of Bobigny concerning one of the examining magistrates of that court. The latter magistrate had on 29 March 1980 charged [H. S.] with breaking the law on narcotics and smuggling in contraband goods, then ordered that he should be detained provisionally. On 10 February 1981, he had referred him, with three co-accused, to the Correctional Court to be tried on those above-mentioned counts.

8.4. With regard to the author's allegations that his family had not received social security allowances, the State party observed that his children had been taken into care by the departmental Social Assistance Office of Bobigny and placed in a home, their mother being of no fixed abode; that Act No. 75-551 of 2 July 1975 protected the families of prisoners in respect of sickness benefits and maternity and that thus far H. S.'s wife had not applied to the Caisse primaire d'assurance maladie for social benefits. The State party further observed that:

> All these grievances thus invoked by the applicant are not only tardy, but do not fall within the scope of the consideration of this communication, which is concerned solely with existing legal and administrative procedures relating to the question of his nationality. They should therefore be kept separate.

8.5. With regard to the alleged violations of articles 7 and 17 of the Covenant, the State party noted that the author had offered no justification in support of his allegations. It further noted that it failed to see how the author could have been subjected to inhuman and degrading treatment or subjected to attacks on his honour and reputation in connection with the legal proceedings before the Tribunal de grande instance of Bobigny, the purpose of which was to resolve the complex legal problem of his nationality and to do so at his own request. In alleging violations of articles 7 and 17 of the Covenant in this respect, the State party affirmed, he was in error.

8.6. Finally, the State party emphasized that, contrary to what the author would appear to maintain, no provision of the International Covenant on Civil and Political Rights obliged a State to confer nationality on individuals who applied for it. It reiterated that the right of every State to determine who were its nationals so far as its international obligations were concerned was an uncontested principle of public international law.

8.7. By a letter dated 28 March 1986, the author informed the Committee that the Tribunal de grande instance of Bobigny had handed down a decision in the case on 13 March 1986, denying him recognition of French nationality; that he had filed an appeal against that decision and that he intended, as a last resort, to bring his case before the Cour de cassation, if so warranted.

9.1. Before proceeding to the merits of the case, the Committee must determine whether the same matter was being examined under another procedure of international investigation or settlement. There is no indication that that is the case. The Committee must also determine whether the communication fulfils other admissibility criteria under the Optional Protocol, including the condition relating to exhaustion of domestic remedies, set out in article 5, paragraph 2 (*b*), of the Optional Protocol. In this connection, the Committee has endeavoured to elicit from the State party clarifications regarding the apparent prolonged delays in the court proceedings related to the question of the author's nationality.

9.2. The Committee notes that the State party has maintained that the inquiries that were conducted during the various proceedings revealed that there were doubts not only as to the author's civil status (date and place of birth and parentage), but also with regard to his actual identity in relation to other individuals having the same name and that these questions had of necessity to be settled before a decision could be taken in respect of the author's nationality (see para. 4.4). The Committee further notes the State party's assertion that the author has not exhausted all the domestic remedies available before the competent French administrative and judicial authorities, not only with regard to the issuing of a certificate of French nationality by the *juge d'instance* (art. 149), but also with regard to the procedure for the restoration of French nationality (art. 153 of the Nationality Code) (see para. 4.7).

9.3. The Committee observes that the present case concerns solely Mr. H. S.'s efforts to have his nationality, as that of a French citizen, recognized anew by the French authorities. H. S. maintains that his nationality was not in dispute when he entered France. Later, on 23 March 1976, the Ministry of Justice made it known that H. S. should be regarded as a foreigner. He was required to surrender two certificates of French nationality, issued to him in 1967 and 1973, respectively, and to hand in his national identity card. After unsuccessful attempts to persuade the Ministry of Justice to "restore" his French nationality and to obtain a new "certificate of nationality" from the competent judge, H. S., in August 1979, applied to the Tribunal de grande instance of Bobigny for "recognition" of his French nationality. Upon completion, those proceedings are appealable, first, to the Cour d'appel and, secondly, to the Cour de cassation.

9.4. The Committee is aware that the proceedings before the Tribunal de grande instance de Bobigny lasted for more than six and a half years. However, the Committee finds that the delays in the proceedings in 1984 and 1985 were caused by the author himself. For that reason the Committee is unable to conclude that the domestic remedies, which, according to both parties, are in progress, have been unduly prolonged in a manner that would exempt the author from exhausting them under article 5, paragraph 2 (*b*), of the Optional Protocol.*

9.5. In the light of the observations set out in paragraphs 9.3 and 9.4 above, the Committee is obliged to conclude that, even assuming that the facts of the case might have raised issues under the Covenant, the requirement of exhaustion of domestic remedies, under article 5, paragraph 2 (*b*), of the Optional Protocol, had not been met by the author at the time of the submission of the communication in September 1984 and that this requirement has still not been met.

9.6. H. S. has introduced other issues in the case, mostly after the communication was transmitted to the State party for observations on the question of admissibility. These issues are either unsubstantiated or fall outside the scope of the International Covenant on Civil and Political Rights and will, therefore, not be examined by the Committee.

10. The Human Rights Committee therefore decides:

(1) That the communication is inadmissible;

(2) That the decision shall be communicated to the author and to the State party.

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* The Committee notes that although there is agreement between the parties that the court proceedings for the "recognition" of the author's nationality were initiated in 1979 and are still in progress, the parties do not agree on the question of whether the separate administrative procedure for the "restoration" of the author's nationality was invoked by him in 1984.

Communication No. 185/1984

Submitted by: L. T. K. (name deleted) undated, received on 18 October 1984
Alleged victim: The author
State party: Finland
Declared inadmissible: 9 July 1985 (twenty-fifth session)

Subject matter: Conscientious objector to military service

Procedural issues: Inadmissibility ratione materiae—*Unsubstantiated allegations—Failure to state a claim —Compatibility with Covenant*

Substantive issues: Freedom of conscience—Freedom of expression—Conscientious objector

Articles of the Covenant: 8 (3), 18 and 19

Articles of the Optional Protocol: 2 and 3

1. The author of the communication (undated), received on 18 October 1984, is L. T. K., a Finnish citizen residing in Finland. He claims to be a victim of a breach by Finland of articles 18 and 19 of the International Covenant on Civil and Political Rights, stating that his status as conscientious objector to military service has not been recognized in Finland and that he has been criminally prosecuted because of his refusal to perform military service.

2.1. The facts, which are not in dispute, are described by the author and the State party as follows: On 25 April 1982, L. T. K. informed the competent authorities that, for serious moral considerations based on his ethical convictions, he was unable to perform military service. Instead of military service, armed or unarmed, he offered to do alternative service. On 22 October 1982, the Military Service Examining Board decided that it had not been proved that serious moral considerations based on an ethical conviction prevented the author from performing armed or unarmed military service and ordered that he should perform armed service. The author appealed to the Ministry of Justice, which, by a decision of 21 January 1983, ordered him to perform unarmed military service. On 10 June 1983, he was called up for service. Upon arrival at his assigned military unit the author refused to perform any military service. Court proceedings were initiated against him and the Valkeala District Court sentenced him on 9 August 1983 to nine months' imprisonment for refusalto perform compulsory military service. The author then appealed to the Kouvola Court of Appeal, which upheld the decision of the District Court on 11 September 1984. The Supreme Court rejected his application for permission to appeal on 30 November 1984.

2.2. In the mean time, the author had again, on 20 February and 10 June 1983, informed the authorities of his ethical convictions and of his desire to perform only alternative service. The Examining Board, however, decided on 1 July 1983 that it had not received sufficient proof of his convictions. The author then appealed to the Ministry of Justice, which again ordered him, on 13 September 1983, to perform unarmed service. An application was filed by the author with the Supreme Administrative Court, alleging that a procedural fault had been made by the Military Service Examining Board. On 6 June 1984, the Supreme Administrative Court declared the application inadmissible and referred the matter to the Ministry of Justice, where it is pending for consideration.

2.3. On 16 September 1983, the author became 30 years old. Paragraph 2 of article 3 of the Unarmed and Alternative Service Act No. 132/69 provides that a man who has been ordered to perform unarmed military service or alternative service and has not entered the service before reaching the age of 30 is thereafter not obligated to do so. As a consequence, after a person has reached the age of 30, ethical conviction cannot be examined by the Military Service Examining Board or by any other public authority.

3.1. The author further argues that the application of an age limit to alternative service now prevents him from substituting military service by alternative service and makes him a victim of discrimination on the basis of age. If, however, the Examining Board would reexamine his case and recognize his ethical convictions, he believes that he would be pardoned.

3.2. The author states that his case has not been submitted to another procedure of international investigation or settlement.

4.1. By its decision of 22 October 1984, 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. The State party was also requested to provide the Committee with copies of any court orders or decisions relevant to this case.

4.2. In its reply, dated 28 January 1985, the State party did not raise objections to the admissibility of the communication. It indicated specifically that the author had exhausted available domestic remedies in the matter complained of, as required under article 5, paragraph 2 (*b*), of the Optional Protocol. As requested, the State party provided the Committee with copies of the relevant administrative and judicial decisions.

4.3. With regard to the question of exhaustion of domestic remedies, the State party observed, *inter alia*:

> As regards the prison sentence passed by the Valkeala District Court, L. T. K. has exhausted all available domestic remedies. He could still seek the annulment of the court decision by bringing the case to the Supreme Court but, taking into account that the Supreme Court has already once considered the case, this extraordinary remedy is unlikely to be effective. . . .
>
> Article 5 of the Unarmed and Alternative Service Act No. 132/69 provides that an order to perform such service is given by the Military Service Examining Board. According to article 6 of the Act the order can be appealed to the Ministry of Justice. A decision by the Ministry is not subject to appeal, which must be stated in the decision. Such a statement appeared in the texts of the Ministry's decisions of 21 January 1983 and 13 September 1983. Consequently L. T. K. had no further ordinary remedies available. According to the Act on Extraordinary Remedies in Administrative Affairs No. 200/66 L. T. K. could still have sought the annulment of the Ministry's decision and thereby brought about a change in his situation. The alleged procedural fault by the Examining Board, referred to the Ministry of Justice by the Supreme [Administrative] Court, is pending. It would, however, seem unreasonable to require that these extraordinary remedies be taken into account when considering the question of admissibility under article 5 (2) of the Optional Protocol. The conclusion, therefore, is that all available domestic remedies within the meaning of article 5 (2) (*b*) of the Optional Protocol have been exhausted with respect to the decisions by the Military Service Examining Board.

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

5.2. The Human Rights Committee observes in this connection that, according to the author's own account he was not prosecuted and sentenced because of his beliefs or opinions as such, but because he refused to perform military service. The Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3 (*c*) (ii) of article 8, can be construed as implying that right. The author does not claim that there were any procedural defects in the judicial proceedings against him, which themselves could have constituted a violation of any of the provisions of the Covenant, or that he was sentenced contrary to law.

6. The Human Rights Committee, after careful examination of the communication, concludes that the facts which have been submitted by the author in substantiation of his claim do not raise an issue under any of the provisions of the International Covenant on Civil and Political Rights. Accordingly, the claim is incompatible with the provisions of the Covenant.

7. The Human Rights Committee therefore decides:

The communication is inadmissible.

Communication No. 187/1985

Submitted by: J. H. (name deleted) on 1 February 1985
Alleged victims: English speaking members of the Canadian Armed Forces
State party: Canada
Declared inadmissible: 12 April 1985 (twenty-fourth session)

Subject matter: promotion policies within the Canadian Armed Forces

Procedural issues: Concept of "victim"—Examination of law in abstracto—*No claim under article 2*—Actio popularis—*Failure to state a claim—Standing of author*

Substantive issues: Language discrimination—Discrimination in promotion

Articles of the Covenant: 2 and 26
Articles of the Optional Protocol: 1 and 2

1. The author of the communication dated 1 February 1985 is J. H., a Canadian national and retired member of the Canadian Armed Forces, living in Ontario, Canada. He alleges that promotion policies in the Canadian Armed Forces are discriminatory and constitute a violation by Canada of article 2, paragraph 1, of the International Covenant on Civil and Political Rights.

2.1. It is alleged that Administrative Order 11-6 (1972) of the Canadian Armed Forces, which provides for an increased percentage of officers and soldiers of French mother tongue, has resulted in discrimination on the basis of language, tantamount to a form of racial discrimination, since English- and French-speaking persons in Canada are of two different ethnic origins. It is alleged that persons of French mother tongue are preferred for promotion within all ranks of the Armed Forces, to the corresponding disadvantage of persons of English mother tongue.

2.2. In late 1978, shortly before his retirement in April 1979, the author, who is of English mother tongue, began his endeavours to point out what he considered to be the linguistic and racial discrimination being practised in the promotion policy of the Canadian Armed Forces. He wrote letters to several opposition Members of Parliament and to two successive Ministers of National Defence. In June 1980 he filed a complaint with the Canadian Human Rights Commission (a statutory body created by federal legislation to administer the Canadian Human Rights Act).

2.3. In 1984 a new administrative order was promulgated (2-15 of 29 June 1984), under which "mother tongue" was no longer to be used to determine the participation ratio of English- and French-speaking members of the Canadian Armed Forces. The reference to "mother tongue" was replaced by "first official language". The author submits that the change was intended to answer the criticism of the prevailing promotion policy. He asserts, however, that the change was only cosmetic and that the same promotion policy continues to be applied today and that the only difference is the manner in which the English and French language and origin are defined.

2.4. As a result of the reworded promotion policy, the Canadian Human Rights Commission felt that there were no longer any grounds for potential ethnic or racial discrimination and informed the author that it would not make a decision in the complaint brought by him. J. H. points out in this connection that there is no legislation in Canada prohibiting discrimination on the basis of language (neither the Charter of Rights and Freedoms, part of the Canadian Constitution, nor the Canadian Human Rights Act includes linguistic discrimination as a prohibited practice). He further submits that the conclusion of the Canadian Human Rights Commission to the effect that there was no discrimination is not a "decision" on which an appeal to the courts could be made. He finally mentions that further correspondence with Members of Parliament and other persons in positions of authority have produced no results.

2.5. There is no specific indication in the communication that the author has himself been adversely affected by the policy which he complains about. He requests that his complaint be examined and that the Government of Canada be advised "that it is actually discriminating against English-speaking Canadians in implementing its incentive programmes to assist French-speaking Canadians".

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

4.1. The Committee notes that articles 1 and 2 of the Optional Protocol require that the author of a communication must himself claim, in a substantiated manner, that he is or has been a victim of a violation by the State party concerned of any of the rights set forth in the Covenant. It is not the task of the Human Rights Committee, acting under the Optional Protocol, to review *in abstracto* national legislation or practices as to their compliance with obligations imposed by the Covenant.

4.2. The author of the present communication has not put forward any facts to indicate that he has himself been a victim of discrimination in violation of the provisions of the Covenant. An allegation to the effect that past or present promotion policies are generally to the detriment of English-speaking members of the Canadian Armed Forces is not sufficient in this respect. The Committee, accordingly, concludes that the author has not shown that he has a claim under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

The communication is inadmissible.

Communication No. 192/1985

Submitted by: S. H. B. (name deleted) on 13 August 1985
Alleged victim: The author
State party: Canada
Declared inadmissible: 24 March 1987 (twenty-ninth session)

Subject matter: Divorce proceedings and award of child custody and alimony

Procedural issues: Non-exhaustion of domestic remedies—Effective remedy—Unreasonably prolonged—Election of remedy—Available remedy

Substantive issues: Discrimination based on sex—Child custody—Parental rights—Matrimonial property—Divorce—Interference with family—Judge's discretion

Articles of the Covenant: 2, 3, 14 (1) and 26
Article of the Optional Protocol: 5 (2) (b)

1. The author of the communication (initial letter of 13 August 1985 and subsequent letters of 19 December 1985, 25 March and 10 June 1986) is S. H. B., a Canadian naturalized citizen born in Egypt in 1942, at present practising medicine in the Province of Alberta. He submits the communication in his own name and on behalf on his son A. B., born in April 1976 in Canada. He alleges violations of articles 2, 3, 7, 8, 14, 15, 23 and 26 of the International Covenant on Civil and Political Rights by federal and provincial authorities in Canada.

2.1. The author states that he was married to J. M. B., a Canadian nurse, on 20 January 1976, because of her advanced pregnancy; their son A. was born less than three months later. As a result of marital disagreements and the husband's allegation of "mental cruelty", the spouses were separated by a separation agreement of December 1977, and divorced in June 1982. The author's communication concerns alleged violations of his rights under the Covenant during the divorce proceedings, in particular in connection with the lower court's decision to grant custody of the child to the mother under the Canadian Divorce Act, to award her alimony and child support in the amount of $800 per month and to divide matrimonial property on the basis of a retroactive application of the new Matrimonial Property Act of the Province of Alberta. Such dispositions allegedly constituted a gross abuse of judicial discretion by the judge concerned of the Trial Division of the Court of Queen's Bench of Alberta.

2.2. In particular, the author claims to be a victim of violations of:

(*a*) Article 2 of the Covenant, because "Canada failed to ensure that there is an effective remedy to the violation of my human rights, notwithstanding that the violations have been committed by persons acting in an official capacity";

(*b*) Article 3, because "the Government of Canada and the Government of Alberta failed to take appropriate steps to prevent discrimination based on sex in the implementation of laws governing child custody and division of matrimonial property";

(*c*) Article 7, because the Matrimonial Property Act which gives judges "absolute and unchallengeable discretionary powers" exposed him to "cruel, inhuman and degrading treatment" by subjecting him "to the whims of the judge, and his prejudices";

(*d*) Article 8, paragraph 2, of the Covenant, because "I am, in effect, held in servitude for an indefinite period of time to my ex-spouse. I am forced to provide luxury to my ex-spouse, without any provisions whatsoever for the discontinuation of this state of servitude";

(*e*) Article 14, because he was tried "before a tribunal, whose competence and impartiality are in very grave doubt";

(*f*) Article 15, because of the retroactive application to him of the Matrimonial Property Act;

(*g*) Article 23, paragraph 4, because Canada has failed to "take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution", as manifested by a "systematic denial of fathers' rights by the courts of Canada generally, and Alberta specially";

(*h*) Article 26, because "there exists in Canada, at present, a rampant and blatant discrimination against men at the dissolution of marriage".

2.3. The author further argues that the granting of unrestricted and unchallengeable discretionary powers to judges in matters of division of matrimonial property and awarding of child custody goes literally against the essence of justice. "If the purpose of all laws is to protect one human from the arbitrary will of another, then the idea of awarding a judge unrestricted and unchallengeable discretionary powers amounts to suspension of the rule of law in favour of the rule of the individual. The unrestricted discretionary powers of judges is literally against the intent and the purposes of the entire International Covenant on Civil and Political Rights, and is indeed unconstitutional according to the Canadian Charter of Rights." In his own case he claims that the trial judge "has been sexist and racist", possibly because the author is of Egyptian origin and his ex-wife was born and raised in the trial judge's home town.

2.4. With regard to the exhaustion of domestic remedies, the author states that he has appealed to the Supreme Court of Alberta, but that the court of appeal refused to investigate the trial judge's use of discretion, and that no written reasons were given for refusing to consider the appeal. The author has also addressed himself to the Chief Justice of Alberta, the Judicial Council, the Minister of Justice of Canada, the Minister of Justice of Alberta, and the Provincial Ombudsman of Alberta, without success, because the judge's power of discretion is considered beyond challenge and thus no investigations were conducted. The author indicates that he could still make an appeal to the Supreme Court

of Canada, but explains that this would not be a practical option because the main issue is the judge's use of discretion and the current law provides that the judge has absolute discretion in matters of awarding child custody and division of matrimonial property, and thus the Supreme Court could not overturn the lower court's decision without a legislative change. Moreover, even if the issue could be examined by the Supreme Court of Canada, the backlog of cases is such that review of his case would be impossible within a reasonable time.

3. By its decision of 15 October 1985, the Working Group of the Human Rights Committee transmitted the communication to the State party concerned, under rule 91 of the Committee's provisional rules of procedure, requesting information and observations relevant to the question of admissibility of the communication. The Working Group also requested the author to provide clarification of his allegation that appeal proceedings before the Supreme Court of Canada would be unduly prolonged and not constitute an effective remedy.

4.1. In his submission dated 19 December 1985, the author refers to the time factor and indicates that it took no less than four and a half years for his case to come to court. This period included a year of waiting before proceedings could start, and another year of waiting until the Amicus Curiae completed his report which was handed to him less than a week before the date of the trial, thus precluding any effective professional challenge to the conclusions of the report. It took approximately two more years of waiting until the Appellate Division of the Supreme Court of Alberta heard his case and dismissed it, without giving any written reasons. He further states that:

> litigants in Canada do not have a right to appeal to the Supreme Court of Canada. Appeals may be heard only after application for leave to appeal is made to, and granted by, the Supreme Court of Canada, which may refuse, without giving any reasons, to hear any appeal. This is more likely to happen when the Provincial Appeal Court decision is—as in my case—unanimous . . . I have it on good authority that, even if leave to appeal is granted by the Supreme Court of Canada, the waiting would be no less than two years and very likely, four years or more.

4.2. The author again draws attention to the factual situation, recalling that:

> legal separation between my ex-spouse and myself occurred when my son, A. P. B., was approximately one and a half years old. At present, my son is very close to the age of 10 years. By the time the issue comes to the Supreme Court of Canada, my son will likely be approximately 14 years of age. My financial loss as a direct consequence of a miscarriage of justice can be measured in the hundreds of thousands of dollars. Clearly, another four years of delay is totally unacceptable by any reasonable standards. Allowing the violations to my human rights and those of my son to continue unabated for another four years is, in itself, a gross travesty of justice.

4.3. The author also refers to the case of the Alberta Union of Provincial Employees which, after losing two court battles in Alberta with regard to the right to strike, submitted its case to the International Labour Organisation, a United Nations body. The Union took its case to the United Nations after losing two battles in Alberta and before reaching the Supreme Court of Canada. The fact that the case was accepted before it reached the Supreme Court of Canada clearly indicates a recognition of the fact that the delay encountered in attempting to go to the Supreme Court of Canada is unacceptable.

5.1. In its submission under rule 91, dated 25 February 1986, the State party describes the factual situation in detail and argues that the communication is inadmissible because of non-exhaustion of domestic remedies and also on the ground of non-substantiation of allegations.

5.2. With regard to the author's claim concerning custody, the State party points out that while he appealed to the Court of Appeal of Alberta on the issues of maintenance and division of matrimonial property, he did not appeal on the issue of custody, although he could have done so pursuant to the Alberta Judicature Act of 1980. Moreover, the State contends that the author has not substantiated his allegation that the custody ruling entailed violations of articles 7, 14, 23 and 26 of the Covenant. The fact that women are more often awarded custody of children upon divorce is insufficient substantiation.

5.3. With regard to the claim that article 2, paragraphs 1 to 3, and article 3 of the Covenant have been violated, the State party submits that although these provisions are relevant to a determination of whether other articles of the Covenant have been violated, they are not capable of independent violation in their own right.

5.4. With regard to maintenance and division of property, the State party notes that the author has failed to seek leave to appeal the judgement of the Alberta Court of Appeal to the Supreme Court of Canada. It is submitted that leave to appeal in at least 18 maintenance and/or matrimonial property cases has been granted by the Supreme Court of Canada since 1975 and that in eight of these cases the appeal was allowed. Thus, "leave to appeal to the Supreme Court of Canada on these matters is an effective and sufficient domestic remedy, although of course the relative merits of the case will affect the likelihood of relief being granted. Certain delays are inevitably involved in invoking the appellate jurisdiction of the highest court of any country, but Canada submits that the time periods involved in proceedings before the Supreme Court of Canada are not untoward in this regard, and that they are least prejudicial in matters such as the present, involving solely financial and property interests."

5.5. The State party also contends that the author has not substantiated his allegations concerning violations by Canada of the following provisions of the Covenant:

(*a*) *Article 7*: It is submitted that the author has not provided any substantiation of his claim to have been subjected to torture or cruel, inhuman or degrading treatment contrary to article 7 of the Covenant. In particular, it is contended that in order to substantiate this claim, it is not sufficient for the author to allege that he has been required to pay a total of $800 a month maintenance to his former wife and child, or that he was required to pay the lump sum of $37,066 to his former wife upon divorce;

(*b*) *Article 8*: It is similarly submitted that the above allegation provides no substantiation of the claim that his right not to be held in servitude pursuant to article 8, paragraph 2, of the Covenant has been violated;

(*c*) *Article 14*: It is submitted that there has been no substantiation of the claim by the author that the trial

judge was biased or incompetent in awarding $800 a month in maintenance to his former wife and child, or in granting his former wife a lump sum payment of $37,066 upon divorce. It is insufficient to allege that an unfavourable decision has been reached in order to substantiate a claim of bias or incompetence upon the part of a tribunal;

(*d*) *Article 15*: It is submitted that there has been no substantiation of the claim by the author that the application of the Matrimonial Property Act resulted in a violation of article 15 of the Covenant. Indeed, it is clear that the facts of this case fall outside the ambit of article 15, since it applies to the criminal rather than the civil process;

(*e*) *Article 23, paragraph 4*: It is submitted that there has been no substantiation of the author's claim that the maintenance and division of property awards violate article 23, paragraph 4, of the Covenant. In particular, it is submitted that it is necessary in these matters for judges to be granted a certain discretion, and that in any event the discretion is not an unfettered one in Canada;

(*f*) *Article 26*: It is submitted that there has been no substantiation of the allegation by the author that the maintenance and division of property award of the trial judge violated article 26 of the Covenant. In particular, no evidence has been provided of any discrimination on the basis of race or sex in the particular circumstances of the author's case.

6.1. In his comments of 25 March and 10 June 1986, the author states that if the Committee requires additional documentary substantiation, he will undertake to provide it. But, in the light of the extensive submissions and exhibits already presented, the author believes that sufficient substantiation has been provided to have the case declared admissible and to warrant further examination on the merits by the Committee. In particular, he argues that "the best substantiation of the allegations lies in the full text of the trial transcript, as well as other official documents, including the text of examination for discovery and four affidavits submitted to the Court of Queen's Bench of Alberta over the course of several years."

6.2. With regard to the allegations of violations by Canada of article 23, paragraph 4, and article 26 of the Covenant, the author states that, in addition to the evidence already provided, "there are numerous expert witnesses who would readily testify to the existence of rampant sexism, in my own case specifically, and in the implementation of child custody and division of matrimonial property laws, generally." Besides reiterating his allegations of "sexism and racism", the author submits "that judges in Canada are protected from legal accountability, contrary to article 26." In this connection he cites a recent attempt to sue members of the Court of Appeal. The Master in Chambers dismissed the claim on the basis that "judicial negligence does not constitute a cause of action at the common law".

6.3. With regard to the State party's contention that he has not exhausted domestic remedies with respect to the issue of custody, the author submits that "it has been the unanimous advice of several legal experts that the awarding of child custody is entirely within the discretion of the judge" and that therefore an appeal to the Court of Appeal would be totally futile. He could not, he argues, obtain a new evaluation of the facts by the Court of Appeal, and the only possibility of challenging the lower court's decision would be by establishing bias or misconduct on the part of the judge or of the Amicus Curiae. In pursuing this "unconventional means", he requested the Provincial Ombudsman in Alberta to conduct an investigation into the way the department of Amicus Curiae in Alberta is run. However, the author alleges that the Attorney-General of Alberta invoked technical objections, thus denying the Ombudsman the opportunity to investigate the matter and to establish the author's allegations. He also reported the lower court judge to the Chief Justice of Alberta and to the Judicial Council. However, "the Judicial Council refused to conduct an investigation, thus effectively denying me the opportunity to prove my allegations of bias and denying me the means to ask for a new trial on the issue of custody." The author also forwards press reports showing that recently many other divorced fathers have unsuccessfully attempted to sue the Amicus Curiae, but that the Master in Chambers (who is not a judge) has blocked the legal action, "thus denying citizens of this province the fundamental constitutional right of having their cases determined in court."

6.4. The author concludes that domestic remedies, to the extent that they can be considered effective, have been exhausted. He further emphasizes the time factor "since the harm to my son continues until a solution is reached."

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

7.2 The Committee observes in this respect, on the basis of the information available to it, that the author has failed to pursue remedies which the State party has submitted were available to him, namely, an appeal to the Court of Appeal on the issue of custody and an application for leave to appeal to the Supreme Court of Canada on the issues of maintenance and division of matrimonial property. The Committee has noted the author's belief that a further appeal on the issue of custody would be futile and that a procedure before the Supreme Court of Canada would entail a further delay. The Committee finds, however, that, in the particular circumstances disclosed by the communication, the author's doubts about the effectiveness of these remedies are not warranted and do not absolve him from exhausting them, as required by article 5, paragraph 2 (*b*), of the Optional Protocol. The Committee accordingly concludes that domestic remedies have not been exhausted.

8. The Human Rights Committee therefore decides:

(1) The communication is inadmissible;

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

Communication No. 204/1986

Submitted by: A. P. (name deleted) on 16 January 1986
Alleged victim: The author
State party: Italy
Declared inadmissible: 2 November 1987 (twenty-first session)*

Subject matter: Conviction of Italian citizen for same offence in two countries

Procedural issues: Compatibility of communication with the Covenant—Inadmissibility ratione materiae *—Non-participation of Committee member in decision—Jurisdiction of State*

Substantive issue: Principle of non bis in idem.

Article of the Covenant: 14 (7)
Article of the Optional Protocol: 3
Rule of Procedure: 85

1. The author of the communication (initial letter dated 16 January 1986 and a further letter of 7 September 1987) is A. P., an Italian citizen born on 12 March 1940 in Tunisia, at present residing in France. He claims to be the victim of a violation of article 14, paragraph 7, of the Covenant by the Italian Government. He is represented by counsel.

2.1. The author states that he was convicted on 27 September 1979 by the Criminal Court of Lugano, Switzerland, for complicity in the crime of conspiring to exchange currency notes amounting to the sum of 297,650,000 lire, which was the ransom paid for the release of a person who had been kidnapped in Italy in 1978. He was sentenced to two years' imprisonment, which he duly served. He was subsequently expelled from Switzerland.

2.2. It is claimed that the Italian Government, in violation of the principle of *non bis in idem,* is now seeking to punish the author for the same offence as that for which he had already been convicted in Switzerland. He was thus indicted by an Italian court in 1981 (after which he apparently left Italy for France) and on 7 March 1983 the Milan Court of Appeal convicted him *in absentia.* On 11 January 1985, the Second Division of the Court of Cassation in Rome upheld the conviction and sentenced him to four years' imprisonment and a fine of 2 million lire.

2.3. The author invokes article 14, paragraph 7, of the Covenant, which provides:

> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

He further rejects the Italian Government's interpretation of this provision as being applicable only with regard to judicial decisions of the same State and not with regard to decisions of different States.

2.4. The author further indicates that in 1984 the Italian Government addressed an extradition request to the Government of France, but that the Paris Court of Appeal, by judgement of 13 November 1985, denied extradition because it would violate French *ordre public* to make the author suffer two terms of imprisonment based on the same effects.

3. The Committee has ascertained that the same matter has not been submitted to another procedure of international investigation or settlement.

4. By its decision of 19 March 1986, 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 the admissibility of the communication, in particular details of the effective remedies available to the author in the particular circumstances of his case. It also requested the State party to provide the Committee with the text of any court orders or decisions of relevance to the case, including the 1981 indictment of the author, the judgement of 7 March 1983 of the Milan Court of Appeal and the judgement of 11 January 1985 of the Court of Cassation in Rome.

5.1. In its submission under rule 91, dated 24 June 1987, the State party provides copies of the court orders and decisions in the author's case and objects to the admissibility of the communication, which it considers unfounded (*sans fondement*). In particular, the State party argues that Mr. P. was tried for two different offences in Switzerland and in Italy.

5.2. The State party first provides an outline of the factual situation:

> A few months after the kidnapping of M. G. M., in Milan on 25 May 1978, and the payment by her family of 1,350 million lire, attempts were made to "launder" sums deriving from the crime. In particular, on 4 September 1978, a person later identified as J. M. F. attempted to convert into a bank cheque the sum of 4,735,000 lire at the Milan branch of the Banca Nazionale del Lavoro; on 6 September 1978, the same individual negotiated the sum of 120 million lire at several banks in Lugano (Switzerland); on 12 September 1978, again at different banks in Lugano, M. M. F., this time accompanied by the author changed 100 million lire into Swiss francs. On that occasion, the Swiss police intervened and J. M. F. absconded, while A. P. was arrested. Some time later, a further sum of 57,650,000 lire was found hidden in a rented car that had been used by J. M. F. and A. P. to travel to Switzerland.

5.3. The State party then rejects the author's contention that article 14, paragraph 7, of the Covenant protects the principle of "international *non bis in idem*". In the opinion of the State party, article 14, paragraph 7, must be understood as referring exclusively to the relationships between judicial decisions of a single State and not between those of different States.

6. In his comments, dated 7 September 1987, the author contends that his allegations with respect to a violation of article 14, paragraph 7, are well founded and argues that article 14, paragraph 7, of the Covenant should be interpreted broadly, so as to apply to judicial decisions of different States.

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* Pursuant to rule 85 of the Committee's provisional rules of procedure, Committee member Mr. Fausto Pocar did not take part in the adoption of the decision.

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

7.2. The Committee notes that the State party does not claim that the communication is inadmissible under article 5, paragraph 2, of the Optional Protocol. With regard to article 5, paragraph 2 (*a*), the Committee observes that the matter complained of by A. P. has not been submitted to another procedure of international investigation or settlement. With regard to article 5, paragraph 2 (*b*), the State party has not claimed that there are domestic remedies which the author could still pursue in his case.

7.3. With regard to the admissibility of the communication under article 3 of the Optional Protocol, the Committee has examined the State party's objection that the communication is incompatible with the provisions of the Covenant, since article 14, paragraph 7, of the Covenant, which the author invokes, does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State.

8. In the light of the above, the Human Rights Committee concludes that the communication is incompatible with the provisions of the Covenant and thus inadmissible *ratione materiae* under article 3 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(*a*) That the communication is inadmissible;

(*b*) That this decision shall be communicated to the State party and the author of the communication.

Communication No. 209/1986

Submitted by: F. G. G. (name deleted) on 15 April 1986
Alleged victim: The author
State party: The Netherlands
Declared inadmissible: 25 March 1987 (twenty-ninth session)

Subject matter: Dismissal of Spanish sailor by a Netherlands private shipping company

Procedural issues: Non-exhaustion of domestic remedies—Competence of HRC to examine communication concerning rights also set out in ICESCR—Scope of application of ICCPR

Substantive issues: Discrimination in employment practices—Right to work—Differentiation based on objective and reasonable criteria—National origin—Citizenship

Article of the Covenant: 26
Article of the Optional Protocol: 5 (2) (b)

1.1. The author of the communication (initial letter of 15 April 1986 and subsequent letter of 28 October 1986) is F. G. G., a Spanish seaman who, in 1983, was dismissed together with 222 other foreign sailors by a Netherlands private shipping company. The reasons for the dismissals put forward by the company were that the foreign seamen's knowledge of Dutch was not sufficient and that the company was forced to reduce its work force because of economic difficulties. The author points out in this connection that most of the foreign seamen had been employed for over 15 years, and that no Netherlands national was dismissed.

1.2. The author states that under Netherlands labour law the *Arbeidsburo* (an agency of the Ministry of Labour) must state whether a dismissal may or may not take place and, in that connection, must hear both parties before taking a decision. He alleges that at the time the company requested permission for his dismissal, he was not properly informed of his rights, but only told that he would have to make his submission to the *Arbeidsburo* within 14 days. Being at sea at the time and not having an opportunity to seek counsel, this requirement, he states, was very difficult for him to comply with.

1.3. The author claims that in the circumstances which he describes he was denied the right to equal treatment before the law and the right to equal protection of the law. In support of his claim he encloses copies of various documents, including a report from the National Ombudsman, a submission by the dismissed seamen to the Cantonal Court (court of first instance) in response to a submission made to the Court by the shipping company, a letter addressed to the Queen of the Kingdom of the Netherlands concerning the dismissal of the foreign seamen, certificates concerning the author's prior satisfactory employment with other Netherlands shipping companies, correspondence between the author and the Ministry of Justice concerning the author's application for a residence permit in the Netherlands and a decision of the Ministry of Justice declining to grant a residence permit to the author.

2. By its decision of 1 July 1986, the Working Group of the Human Rights Committee transmitted the communication to the State party concerned under rule 91 of the Committee's provisional rules of procedure, requesting information and observations relevant to the question of admissibility of the communication.

3.1. In its submission under rule 91, dated 29 September 1986, the State party describes the factual situation in detail and argues that the communication is

inadmissible because of non-exhaustion of domestic remedies and also on the ground of incompatibility with the Covenant.

3.2. With regard to the author's claim about his dismissal, the State party states that F. G. G. "was employed as a seaman by NedLloyd Rederijdiensten BV, Rotterdam". The continuing recession and the considerable overcapacity of the world fleet, together with sizeable operating losses by the company, necessitated a radical reorganization within NedLloyd, entailing a reduction in the number of employees. It was decided by NedLloyd that 209 shore-based staff and 222 crew members would have to be dismissed. In 1983 NedLloyd applied to the director of the Local Employment Office in Rotterdam (the competent government body) for dismissal permits as it was obliged to do under article 6 of the Labour Relations (Special Powers) Decree promulgated by the Netherlands Government in 1945. In the absence of a mutual agreement between the employer and the employee, employment may not be terminated, under the said article, without a permit from the director of the Local Employment Office. With a few exceptions, the permits applied for were granted by the director on 28 September 1983. NedLloyd then proceeded to dismiss those concerned, including F. G. G. One hundred and twenty of the dismissed seamen, including F. G. G., subsequently issued a writ of summons, dated 13 February 1984, asking the Rotterdam Cantonal Court to declare their dismissal null and void and to order that they be reinstated in their jobs because their dismissal had been manifestly unreasonable. Netherlands courts are competent to make such an order under articles 1639s and 1639t of the Civil Code. The dismissed seamen claimed in this action that the criteria used in selecting those who were to be dismissed were discriminatory. The Cantonal Court reached a provisional decision in respect of this case on 13 June 1984, against which the dismissed seamen, including F. G. G., and NedLloyd lodged an appeal. The judicial proceedings are still in progress. In relation to the proceedings concerning his dismissal by NedLloyd, F. G. G. invokes "the right to be fairly and equally treated before the law", while in relation to the proceedings concerning the granting of the dismissal permit by the director of the Local Employment Office, he invokes "the right to have full information and the opportunity to defend himself".

3.3. With regard to the admissibility of F. G. G.'s communication, the State party addresses two questions:

(*a*) Does the application relate to violation by the Kingdom of the Netherlands of rights and freedoms embodied in the International Covenant on Civil and Political Rights and is the application compatible with the provisions of the Covenant?

(*b*) Have all domestic remedies been exhausted?

3.4. The State party submits that it is not clear which of the rights and freedoms embodied in the Covenant F. G. G. deems to have been violated. If F. G. G.'s invocation of "the right to have full information and the opportunity to defend himself" is intended to refer to article 14, paragraph 1, of the Covenant, the State party argues that it is not well-founded, "since he invokes this right in respect of the procedure whereby the dismissal permit was granted by the director of the Local Employment Office. This procedure does not, however, constitute 'the determination of any criminal charge' or of 'rights and obligations in a suit at law' to which article 14, paragraph 1, refers. The application cannot therefore be said to relate to violation of this paragraph of the Covenant."

3.5. In respect of F. G. G.'s invocation of "the right to be fairly and equally treated before the law", the State party observes that

If this is intended as an invocation of article 26 of the Covenant, then in so far as this article is invoked in respect of F. G. G.'s dismissal by NedLloyd the Netherlands Government . . . takes the view that article 26 of the Covenant does entail an obligation to avoid discrimination, but that this article can only be invoked under the Optional Protocol to the Covenant in the sphere of civil and political rights. The scope of article 26 of the Covenant is not necessarily limited to those civil and political rights that are embodied in the Covenant. (The Netherlands Government could, for instance, envisage the admissibility under the Optional Protocol of a complaint concerning discrimination in the field of taxation.) But the Government cannot accept the admissibility of a complaint concerning rights which are not in themselves civil and political rights, such as economic, social and cultural rights. The latter category of rights is governed by a separate international covenant. F. G. G.'s complaint relates to rights in the economic and social sphere, which fall under the International Covenant on Economic, Social and Cultural Rights. Articles 2, 6 and 7 of that Covenant are of particular relevance here. That Covenant has its own specific system and its own specific organ for international monitoring of how States parties meet their obligations. It deliberately does not provide for an individual complaints procedure. The Government considers it incompatible with the aims of both the Covenants and the Optional Protocol that an individual complaint with respect to the right to equal treatment as referred to in article 2 of the International Covenant on Economic, Social and Cultural Rights should be dealt with by the Human Rights Committee by way of an individual complaint under the Optional Protocol based on article 26 of the International Covenant on Civil and Political Rights. The Government therefore takes the view that the application submitted by F. G. G. does not relate to any violation by the Kingdom of the Netherlands of rights and freedoms embodied in that Covenant and that it is not compatible with the provisions thereof.

3.6. With regard to the question whether domestic remedies have been exhausted, the State party observes:

The civil proceedings brought by the seamen in connection with the dismissal by NedLloyd of F. G. G. and his fellow employees . . . are still *sub judice*. The [Rotterdam] Cantonal Court has not yet made a definitive decision with regard to the seamen's claim. Among the issues raised in these proceedings is the lawfulness of the granting of the dismissal permit. Article 26 of the Covenant is one of the provisions invoked by the seamen. The definitive decision of the Cantonal Court will be open to appeal before the District Court whose decision is open to appeal in cassation before the Supreme Court. The Government therefore takes the view that with regard to F. G. G.'s application domestic remedies have not yet been exhausted.

4.1. In his comments of 28 October 1986, the author contends that the State party's submission is incomplete. He adds the following facts:

1. From 24 October 1963 to 8 September 1971 I worked on Netherlands based ships.

2. From 9 September 1971 to 7 August 1976 I worked on Netherlands based ships for transport on inland water (Rhine).

3. From 7 August 1976 to 22 September 1983 I worked on Netherlands based ships (NedLloyd Company).

4. I was registered at the Rotterdam Municipality from 24 April 1972 until 4 August 1978 when, without my knowledge, I was erased from the register of municipal inhabitants.

5. On three different occasions until 1983, I requested official permission to establish myself in the Netherlands, which was not granted, although I fulfilled all the requirements imposed under the Netherlands law for foreign seamen (no criminal/political record either in Spain or in the Netherlands; more than seven years of employment on Netherlands based ships . . .; employed and registered in a given Netherlands municipality).

4.2. With regard to his claim to be a victim of discrimination, he stresses that

The people fired were all foreign workers . . . According to the Netherlands Labour Relations Act, when dismissals may take place, the Labour Employment Office must take into account the following elements:

(*a*) Seniority (first in, last out);

(*b*) Representation (persons to be fired must be proportionally represented among different "workers stratas at the company branch"). That means candidates to be dismissed must be selected among persons of different age, mastership, experience, education, etc;

(*c*) Workers to be fired have the right to ask for an alternative job at the same company/subsidiaries, if there are vacancies.

All of these elements are stated at the Collective Labour Agreement (CAO) signed by the Netherlands Labour Unions and the Companies. The CAO was agreed five years before we were fired and any foreign seaman with more than three years of service was automatically included in it, independently of whether the seaman was a member of a given union or not.

4.3. The author argues that none of the abovementioned criteria was taken into account by the Labour Employment Office at Rotterdam. He further states:

The Minister of Labour produced a letter (dated 23 September 1983) to the Director of the Labour Employment Office, stating that in the specific situation of the foreign seamen ("NedLloyd Case") the principles of seniority, and representation must not be applied. A new criteria, completely unknown to us and which was not present in the CAO was implemented: the criteria of the place of residence for foreign seamen. That means, seamen could be fired if they could not prove that they had a residence on Netherlands soil. Never before was the place of residence an element to determine whether workers could be fired.

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

5.2. With regard to article 5, paragraph 2 (*b*), of the Optional Protocol, the State party has argued that the civil proceedings concerning the author and the other seamen are still *sub judice* before the Rotterdam Cantonal Court. An adverse decision by that court would be appealable to the District Court, whose decision in turn could be tested in cassation before the Supreme Court. Accordingly, the Committee finds that domestic remedies have not been exhausted.

6. The Human Rights Committee therefore decides:

(1) The communication is inadmissible;

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

Communication No. 212/1986

Submitted by: P. P. C. (name deleted) on 27 October 1986
Alleged victim: The author
State party: The Netherlands
Declared inadmissible: 24 March 1988 (thirty-second session)

Subject matter: Alleged discrimination in the assessment of unemployment benefits by State party

Procedural issue: No claim under article 2 of the Optional Protocol

Substantive issues: Scope of application of article 26 of the Covenant—Unemployment benefits—Minimum income—Unreasonable differentiation—Right to social security

Article of the Covenant: 26
Article of the Optional Protocol: 2

1. The author of the communication, dated 27 October 1986, is P. P. C., a citizen of the Netherlands, residing in that country. He alleges that he is the victim of a violation of article 26 of the International Covenant on Civil and Political Rights by the Government of the Netherlands. He is represented by counsel.

2.1. The author states that he has been unemployed since November 1982 and that he received unemployment benefits until July 1984 and since then benefits equal to the amount of the legal minimum wage. From 14 August to 14 October he was briefly employed, his income for that period being 200 guilders a month higher than the minimum wage. From 14 October onwards he again drew unemployment benefits. Beyond that, he requested the local authorities of Maastricht to grant him benefits under a law providing additional assistance to persons with a minimum income for loss of purchasing power over a certain year. Assessment of entitlement to benefits under that law is based on a person's income during the month of September multiplied by 12. But because P. P. C. had worked during the month of September, the annual calculation showed a figure much higher than his real income in 1984 and, consequently, he did not qualify for benefits under the "compensations law" of 1984. The author took his case to the highest administrative organ in the Netherlands, Administratieve Rechtspraak Overheidsbeschikkingen (AROB), which maintained that the calculation was based on norms applied equally to all and that therefore there had been no discrimination in his case. The author claims to have exhausted domestic remedies.

2.2. The author maintains that a broad interpretation of article 26 of the Covenant would be in line with that prevailing in the parliamentary debates in the Netherlands at the time when the Covenant was ratified.

3. By its decision of 9 April 1987, 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. In its submission dated 25 June 1987, the State party reserved the right to submit observations on the merits of the communication which might turn out to have an effect on the question of admissibility. For that reason the State party suggested that the Committee might decide to join the question of the admissibility to the examination of the merits of the communication.

5. The author's deadline for comments on the State party's submission expired on 26 September 1987. No comments have been received from the author.

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

6.2. Pursuant to article 2 of the Optional Protocol, the Committee may only consider communications from individuals who claim that any of their rights enumerated in the Covenant have been violated. The Committee has already had an opportunity to observe that the scope of article 26 can also cover cases of discrimination with regard to social security benefits (communications Nos. 172/1984, 180/1984 and 182/1984). **It considers, however, that the scope of article 26 does not extend to differences of results in the application of common rules in the allocation of benefits.** In the case at issue, the author merely states that the determination of compensation benefits on the basis of a person's income in the month of September led to an unfavourable result in his case. Such determination is, however, uniform for all persons with a minimum income in the Netherlands. Thus, the Committee finds that the law in question is not *prima facie* discriminatory, and that the author does not, therefore, have a claim under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(*a*) That the communication is inadmissible;

(*b*) That this decision shall be communicated to the State party and to the author.

Communication No. 217/1986

Submitted by: H. v. d. P. (name deleted) on 16 December 1986
Alleged victim: The author
State party: The Netherlands
Declared inadmissible: 8 April 1987 (twenty-ninth session)

Subject matter: Recruitment policies—Promotion practice of inter-governmental organization

Procedural issues: Competence of the HRC—Inadmissibility ratione materiae*—No reservation by State party with regard to submission of "same matter" to European Commission—Failure to state a claim*

Substantive issues: Discrimination based on other status —Discrimination in promotion

Articles of the Covenant: 2, 14, 25 (c) *and 26*
Articles of the Optional Protocol: 1 and 3

1. The author of the communication dated 9 June 1986 is H. v. d. P., a national of the Netherlands born in 1945, at present residing in the Federal Republic of Germany. He claims to be a victim of violations by the Netherlands of articles 2, 14, 25 (*c*) and 26 of the International Covenant on Civil and Political Rights.

2.1. The author, who was an industrial engineer in the Netherlands, is now employed as a substantive patent examiner at the European Patent Office (EPO) in Munich, Germany. He states that in January 1980 he applied for a post as examiner in EPO. He was offered the post at the A1, step 2 level and he accepted it. Only after he had been several months with the organization, and had had the opportunity to compare his credentials and experience with that of his peers, did he realize that he had apparently been appointed at a discriminatorily low level and he felt that the preponderance of citizens of the Federal Republic of Germany in the higher grades was the result of the discriminatory practices of the organization. He thus lodged an appeal on the basis of denial of equal treatment, both within the Co-ordinated Organizations (North Atlantic Treaty Organization, Council of Europe, European Space Agency, etc.) and within EPO itself, claiming that he should have been appointed at the A2 level in 1980. His appeal was rejected on 19 January 1982 by the President of EPO as ill-founded. He then appealed to the Internal Appeals Committee, which on 6 December 1982 submitted its report rejecting the author's appeal and concluding that "no breach of the Service Regulations or of any rule of general law affecting international civil servants has been established". In reaching its decision, the Internal Appeals Committee relied heavily on the judicial precedents of the Administrative Tribunal of the International Labour Organisation. On 16 February 1983, the author proceeded to appeal to the Administrative Tribunal of ILO, which dismissed his complaint (Judgement No. 568 of 20 December 1983), concluding that

> The circumstances, in which the organization was created . . . show that it was necessary for the organization to recruit a large staff to fill all grades from the highest to the lowest and so, when fixing the initial grade, to take into account experience gained, first, in patent offices and, second, in industry generally. In reckoning this experience the organization distinguishes between the first and second categories. The complainant contends that this is an unreal distinction and consequently one which offends against the principle of equality of treat-

ment. In the opinion of the Tribunal, the distinction is not unreal and the complainant has not shown any breach of principle. He is employed as a search examiner and in that work it is reasonable to believe that experience in the handling of patent applications is more immediately useful than general experience as an industrial engineer.

2.2. The author applied to the European Commission of Human Rights* on 13 June 1984, which on 15 May 1986 declared his application inadmissible *ratione materiae* on the grounds that litigation concerning the modalities of employment as a civil servant, on either the national or international level, fell outside the scope of the European Convention on Human Rights.

2.3. The author then turned to the Human Rights Committee, which he considers competent to consider the case, since five States parties (France, Italy, Luxembourg, the Netherlands and Sweden) to the European Patent Convention are also parties to the Optional Protocol to the International Covenant on Civil and Political Rights. He argues that "pursuant to article 25 (*c*), every citizen shall have access, on general terms of equality, to public service in his country. EPO, though a public body common to the Contracting States, constitutes a body exercising Dutch public authority". The appeal to the President of EPO and the opinion given by the Internal Appeals Committee, the author argues, do not constitute an effective remedy within the meaning of article 2 of the Covenant against violations of article 25 (*c*) of the Covenant. Moreover, "the Internal Appeals Committee is a travesty of competence, independence and impartiality as required by article 14 of the Covenant. IAC declines to adjudicate on the basis of public international law invoked by the applicant, i.e. law which the Contracting States undertook solemnly to observe".

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

3.2. The Human Rights Committee observes in this connection that it can only receive and consider communications in respect of claims that come under the jurisdiction of a State party to the Covenant. The author's grievances, however, concern the recruitment policies of an international organization, which cannot, in any way, be construed as coming within the jurisdiction of the Netherlands or of any other State party to the International Covenant on Civil and Political Rights and the Optional Protocol thereto. Accordingly, the author has no claim under the Optional Protocol.

4. The Human Rights Committee therefore decides:

The communication is inadmissible.

* When ratifying the Optional Protocol the Netherlands did not make a reservation aimed at precluding examination by the Human Rights Committee of a case previously considered under another procedure of international investigation or settlement.

Communication No. 243/1987

Submitted by: S. R. (name deleted) on 26 August 1987
Alleged victim: The author
State party: France
Declared inadmissible: 5 November 1987 (thirty-first session)*

Subject matter: Inability of French citizen to exercise his profession as teacher of Breton

Procedural issues: Non-exhaustion of domestic remedies—Non-participation of Committee member in decision

Substantive issues: Discrimination based on language—Right to work—Minorities rights

Articles of the Covenant: 26 and 27
Article of the Optional Protocol: 5 (2) (b)
Rule of Procedure: 85

1. The author of the communication (initial letter dated 26 August 1987; further letters dated 1, 7 and 26 October 1987) is S. R., a French citizen born on 14 October 1956, at present living in Paris. He claims to be a victim of a violation by the French Government of article 2, paragraphs 1 to 3, articles 24, 26 and 27 of the International Covenant on Civil and Political Rights.

2.1. The author is a teacher of French literature and of the Breton language at two high schools in the Greater Paris area. He states that upon the recommendation of the French Ministry of Education, he obtained authorization to teach French literature, which also permitted him to teach Breton, on a part-time basis. For four years, he was able to teach Breton on this basis, although, as he claims, the director of the competent office within the Ministry of Education (*Mission de l'action culturelle et des cultures et langues régionales*) had promised the creation of a full-time post for the teaching of Breton. That post was not, however, established, although its creation was possible, in the author's opinion, given the anticipated increase in the number of students learning the Breton language at the high school of Enghien and the scheduled creation of a Breton course at the Academy of Versailles.

2.2. In the spring of 1987 (no exact date is given, although the most likely date appears to be early May 1987), the Ministry of Education decided to transfer the

* Pursuant to rule 85 of the provisional rules of procedure, Committee member Ms. Christine Chanet did not take part in the adoption of the decision.

author from the Academy of Versailles to the Academy of Lille, where he was to be expected to teach only French with effect from the school year 1987/88, but the Rector of the Academy of Versailles, by telex of 17 June 1987 to the Ministry of Education, asked that the author be kept at his present post and requested the creation of a full-time teaching post for Breton. By a decision of 15 September 1987, the author was reinstated in the Academy of Versailles to teach French literature 11 hours per week and Breton six hours per week for the school year 1987/88. He claims that nine hours per week for the teaching of Breton would have been available, but that the Rectorate of the Academy refused to let him teach Breton at the High School of Nanterre and instead ordered him to teach French. The Rectorate has also decided to evaluate his performance as a teacher of French and not, as he had requested, as a teacher of Breton. By decision of 6 October 1987, the Ministry of Education formalized the decision of the Academy. It is now threatening to dismiss him.

2.3. The author states that there was a growing demand for the teaching of Breton among high school students, illustrated by the fact that the number of high school students who took final school exams (*épreuves de Baccalauréat*) in Breton in the Paris area rose from 50 in 1985 to 133 in June 1987.

2.4. With regard to the exhaustion of domestic remedies, the author does not state whether he has submitted his case to an administrative tribunal, nor does he state what kind of judicial remedies would be open to him. He attaches copies of an extensive correspondence with the competent authorities in the Ministry of Education as well as copies of numerous—unsuccessful—interventions on his behalf by Deputies of the National Assembly, Mayors and Senators. Although he acknowledges that he has not exhausted domestic remedies, he points to the urgent character of his communication, as he seeks to defend the "civil rights" of students to follow courses in Breton from the beginning of the school year 1987/88.

2.5. The author states that he has not submitted his case to another procedure of international investigation or settlement.

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

3.2. The Committee observes in this connection and on the basis of the information before it that the author has not submitted his case to any French administrative tribunal. It has noted the author's contention, in his letter of 26 August 1987, that his communication presents a character of urgency because of an alleged civil right of students to take courses in the Breton language ("*droits civil des élèves d'obtenir un enseignement de breton*"). It notes, however, that, in the particular circumstances disclosed by the communication, the author's contention does not absolve him from pursuing his case before the French courts and from exhausting whatever remedies are available to him. The Committee has not enough information to find that the application of such remedies would be unreasonably prolonged and concludes that the requirements of article 5, paragraph 2 (*b*), of the Optional Protocol have not been met.

4. The Human Rights Committee therefore decides:

(*a*) That the communication is inadmissible;

(*b*) That this decision shall be communicated to the author and, for information, to the State party.

Communication No. 245/1987

Submitted by: R. T. Z. (name deleted) on 1 October 1987
Alleged victim: The author
State party: The Netherlands
Declared inadmissible: 5 November 1987 (thirty-first session)*

Subject matter: Alleged discrimination of Dutch citizen during compulsory military service

Procedural issues: No claim under article 2—Non-participation of Committee member in decision

Substantive issues: Discrimination during military service—Right to appeal—Review of conviction and sentence

Article of the Covenant: 26
Article of the Optional Protocol: 2
Rule of Procedure: 85

1. The author of the communication dated 1 October 1987 (2-page letter and 22 pages of enclosures, all in Dutch) is a citizen of the Netherlands, born in 1960, residing in Haarlem, the Netherlands. He claims to be the victim of a violation by the Government of the Netherlands of article 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1. The author states that he was summoned to appear before a military court because of his refusal to obey orders in the course of his military service. In the Netherlands, it is possible for citizens to object to a summons. If they do so, the judge is required to decide on the objection before the court proceedings begin. A person who is subject to military jurisdiction during the period of compulsory military service does not have this

* Pursuant to rule 85 of the provisional rules of procedure, Committee member Mr. Joseph Mommersteeg did not take part in the adoption of the decision.

right, because military penal procedures do not envisage the possibility of an appeal against a summons. Thus, the author is unable to appeal against the summons before the military court.

2.2. The author claims that this constitutes a violation of article 26 of the Covenant since he is being treated differently from civilians who are given the possibility to appeal against a summons before the start of court proceedings.

2.3. With respect to the requirement of exhaustion of domestic remedies, the author states that he took his case to the highest administrative organ in the Netherlands, the Administratieve Rechtspraak Overheidsbeschikkingen (AROB), which declared his appeal inadmissible.

2.4. The Committee has ascertained that the author's case has not been submitted to another procedure of international investigation or settlement.

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

3.2. The Committee observes that, in the case at issue, the author has not claimed to be the victim of discrimination on any grounds prohibited under article 26 of the Covenant. He merely alleges that he is being subjected to different treatment during the period of his military service because he cannot appeal against a summons like a civilian. The Committee observes that the Covenant does not preclude the institution of compulsory military service by States parties, even though this means that the rights of individuals may be restricted during military service, within the exigencies of such service. The Committee notes, in this connection, that the author has not claimed that the Netherlands military penal procedures are not being applied equally to all Netherlands citizens serving in the Netherlands armed forces. It therefore concludes that the author has no claim under article 2 of the Optional Protocol.

4. The Human Rights Committee therefore decides:

(*a*) That the communication is inadmissible;

(*b*) That this decision shall be communicated to the author and, for information, to the State party.

Communication No. 267/1987

Submitted by: M. J. G. (name deleted) on 19 November 1987
Alleged victim: The author
State party: The Netherlands
Declared inadmissible: 24 March 1988 (thirty-second session)

Subject matter: Alleged discrimination of Dutch citizen during compulsory military service—Conscientious objector

Procedural issue: No claim under article 2 of the Optional Protocol

Substantive issues: Discrimination during military service—Review of conviction and sentence—Right to appeal

Article of the Covenant: 26
Article of the Optional Protocol: 2

1. The author of the communication (initial letter dated 19 November 1987) is M. J. G., a citizen of the Netherlands, born on 29 December 1963, residing in Bilthoven, the Netherlands. He claims to be the victim of a violation by the Government of the Netherlands of article 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1. The author states that he is a conscientious objector. He was summoned to appear before a military court because of his refusal to obey orders in the course of his military service. In the Netherlands, it is possible for private citizens to object to a summons. If they do so, the judge is required to decide on the objection before the court proceedings begin. During the period of compulsory military service, a soldier, who comes under military jurisdiction, does not have this right, because military penal procedures do not envisage the possibility of an appeal against a summons. Thus, the author was unable to appeal against the summons before a military court.

2.2. The author claims that this constitutes a violation of article 26 of the Covenant, since he is not being treated as a civilian who can avail himself of the possibility to appeal against a summons before the start of court proceedings.

2.3. With respect to the requirement of exhaustion of domestic remedies, the author states that he appealed, on 12 November 1986, to the Administratieve Rechtspraak Overheidsbeschikkingen (AROB), the highest administrative organ in the Netherlands, arguing, *inter alia*, that the summons was in violation of article 6 of the European Convention on Human Rights and that he was entitled, under sections 285 and 289 of the Penal Code and under international treaties, to object to military service against his will. By decision of 31 December 1986, the President of the Afdeling Rechtspraak Raad van State (ARRS), the AROB Legal Chamber, declared the appeal inadmissible on the grounds that the law governing the procedure before AROB did not provide for an appeal against orders or judgements based on the Penal Code or the Code of

Penal Procedure. By letter of 16 January 1987, the author introduced another recourse with the same Legal Chamber of AROB (which is possible under Netherlands law), claiming that he could not be considered an "accused" person within the meaning of the Penal Code, but a defendant within the meaning of the Civil Code. That would make an appeal possible. On 11 June 1987, the Legal Chamber of AROB dismissed the appeal.

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

3.2. The Committee notes that the author claims that he is a victim of discrimination on the grounds of "other status" (Covenant, art. 26 *in fine*) because, being a soldier during the period of his military service, he could not appeal against a summons like a civilian. The Committee considers, however, that the scope of application of article 26 cannot be extended to cover situations such as the one encountered by the author. The Committee observes, as it did with respect to communication No. 245/1987 (*R. T. Z.* v. *the Netherlands*), that the Covenant does not preclude the institution of compulsory military service by States parties, even though this means that some rights of individuals may be restricted during military service, within the exigencies of such service. The Committee notes, in this connection, that the author has not claimed that the Netherlands military penal procedures are not being applied equally to all Netherlands citizens serving in the Netherlands armed forces. It therefore concludes that the author has no claim under article 2 of the Optional Protocol.

4. The Human Rights Committee therefore decides:

(*a*) That the communication is inadmissible;

(*b*) That this decision shall be communicated to the author and, for information, to the State party.

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

Communication No. 16/1977

Submitted by: Daniel Monguya Mbenge on 8 September 1977
Alleged victims: The author, members of his family and others
State party: Zaire
Date of adoption of views: 25 March 1983 (eighteenth session)

Subject matter: Political persecution of Zairian citizens—Political refugee

Procedural issues: Standing of author—Events prior to entry into force of Covenant—Inadmissibility ratione temporis

Substantive issues: Arbitrary arrest and detention—Right to choose own counsel—Equality of arms—Fair trial—Trial in absentia*—Death sentence—Effective remedy—Amnesty—Appeal for clemency—Review of domestic court decision—Political rights*

Articles of the Covenant: 2 (3), 6 (2), 9 (1), 12 (2), 14 (2) and (3) and 19

Article of the Optional Protocol: 1

1.1. The author of this communication, Daniel Monguya Mbenge, is a Zairian citizen now residing in Belgium as a political refugee. He has submitted the communication on his own behalf and on behalf of the following relatives and business connections: Ibale Simon Biyanga, his brother; Abraham Oyabi, his younger brother; Emmanuel Ngombe, his father-in-law; the family driver, whose name is not given; and a pharmacist named Mozola.

1.2. The author has approached the Committee to complain of what he considers to be systematic persecution of his family by the Government of Zaire. He alleges that this persecution has continued against his family since the time of his sentence to death in September 1977 for supposedly having participated in the invasion of the province of Shaba. In March 1978, he was again sentenced to death as the alleged instigator of a plot against the régime. A petition for clemency filed on behalf of the author and other co-defendants was rejected by the President of Zaire the same month. The movable and immovable property of the author has been transferred to the State.

2.1. Until 1982, Daniel Monguya Mbenge was Governor of the Shaba region (formerly Katanga). In 1972, he was sentenced to a year's imprisonment for offences against a foreign head of State. Subsequent to this sentence he was stripped of his functions as Governor. In February 1974, he left Zaire for what he called reasons of health. Later, he established residence in Brussels, where the Belgian authorities in due course granted him the status of political refugee.

2.2. With reference to the two death sentences passed against him, the author claims that he learned of them through the press, and that the judicial authorities of his country neither summoned him to appear nor allowed him to defend himself or have a lawyer to defend him. Furthermore, he says he was not notified of the sentences. He therefore claims that he has been the victim of convictions and sentences at variance with the provisions of the Covenant. In support of his complaint, he cites article 6, paragraphs 1, 2 and 4; article 12, paragraph 2; article 14, paragraphs 2 and 3 (*a*), (*b*), (*d*), (*e*) and (*g*), and article 19, paragraphs 1 and 2, of the Covenant, which he considers have been violated by the Government of his country.

2.3. He claims that the President of Zaire sought in vain to have him extradited from Belgium, and practically took hostage several members of his family by arresting them and imprisoning them one after the other.

3. Asked by the Committee why he was acting on behalf of the above-mentioned persons, he said that they were relatives or persons with whom he had business contacts and that they had been persecuted as follows:

(*a*) Simon Ibale Biyanga, the author's brother and a former Deputy Chief of Division in the Department of the Interior, was arrested arbitrarily by the security services of Zaire and held without charge for 21 days. He apparently left Zaire secretly and is now in Belgium;

(*b*) Abraham Oyabi, the author's younger brother, was allegedly arrested on 1 September 1977 and held hostage during the course of a search for his older brother, Simon. According to the latest reports, he was freed early in 1979 or late in 1978 (25 December 1978). He was sent to Miadembelo, his parents' home village, although he himself was born at Kinshasa and had never lived in that village. It should be noted that there is no documentary evidence of any sentence having been passed against this person;

(*c*) Emmanuel Ngombe, the author's father-in-law, was arrested on 1 September 1977 and freed in July 1978 as the result of the amnesty declared by the President of Zaire;

(*d*) The pharmacist Mozola and the family driver were arrested on 1 September 1977 and freed as the

* The Committee's views in every case incorporate the relevant paragraphs of the Committee's earlier decision on admissibility.

result of an amnesty in July 1978. No conviction appears to have been given against them.

4. On 24 January 1978, the Human Rights Committee decided to transmit the communication to the State party concerned under rule 91 of the provisional rules of procedure and to request it to submit information and observations on the question of the admissibility of the communication. No reply has been received from the State party.

5. On 24 April 1979, on the basis of the information before it, the Human Rights Committee concluded:

(*a*) That, in addition to himself, the author was justified in acting on behalf of his brothers and his father-in-law by reason of close family connection;

(*b*) That the facts of the claim, as presented by the author, merited that the communication be declared admissible, in so far as it related to himself and his younger brother, Abraham Oyabi, with regard to the events alleged to have occurred on or after 1 February 1977;

(*c*) That further information was needed with regard to the situation of the author's brother Simon Biyanga, and his father-in-law, before the Committee could decide on the admissibility of the communication in so far as it related to them;

(*d*) That the author had not established any grounds justifying his authority to act on behalf of the pharmacist, Mozola, and the unnamed family driver.

The Committee therefore decided:

(i) That, in addition to himself, the author was justified by reason of close family connection in acting on behalf of his brothers, Simon Biyanga and Abraham Oyabi, and his father-in-law, Emmanuel Ngombe;

(ii) That the communication was admissible, in so far as it related to events alleged to have occurred on or after 1 February 1977, in respect of the author and his brother, Abraham Oyabi;

(iii) That the author be requested to furnish, within six weeks of the transmittal of the decision to him, detailed information on the facts of the claim in so far as it related to his brother, Simon Biyanga, and his father-in-law, Emmanuel Ngombe, including precise information on their present situation and whereabouts, and why they could not act for themselves;

(iv) That the communication was inadmissible in so far as it related to the other alleged victims, the pharmacist, Mozola, and the family driver;

(v) That any reply received from the author pursuant to paragraph 3 of the decision should be transmitted to the State party to enable it to comment thereon within four weeks of the date of the transmittal;

(vi) That, in accordance with article 4 (2) of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of the decision, written explanations or statements clarifying the matter in so far as the communication related to Daniel Mbenge and Abraham Oyabi, and the remedy, if any, that might have been taken by it;

(vii) That the State party should be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must primarily relate to the substance of the matter under consideration, and in particular the specific violations alleged to have occurred. The State party was requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration.

6. In reply to its request for further information concerning the alleged victims, Simon Biyanga and Emmanuel Ngombe, the author informed the Committee by letter dated 7 June 1979 that his brother, Simon Biyanga, and his brother's family had left Zaire and that they were then living in Belgium, and that his father-in-law, Emmanuel Ngombe, had been released and has rejoined his family. The author further informed the Committee that his brother, Abraham Oyabi, had been released from detention towards the end of 1978 or early in 1979.

7. In the light of this information, the Committee decided, on 21 July 1980, to discontinue consideration of the communication in so far as it related to Simon Biyanga and Emmanuel Ngombe, since it appeared that these alleged victims would now be in a position to act on their own behalf, if they so wished.

8. In its explanations of 3 June 1980, communicated pursuant to article 4 (2) of the Optional Protocol, the State party declared that Daniel M. Mbenge and Abraham Oyabi had benefited from the amnesty laws in Zaire and were therefore free to return to the country; adding, with regard to Daniel M. Mbenge, that although he "is a former criminal sentenced for embezzlement", he had been granted a presidential pardon.

9. On 15 June 1980, the author submitted his comments in response to the explanations furnished by the State party, describing the latter as false and defamatory. He asserted that, contrary to the provisions of the amnesty laws and the favourable effect they were meant to produce, his possessions, which had been seized by the State when he was sentenced, were still being sold by auction in Kinshasa. In particular, he rejected the assertion by the State party that he had been convicted for embezzlement. He reiterated that he had been sentenced for political reasons. He added that, despite the fact that the amnesty measure of 1978 had also applied to his brother Oyabi, the latter had had to take refuge in the Congo in November 1979 to avoid arbitrary arrest by the security forces of Zaire for a second time. He therefore concluded that to return to Zaire as required under the amnesty laws would not be without risk for him.

10. By its decision of 21 July 1980, the Committee invited the Government of Zaire to provide it with further particulars of the legal effects of the amnesty laws, in so far as they related to the persons and property of D. M. Mbenge and A. Oyabi and, in particular, to confirm in this connection the Committee's interpretation, namely, that the convictions and two sentences

delivered against Daniel M. Mbenge, as well as all the consequences of these convictions in criminal and civil law, were expunged by the amnesty.

11. In its reply the State party, under cover of its note of 6 October 1980, forwarded to the Committee the texts of the amnesty laws and of the judicial decisions by which D. M. Mbenge was sentenced in 1972, 1977 and 1978. The State party added that "if a Zairian citizen decided to return to the country, even after the expiry of the time-limit (for the amnesty), the President of the Republic was quite ready to grant him a new amnesty which might affect his person and his property." The Government of Zaire has not provided other details in response to the Committee's request.

12. The Human Rights Committee, considering the present communication in the light of all information made available to it by the parties as provided for in article 5 (1) of the Optional Protocol, decides to base its views on the undisputed submissions of the author of the communication and on the documents transmitted by the State party, in particular the judgements of 17 August 1977 and 16 March 1978.

13. Daniel Monguya Mbenge, a Zairian citizen and former Governor of the province of Shaba, who had left Zaire in 1974 and is at present living in Brussels, was twice sentenced to capital punishment by Zairian tribunals. The first death sentence was pronounced against him by judgement of 17 August 1977, in particular for his alleged involvement in the invasion of the province of Shaba by the so-called Katanga gendarmes in March 1977. The second judgement is dated 16 March 1978. It pronounces the death sentence for "treason" and "conspiracy" without providing facts to establish these charges. Daniel Monguya Mbenge learned about the trials through the press. He had not been duly summoned at his residence in Belgium to appear before the tribunals. An amnesty decree of 28 June 1978 (Act 78-023 of 29 December 1978) covering offences "against the external or internal security of the State or any other offence against the laws and regulations of the Republic of Zaire", committed by Zairians having sought refuge abroad, was restricted to persons returning to Zaire before 30 June 1979.

14.1. In the first place, the Human Rights Committee has to examine whether the proceedings on the basis of which the author of the communication has been twice sentenced to death disclose any breach of rights protected under the International Covenant on Civil and Political Rights. According to article 14 (3) of the Covenant, everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. This provision and other requirements of due process enshrined in article 14 cannot be construed as invariably rendering proceedings *in absentia* inadmissible irrespective of the reasons for the accused person's absence. Indeed, proceedings *in absentia* are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice. Nevertheless, the effective exercise of the rights under article 14 presupposes that the necessary steps should be taken to inform the accused beforehand about the proceedings against him (art. 14 (3) (*a*)). Judgement *in absentia* requires that, notwithstanding the absence of the accused, all due notification has been made to inform him of the date and place of his trial and to request his attendance. Otherwise, the accused, in particular, is not given adequate time and facilities for the preparation of his defence (art. 14 (3) (*b*)), cannot defend himself through legal assistance of his own choosing (art. 14 (3) (*d*)) nor does he have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf (art. 14 (3) (*e*)).

14.2. The Committee acknowledges that there must be certain limits to the efforts which can duly be expected of the responsible authorities of establishing contact with the accused. With regard to the present communication, however, those limits need not be specified. The State party has not challenged the author's contention that he learned of the trials only through press reports after they had taken place. It is true that both judgements state explicitly that summonses to appear had been issued by the clerk of the court. However, no indication is given of any steps actually taken by the State party in order to transmit the summonses to the author, whose address in Belgium is correctly reproduced in the judgement of 17 August 1977 and which was therefore known to the judicial authorities. The fact that, according to the judgement in the second trial of March 1978, the summons had been issued only three days before the beginning of the hearings before the court, confirms the Committee in its conclusion that the State party failed to make sufficient efforts with a view to informing the author about the impending court proceedings, thus enabling him to prepare his defence. In the view of the Committee, therefore, the State party has not respected D. Monguya Mbenge's rights under article 14 (3) (*a*), (*b*), (*d*) and (*e*) of the Covenant.

15. With reference to the claim that the death sentences were pronounced for political reasons on trumped-up charges, the Committee observes that it does not come within its general mandate to review judicial decisions of national courts of States parties and that it may not reject as false the facts mentioned therein unless there is clear evidence that the trial in question was affected by serious irregularities in violation of the Covenant. Due in particular to a lack of information from the Government of Zaire, there may be some reason to question the correctness of the charges brought against D. Monguya Mbenge, especially with regard to the judgement of 16 March 1978. While the earlier judgement of 17 August 1977 contains a rather elaborate statement of facts and expressly refers to witnesses having testified under oath, the judgement of 16 March 1978 does not even specify the charges brought forward against the accused and thus leaves open the question why the author of the communication was convicted of treason and conspiracy. Nevertheless, the Committee considers that it does not have sufficient information in order to arrive at the conclusion that Daniel Monguya Mbenge has been the victim of purely politically motivated and substantially unfounded charges.

16. In view of the findings of violations of article 14 (3) of the Covenant, the Committee does not consider it

necessary in the circumstances of the present case to examine further the question whether article 14 (2) was also violated.

17. Daniel Monguya Mbenge also alleges a breach of article 6 of the Covenant. Paragraph 2 of that article provides that sentence of death may be imposed only "in accordance with the law [of the State party] in force at the time of the commission of the crime and not contrary to the provisions of the Covenant". This requires that both the substantive and the procedural law in the application of which the death penalty was imposed was not contrary to the provisions of the Covenant, and also that the death penalty was imposed in accordance with that law and therefore in accordance with the provisions of the Covenant. Consequently, the failure of the State party to respect the relevant requirements of article 14 (3) leads to the conclusion that the death sentences pronounced against the author of the communication were imposed contrary to the provisions of the Covenant, and therefore in violation of article 6 (2).

18. The Committee has next to examine whether any measure taken by the State party subsequent to the pronouncement of the death penalties and, in particular, the amnesty to which the Committee's attention has been drawn, provided Daniel Monguya Mbenge with an effective remedy for the violation of his rights, in accordance with article 2 (3) of the Covenant. The adverse effects of the two judgements cannot be deemed to have ceased by reason of the amnesty put into force by Act No. 78-012 of 28 June 1978 and extended until 30 June 1979 by Act No. 78-023 of 29 December 1978. It appears that the author of the communication could have enjoyed this amnesty only if he had returned to Zaire before the expiration date. It is, however, understandable that he hesitated to take advantage of the amnesty decree, since the second trial in which he had again been sentenced to death took place only about three months before the coming into force of the amnesty. In fact he submits that, notwithstanding the amnesty measure, his brother Oyabi had been persecuted in November 1979. The submission of the State party to the effect that the President of the Republic would be entirely prepared to grant a new amnesty to citizens re-entering Zaire even after the expiration of the amnesty decree does not offer a secure legal basis upon which the author could firmly have relied. The Committee notes further that no valid reasons have been put forward by the State party which would explain why a person, in order to benefit from the amnesty, should have been required to return to the territory of Zaire.

19. In his communication, the author also referred to articles 12 (2) and 19 (1) and (2) of the Covenant as being relevant in his case. As regards article 12 (2), the Committee recalls that the author had already left his country before 1 February 1977, the date of entry into force of the Optional Protocol in respect of Zaire, and has not returned there since. As regards article 19 (1) and (2), the author, who has been living outside Zaire since 1974, has not furnished the Committee with any relevant facts as to the measures taken against him by the Government of Zaire on or after 1 February 1977. The events predating 1 February 1977, which are described by the author at some length, cannot be taken into account by the Committee.

20. Concerning Abraham Oyabi, the Human Rights Committee bases its assessment on the undisputed fact that he was arrested on 1 September 1977 in order to force him to disclose the whereabouts of Simon Biyanga, and that he was not released from detention until late in 1978 or early in 1979. The State party has not claimed that there was any criminal charge against him. In the view of the Committee, therefore, he was subject to arbitrary arrest and detention contrary to article 9 of the Covenant.

21. 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 set out in paragraphs 13 to 20 above, in so far as they have occurred on or after 1 February 1977, disclose violations of the International Covenant on Civil and Political Rights, in particular:

(*a*) With respect to Daniel Monguya Mbenge:

Of article 6 (2), because Daniel Monguya Mbenge was twice sentenced to death in circumstances contrary to the provisions of the Covenant;

Of article 14 (3) (*a*), (*b*), (*d*) and (*e*), because he was charged, tried and convicted in circumstances in which he could not effectively enjoy the safeguards of due process, enshrined in these provisions;

(*b*) With respect to Abraham Oyabi:

Of article 9, because he was subjected to arbitrary arrest and detention.

22. The Committee, accordingly, is of the view that the State party is under an obligation to provide the victims with effective remedies, including compensation for the violations they have suffered, and to take steps to ensure that similar violations do not occur in the future.

Communication No. 43/1979

Submitted by: Ivonne Ibarburú de Drescher on 11 January 1979
Alleged victim: Adolfo Drescher Caldas (author's husband)
State party: Uruguay
Date of adoption of views: 21 July 1983 (nineteenth session)*

Subject matter: Detention and trial of Uruguayan civilian by military authorities

Procedural issues: Sufficiency of State party reply under article 4 (2)—Withdrawal of communication from IACHR

Substantive issues: Arbitrary arrest—Prompt security measures—Habeas corpus—*Detention incommunicado—Access to counsel—Right to choose own counsel—Delay in proceedings—Denial of defence facilities*

Articles of the Covenant: 9 (2) and (4), 10 (1) and 14 (3) (b) *and* (c)
Articles of the Optional Protocol: 4 (2) and 5 (2) (a)

1. The author of the communication (initial letter dated 11 January 1979 and further submissions dated 19 September 1979 and 3 May 1983) is a Uruguayan national, residing at present in Mexico. She submitted the communication of behalf of her husband, Adolfo Drescher Caldas, a 44-year-old Uruguayan national at present imprisoned in Uruguay.

2.1. The author states that her husband, who has been an official of the trade union corresponding to his occupation (the Bank Employees' Association of Uruguay), was arrested in Montevideo, Uruguay, on 3 October 1978 by officials who did not identify themselves or produce any judicial warrant and who apparently belonged to the Navy. She adds that the reasons for his arrest were not stated and are still unknown to his family. The author believes that her husband was arrested because of his trade-union activities. She alleges that he was held incommunicado for two months and his whereabouts were not revealed to his relatives. At the beginning of December 1978, he was transferred to Libertad prison, where his father was allowed to visit him. At the beginning of January 1979, however, he was removed from that prison and the family was again unable to find out his whereabouts.

2.2. The author claims that there were no local remedies to be exhausted, *habeas corpus* being inoperative under the régime of prompt security measures.

2.3. By her initial communication of 11 January 1979, the author requests that a medical examination should be permitted by doctors indicated by her husband's family.

2.4. In her initial communication of 11 January 1979, the author claims that her husband is a victim of violations of articles 2 (3) (*a*) and (*b*); 3; 9 (1), (2), (3) and (4); 10 (3); 12 (1), (2) and (3); 15 (1); 17; 18 (1); 19 (1) and (2); 22; 25; 26 and possibly of articles 6, 7 and 14 of the International Covenant on Civil and Political Rights.

3. By its decision of 23 April 1979, the Human Rights Committee held that the author of the communication was justified by reason of close family connection in acting on behalf of the alleged victim. By that same decision, the Human Rights Committee transmitted the communication under rule 91 of its provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication. The Committee further drew the State party's attention to the concern expressed by the author with regard to the state of health and whereabouts of her husband; and it requested the State party to furnish information thereon to the Committee.

4. In its submission under rule 91 of the provisional rules of procedure dated 13 July 1979, the State party states that Adolfo Drescher Caldas was arrested on 28 September 1978 in conformity with the prompt security measures for his alleged involvement in subversive activities. He was charged on 7 November 1978 before a Military Examining Judge with violations of article 60 (V) of the Military Criminal Code and articles 340 (theft), 237 (forgery or alteration of an official document by a private individual) and 54 (accumulation of offences) of the Ordinary Criminal Code. He had a defending counsel appointed by the court, a colonel of the army. The State party argues that domestic remedies have not been exhausted as no complaint or petition whatsoever was submitted to any Uruguayan authorities. The State party further

(*a*) rejects the contention that Adolfo Drescher Caldas was illegally held incommunicado, since the state of incommunicado was terminated by the Military Examining Judge in the warrant for commitment;

(*b*) denies that his whereabouts were not revealed to his relatives;

(*c*) asserts that at the time of his arrest he was informed that he was being arrested in conformity with the prompt security measures.

The State party informs the Committee that Adolfo Drescher Caldas is being held in Military Detention Establishment No. 1, which has its own permanent and emergency medical service and that medical inspections are carried out daily.

5.1. In a further letter of 19 September 1979, the author commented on the State party's submission under rule 91 of the Committee's provisional rules of procedure.

5.2. With respect to the State party's argument that domestic remedies had not been exhausted in the case of Adolfo Drescher Caldas, the author argues that the State party completely ignored the Committee's request

* Mr. Walter Surma Tarnopolsky did not participate in the adoption of the views of the Committee under article 5 (4) of the Optional Protocol in this matter.

for information as to any specific remedy that might have been available in this particular case.

5.3. The author further contests the State party's submission as to the substance of her allegations. She maintains her allegation that her husband was held incommunicado at the beginning of his detention and that his relatives did not know his whereabouts. She argues that the State party admitted this fact when it declared that the state of incommunicado was lifted by the Military Examining Judge in the warrant of commitment after it had stated that he was charged on 7 November 1978 before the Military Examining Judge. The author concludes that the State party admits that Adolfo Drescher Caldas was held incommunicado from his arrest until 7 November 1978, i.e., for about six weeks. The author further contests the State party's affirmation that her husband was informed of the reason for his arrest at the time of his arrest, because he was told that he had been arrested under the prompt security measures. The author argues that this explanation amounted exactly to the same thing as giving no reason at all, for the power of arrest was said to be entirely discretionary under this "régime". The author also claims that her husband had no counsel of his own choosing because he only could choose between two court-appointed defence counsels. She alleges that he was "tried by a Colonel and defended by a Colonel and charged with theft and forgery in a clumsy attempt to disguise political persecution".

6. The Human Rights Committee, after having considered the State party's as well as the author's submissions with regard to the question of exhaustion of domestic remedies and on the basis of the information before it, found that it was not precluded by article 5 (2) (*b*) of the Optional Protocol from considering the communication. The Committee was also unable to conclude that, in the circumstances of this case, the communication was inadmissible under article 5 (2) (*a*) of the Optional Protocol.

7. On 24 October 1979, the Human Rights Committee therefore decided:

(*a*) That the communication was admissible;

(*b*) That, in accordance with article 4 (2) of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(*c*) That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to perform its responsibilities, it required specific responses to the allegations which had been made by the author of the communication and the State party's explanations of the actions taken by it. The State party was requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration.

8. In its submission under article 4 (2) of the Optional Protocol dated 16 June 1980, the State party stated that the case of Mr. Drescher Caldas had been before the Inter-American Commission on Human Rights (case No. 3439) since 25 October 1978, i.e., before Mrs. de Drescher made her submission to the Committee.

9. By a letter of 18 August 1981, the secretariat of the Human Rights Committee was informed by the secretariat of the Inter-American Commission on Human Rights that case No. 3439 was submitted by a letter of 25 October 1978 by a close family member of Adolfo Drescher Caldas, but that the complaint had been withdrawn from IACHR by a letter sent to the Commission in September 1979.

10. In her submission of 3 May 1983, under rule 93 (3) of the provisional rules of procedure, the author confirms that she withdrew the case of her husband from IACHR. She alleges that he continues to be imprisoned under the same conditions as previously denounced.

11. The 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.

12.1. The Committee decides to base its views on the following facts which have either been essentially confirmed by the State party or are uncontested except for denials of a general character offering no particular information or explanation.

12.2. Adolfo Drescher Caldas, a former trade-union official, was arrested in Montevideo, Uruguay, on 28 September 1978, by officials who did not identify themselves or produce any judicial warrant and who apparently belonged to the Navy. He was informed that he was arrested under the prompt security measures, but not, it appears, more specifically of the reasons for his arrest. During the first six weeks of his detention, he was kept incommunicado and his relatives did not know his whereabouts. Recourse to *habeas corpus* was not available to him. On 7 November 1978, he was charged before the Military Examining Judge with violations of article 60 (V) of the Military Criminal Code and article 340 (theft), 237 (forgery or alteration of an official document by a private individual) and 54 (accumulation of offences) of the Ordinary Criminal Code. He had a defending counsel appointed by the court, Colonel Alfredo Ramírez, and in July 1979 his case was before the Military Court of the fourth sitting. In December 1978, he was brought to Libertad prison, the Military Detention Establishment No. 1, where he continues to be detained.

13.1. In formulating its views, the Human Rights Committee also takes into account the following considerations.

13.2. With regard to the author's contention that her husband was not duly informed of the reasons for his arrest, the Committee is of the opinion that article 9 (2) of the Covenant requires that anyone who is arrested shall be informed sufficiently of the reasons for his arrest to enable him to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded. It is the view of the Committee that it was not sufficient simply to inform Adolfo Drescher Caldas that he was being arrested under the prompt security measures without any indication of the substance of the complaint against him.

13.3. The Committee observes that the detention incommunicado of a detainee for six weeks after his arrest is not only incompatible with the standard of humane treatment required by article 10 (1) of the Covenant, but also deprives him, at a critical stage, of the possibility of communicating with counsel of his own choosing as required by article 14 (3) (*b*) and, therefore, of one of the most important facilities for the preparation of his defence.

13.4. In operative paragraph 3 of its decision of 24 October 1979, the Committee requested the State party to submit copies of any court orders or decisions of relevance to the matter under consideration. The Committee notes with regret that it has not been furnished with any of the relevant documents or with any information about the outcome of the criminal proceedings commenced against Adolfo Drescher Caldas in 1978. It must be concluded that he has not been tried without undue delay as required by article 14 (3) (*c*) of the Covenant.

14. 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 as found by the Committee disclose violations of the International Covenant on Civil and Political Rights, particularly of:

Article 9 (2), because, at the time of his arrest, Adolfo Drescher Caldas was not sufficiently informed of the reasons for his arrest;

Article 9 (4), because recourse to *habeas corpus* was not available to him;

Article 10 (1), because he was kept incommunicado for six weeks after his arrest;

Article 14 (3) (*b*), because he was unable, particularly while kept incommunicado, to communicate with counsel of his own choosing;

Article 14 (3) (*c*), because he was not tried without undue delay.

15. The Committee, accordingly, is of the view that the State party is under an obligation to take immediate steps (*a*) to ensure strict observance of the provisions of the Covenant and provide effective remedies to the victim; (*b*) to transmit a copy of these views to Adolfo Drescher Caldas; (*c*) to take steps to ensure that similar violations do not occur in the future.

Communication No. 49/1979

Submitted by: Mr. and Mrs. Marais, Sr., on behalf of their son, Dave Marais, Jr., later represented by Maître Eric Hammel on 19 April 1979
Alleged victim: Dave Marais, Jr.
State party: Madagascar
Date of adoption of views: 24 March 1983 (eighteenth session)

Subject matter: Detention of South African citizen in Malagasy prison

Procedural issues: Exhaustion of domestic remedies—Burden of proof—Weight of evidence—Failure of investigation of allegations by State party—Sufficiency of State party's reply under article 4 (2)—Repeated request to State party to submit specific information

Substantive issues: State of emergency—Derogation from Covenant—Detention incommunicado—Ill-treatment of detainees—Prison conditions—State of health of victim—Arrest and harassment of counsel—Denial of defence facilities—Access to counsel—Equality of arms—Right to overflight—Correspondence of prisoners

Articles of the Covenant: 4 (3), 7, 10 (1) and 14 (3) (b) *and* (d)
Articles of the Optional Protocol: 4 (2) and 5 (2) (b)

1.1. The communication (initial letter dated 19 April 1979 and several subsequent letters) was initially submitted by Mr. and Mrs. Dave Marais, Sr., South African nationals living in South Africa, on behalf of their son, Dave Marais, Jr., a South African national detained in Madagascar. The alleged victim is also represented before the Committee by Maître Eric Hammel, who was an attorney at Antananarivo, Madagascar, until his expulsion by the Malagasy authorities on 11 February 1982, and is at present living in France.

1.2. The initial authors claim that their son is unable to submit a communication himself, as he is allegedly not permitted to engage in correspondence from the prison where he is held in Madagascar.

1.3. The initial authors state that their son was a passenger on a chartered aircraft, which, en route to Mauritius, was forced to make an emergency landing in Madagascar on 18 January 1977 because of bad weather and lack of fuel. Dave Maris, Jr., and the pilot of the aeroplane, John Wight, were arrested at that time, and, it appears, subsequently tried for overflying Malagasy territory, convicted and sentenced to five-year prison terms. Another passenger, Ed Lappeman, a United States citizen, was also tried and convicted on the same charges. The authors allege that their son's right to a fair trial and the guarantees necessary for his defence were continuously violated. The alleged victim's first attorney, Jean-Jacques Natai, left Madagascar and was refused re-entry into the country. It appears that Dave Marais, Jr., was subsequently represented by two other lawyers before his defence before the domestic courts was undertaken by Maître Eric Hammel.

1.4. Regarding domestic remedies, the initial authors state that letters have been sent to various authorities in Madagascar pleading for the release of Dave Marais, Jr., but that all such efforts have been in vain.

1.5. The initial authors do not specify the articles of the Covenant allegedly violated.

2. The mother of the alleged victim, Mrs. E. Marais, in a letter to the Committee dated 25 October 1979, stated that she had learned from an anonymous source that her son had been transferred to a gaol 60 km from Antananarivo and that he had been separated from John Wight, who was in a prison north of Antananarivo. She stated that she had not received any letters from her son and that she was not allowed to write to him. She had written many letters to President Ratsiraka, but had never received a reply. All her applications for a visa were refused. She had also telephoned one of her son's former lawyers in Antananarivo, who allegedly was intimidated and could give no information about her son.

3. By its decision of 7 August 1979, 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.

4.1. In its submission of 20 February 1980, the State party objected to the admissibilty of the communication on the ground that the alleged victim had not exhausted domestic remedies.

4.2. The State party stated that Dave Marais, Jr., and two others had been accused of offences punishable under articles 82 (3) and 83 (2) of the Penal Code of Madagascar and Decree No. 75-112 MD of 11 April 1975, for espionage and overflying the territory "while the state of emergency was in force". They had been detained on 18 January 1977, remanded in custody on 4 February 1977; the order for their arrest was issued by the Criminal Proceedings Division on 24 February 1978 and referred on the same date to the competent military court. By judgement No. 105 of 22 March 1978, the Military Court convicted Dave Marais, Jr., and the two others

> of having, on 18 January 1977, and in any event within the last three years, at Manakara and Mananjary and over Malagasy territory in general, flown over Malagasy territory in a foreign aircraft without being authorized to do so by any diplomatic convention and without permission from the Malagasy authorities, thereby endangering, in time of peace, the external security of the State of Madagascar.

They were sentenced to five years in prison and a fine of 500,000 francs, with confiscation of the articles seized.

4.3. While serving their sentence, Dave Marais and another person escaped from the Antananarivo Central Prison, where they were being held. They were apprehended and brought before the prosecuting authority. On 16 June 1979, the examining magistrate was requested by the prosecuting authority to bring an indictment against Dave Marais *et al.*

4.4. The State party further explained that if Dave Marais thought that his rights had been violated, he could, either on his own behalf or through his counsel, have referred the matter to the examining magistrate or invoked article 112 (2) of the Code of Criminal Procedure, which privides that "any violation of the measures for the protection of the freedom of the individual prescribed by the articles contained in this chapter shall be punishable under the provisions of articles 114 *et seq.* of the Penal Code".

5.1. By its decision of 25 July 1980, the Human Rights Committee, having taken note of the State party's submission of 20 February 1980 and noting, *inter alia*, that the State party referred in its submission to "the state of emergency" in force in the Democratic Republic of Madagascar on 18 January 1977, requested the State party in the light of the obligation imposed by article 4 (3) of the Covenant to clarify whether the right of derogation referred to therein had been applied and, if so, whether any derogation had in any way affected the alleged victim; it also requested the State party to furnish further information and clarifications as to the following points, in order to enable the Committee to ascertain whether domestic remedies had been exhausted by or on behalf of the alleged victim:

(*a*) Whether the alleged victim had been informed of and afforded an effective opportunity to invoke article 112 (2) of the Code of Criminal Procedures;

(*b*) Whether there were any other remedies that could be invoked by the alleged victim in the particular circumstances of his case and, if so, whether he had been informed about them and afforded an effective opportunity to resort to them;

(*c*) The results of the preliminary investigation carried out by the Third Department, Antananarivo, and the present stage of the proceedings that might have ensued;

(*d*) The means of communication between the alleged victim, his family and legal counsel, in particular his access to Maître Eric Hammel, who, according to information furnished by the mother of the alleged victim, had undertaken to represent Dave Marais in his defence before the domestic tribunals.

5.2. The Human Rights Committee further requested the State party (*a*) to furnish the Committee with copies of the judgement of the Military Court, No. 105 of 22 March 1978, and the judgement of the Supreme Court, rendered on 20 March 1979, both of which were referred to in the State party's submission of 20 February 1980; (*b*) to furnish information as to the whereabouts and the state of health of the alleged victim; (*c*) to submit the information and clarifications sought to the Human Rights Committee in care of the Division of Human Rights, United Nations Office at Geneva, within six weeks of the transmittal of this decision to it.

5.3. At the same time, the Human Rights Committee decided to make known to Maître Eric Hammel the contents of the decision, with a view to obtaining from him any pertinent information about the situation of Dave Marais and the issues complained of in the communication, and to furnish him at the same time, in his capacity as legal representative of the alleged victim, with copies of the submissions of the authors of the communication and the State party, as well as with the text of the Committee's decision of 7 August 1979.

6. By its decision of 24 October 1980, the Human Rights Committee, noting that no response had been received from the State party following the Committee's decision of 25 July 1980, decided to urge the State party, without further delay, to provide the Human Rights Committee with the information and clarifications sought in the Committee's decision of 25 July 1980, including the information requested concerning the whereabouts and the state of health of Dave Marais, Jr.

7. By its decision of 31 March 1981, the Human Rights Committee, noting with concern that no further information or clarifications had been received in response to its decisions of 25 July 1980 and 24 October 1980, and considering that the State party's failure to provide the Committee with the information and clarifications requested had hampered the Committee's consideration of the communication:

(*a*) *Strongly urged* the State party to provide the Committee without delay with the information and clarifications already requested, including, *inter alia*, the text of the judgement No. 105 of 22 March 1978 of the Military Court and the judgement of 20 March 1979 of the Supreme Court, as well as detailed information relating to the alleged victim's state of health and whereabouts and his access to his legal representative, Maître Eric Hammel.

(*b*) *Requested* the State party, should there hitherto have been any obstacles barring Maître Eric Hammel from access to his client, to take the necessary steps to remove such obstacles and to ensure that the lawyer and his client had the proper facilities for effective access to each other. The State party should inform the Committee of the steps taken by it in this connection;

(*c*) *Expressed* the hope that the State party would be in a position to provide the information sought pursuant to the instant decision and the Committee's earlier decisions of 25 July and 24 October 1980, by not later than 1 June 1981, so that further delays in the consideration of the communication could be avoided;

(*d*) *Decided* that any information or clarifications received from the State party pursuant to this decision should be transmitted to the authors of the communication and to Maître Eric Hammel, in his capacity as legal representative of Dave Marais, Jr., to enable them to comment thereon.

8.1. In a submission of 16 May 1981, Maître Eric Hammel stated that Dave Marais, Jr., and John Wight appeared before the Antananarivo Court of Summary Jurisdiction on 14 May 1981 on charges of prison-breaking and complicity in overflying the territory of Madagascar; by a judgement of 15 May 1981, the Antananarivo Court sentenced Dave Marais and John Wight to two years' imprisonment and a fine of 1 million francs; under this judgement they should be released from prison on 4 February 1984, but an appeal against the judgement was lodged on 15 May 1981 and the case was to be heard by the Summary Jurisdiction Chamber of the Appeals Court.

8.2. Maître Eric Hammel further stated that he saw Dave Marais, Jr., on two days during the trial, and that his client alleged that he had been detained since December 1979 in the basement of the Direction générale d'investigations et documentation (DGID), a political police prison at Ambohibao near Antananarivo, in a cell measuring 2m by 1m and, apparently, without light.

8.3. Maître Hammel stated that at the time of writing (May 1981), his client had been held incommunicado for over 18 months; that he was forbidden to send or receive letters or papers of any description whatsoever.

8.4. In an annexed legal memorandum on the case of Dave Marais, Jr., his attorney acknowledged that the procedure followed at the trial of Dave Marais in May 1981 was regular from the legal point of view and that the hearings were held correctly. He averred, however, that his client was not being held in a proper establishment of imprisonment together with other prisoners, but that he was kept in strict solitary confinement in the cellar of a political police prison, and that, as a consequence, although he was attended by a Malagasy medical doctor and his state of health appeared to be satisfactory, he was suffering from depression after being held incommunicado for more than 18 months (by May 1981).

8.5. He stated that in letters of 27 December 1979 and 14 January 1980, he had drawn the attention of the Minister of Justice of Madagascar to his client's illegal detention, pointing out that under articles 550 and 551 of the Code of Penal Procedure, detainees who had already been sentenced or are awaiting sentence must be held in an establishment of the Penitentiary Department of the Ministry of Justice, and that the detention of a sentenced prisoner by a police department is thus strictly illegal. He further stated that he had reminded the Minister of Justice in several further letters without receiving any reply and without any action being taken to date. Copies of five such letters are annexed to Maître Hammel's submission.

8.6. With respect to the alleged victim's right to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing, Maître Hammel stated that, with the exception of two days during the trial, he had been unable to communicate with his client.

8.7. As a consequence of his enquiry into his client's state of health through the examining magistrate, Maître Hammel was charged at the instance of the Attorney-General with spreading false rumours. He further stated that he had twice been questioned by the DGID political police.

8.8. With respect to the possibility of lodging a complaint on the grounds of infringement of liberty pursuant to articles 112 and 114 of the Malagasy Penal Code, Maître Hammel stated that these two provisions were purely of a token nature and have no practical significance. In substantiation of this allegation, he stated that on the occasion of the internment of another client, he also lodged a complaint under article 114 and that the Minister of Justice commandeered this file from the court, thus making it impossible for any action to be taken on the complaint.

8.9. In a letter dated 22 May 1981, Maître Hammel added that, after the hearing of 15 May, Dave Marais, Jr., remained for three days in Antananarivo Prison, where he had a long interview with him. On 18 May,

Marais was again taken to the political police prison at Ambohibao in the same manner as before, i.e., a squad of political police officers came to Antananarivo Prison demanding, without any instructions or warrant, that the prisoner Dave Marais should be handed over. He was again in the basement of the prison at Ambohibao, in a cell measuring 2m by 1m. Any communication at the political police prison was forbidden and the detainees were kept completely incommunicado.

8.10. In a letter dated 14 June 1981, Maître Hammel stated that Messrs. Marais and Wight were brought to Antananarivo Prison for the preparatory formalities for a criminal court proceeding to be held on 31 July 1981. Maître Hammel indicated that Marais was well, as far as his health was concerned, but that he was suffering from psychological depression as a result of 20 months of unrelieved solitary confinement in a basement.

8.11. The Committee has also learned that the third person on the aircraft, Ed Lappeman, an American citizen, was released by Malagasy authorities in November 1980.

9. At its thirteenth session, the Human Rights Committee continued consideration of the Marais case in view of the latest submissions from Maître Hammel. It determined that a decision as to admissibility would be taken at the fourteenth session. The State party was so informed on 7 August 1981.

10. In a further letter dated 4 August 1981, Maître Hammel reported that Messrs. Marais and Wight appeared before the Criminal Court of Antananarivo from 31 July to 4 August 1981 to answer charges of conspiracy together with 14 Malagasy defendants; while most of the Malagasy defendants were sentenced to 5-10 years of imprisonment, the two South Africans were acquitted. Mr. Marais spent a week in Antananarivo Prison in order to appear before the Criminal Court, and was then taken back to the basement of the political police prison at Ambohibao. The conditions of his detention remained unchanged.

11. At its fourteenth session in October 1981, the Human Rights Committee noted with concern that its decisions of 25 July 1980, 24 October 1980 and 31 March 1981, in which it requested the State party to provide information and clarifications, had gone unheeded and that thereby it had been seriously hampered in discharging its responsibilities under the Optional Protocol.

12. The Committee had not received any information that the matter had been submitted to another procedure of international investigation or settlement. It therefore found that it was not precluded by article 5 (2) (*a*) of the Optional Protocol from considering the communication. The Committee was also unable to conclude, on the basis of the information before it, that there were remedies available to the alleged victim which he could pursue or should have pursued. The Committee noted that the State party had failed to respond to a specific request for information on domestic remedies, which the Committee addressed to the State party in its decision of 25 July 1980. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (*b*) of the Optional Protocol.

13. On 28 October 1981, the Human Rights Committee therefore decided:

(*a*) That the communication was admissible;

(*b*) That, in accordance with article 4 (2) of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(*c*) That the State party should be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to perform its responsibilities, it required specific responses to the allegations made and the State party's explanations of the actions taken by it. The State party was again requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration;

(*d*) To reiterate the request contained in its decision of 31 March 1981 that the State party should provide the Committee with detailed information about Mr. Marais' state of health and his access to his legal representative. Without prejudging the merits of the case, the Human Rights Committee stressed that the State party should ensure that Mr. Marais was held under humane conditions of imprisonment in accordance with the requirements set forth in article 10 of the Covenant and that he should have proper access to legal counsel.

14. In a letter dated 14 February 1982, Maître Hammel informed the Division of Human Rights that the Malagasy political police had arrested him in connection with the officers' plot of 16 January 1982, searched his home and seized part of his dossier on the Marais case; that he was subsequently detained in the basement of the political police prison at Ambohibao and finally expelled from Madagascar to France, a country of which he is a citizen. In the same letter, Maître Hammel stated that Dave Marais was in good health. In a letter dated 22 May 1982, Maître Hammel asserted that he still represented Mr. Marais.

15.1. The time-limit for the State party's submission under article 4 (2) of the Optional Protocol expired on 8 June 1982. By a note dated 11 August 1982, the State party transmitted a copy of a letter dated 14 July 1982 signed by Dave Marais, Jr., and John Wight and addressed to the Director General of the Directorate-General of Investigations and Documentation of the Malagasy Republic, reading as follows:

> We would like to thank you very much for the letters from our families, which were safely received yesterday. It is absolutely wonderful to have news of our wives after so many months.
>
> In writing, I take the opportunity also to thank you for all the money which you have provided to buy cigarettes, soap and medicine. Also for the food, the room and particularly for the kindness shown to us. We remain in good spirits and, in view of the circumstances, want for almost nothing, except, of course, our freedom.
>
> I would like to request your permission to write to President Ratsiraka to ask him if he might be so good as to consider a remission of sentence or an amnesty for us. I am extremely eager to return home so as to be able to participate in the struggle against *apartheid* . . .

15.2. The State party further informed the Committee that the relevant Malagasy High Authorities were studying the action to be taken on the requests made in the letter referred to above.

16.1. The Human Rights Committee further examined the communication of Dave Marais at its seventeenth session. In view of the information furnished by the State party, which the Committee welcomed, and in order to give time to the President of the Democratic Republic of Madagascar to respond to the appeal for clemency made to him by Messrs. Marais and Wight, the Committee decided to defer further consideration of their cases until its eighteenth session. The State party was so informed on 25 November 1982 and was requested to inform the Committee not later than 31 January 1983 whether the appeal for clemency made by Messrs. Marais and Wight was granted.

16.2. The Human Rights Committee notes with regret that the State party has not responded to its request.

17.1 The Human Rights Committee has the obligation under article 5 (1) of the Optional Protocol to consider this communication in the light of all written information made available to it on behalf of Dave Marais, Jr., and by the State party. It, therefore, decides to base its views on the following facts, which have not been contradicted by the State party.

17.2. Dave Marais, Jr., a South African national, was a passenger on a chartered aircraft which, en route to Mauritius, made an emergency landing in Madagascar on 18 January 1977. The pilot of the plane, John Wight, a South African national, another passenger on the plane, Ed Lappeman, a national of the United States of America, and Dave Marais, Jr., were tried and sentenced to five years' imprisonment and a fine for overflying the country without authority and thereby endangering the external security of Madagascar. On 19 August 1978, while serving his sentence, Dave Marais escaped from the Antananarivo Central Prison, was subsequently apprehended, tried on charges of prison-breaking and sentenced to an additional two years' imprisonment; an appeal was lodged on 15 May 1981.

17.3. Dave Marais' first attorney, Jean-Jacques Natai, left Madagascar and was subsequently refused re-entry into Madagascar. Later Maître Eric Hammel became the defence attorney for Dave Marais. Although Maître Hammel obtained a permit from the Examining Magistrate to see his client, he was repeatedly prevented from doing so. From December 1979 to May 1981, Dave Marais was unable to communicate with Maître Hammel and to prepare his defence, except for two days during the trial itself. On 11 February 1982, Malagasy political police authorities arrested Maître Hammel, detained him in the basement of the Ambohibao political police prison and, subsequently, expelled him from Madagascar, thereby further impairing his ability to represent Dave Marais effectively.

17.4. In December 1979, Dave Marais was transferred from the Antananarivo Prison to a cell measuring 1m by 2m in the basement of the political police prison at Ambohibao and has been held incommunicado ever since, except for two brief transfers to Antananarivo for trial proceedings.

18.1. In formulating its views, the Human Rights Committee also takes into account that, although the State party was requested to furnish the Committee with copies of any court orders or decisions of relevance to the case and with information in regard to Mr. Marais' access to his legal representative Maître Hammel, none has been received. The Committee further requested the State party to give detailed information relating to the alleged victim's state of health and whereabouts. No information has been received other than a copy of a letter purportedly written by Dave Marais and John Wight and transmitted by the State party by note of 11 August 1982.

18.2. With regard to the burden of proof the Committee has already established in its views in other cases (e.g., No. 30/1978)[1] that the said burden cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence, and that frequently the State party alone has access to relevant information. It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it.

18.3. In the circumstances, the Committee cannot but give appropriate weight to the information submitted on behalf of Dave Marais, including that submitted by his legal representative, Maître Hammel.

19. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, notes with serious concern that the State party has ignored its repeated requests for specific information and has thereby failed to comply with its obligations under article 4 (2) of the Optional Protocol. The Committee is of the view that the communication discloses violations of the Covenant, in particular of:

Articles 7 and 10 (1), because of the inhuman conditions in which Dave Marais, Jr., has been held in prison in Madagascar incommunicado since December 1979;

Article 14 (3) (*b*) and (*d*), because he has been denied adequate opportunity to communicate with his counsel, Maître Hammel, and because his right to the assistance of his counsel to represent him and prepare his defence has been interfered with by Malagasy authorities.

20. The Committee, accordingly, is of the view that the State party is under an obligation to provide the victim with effective remedies for the violations which he has suffered and to take steps to ensure that similar violations do not occur in the future. The Committee would welcome a decision by the State party to release Mr. Marais, prior to completion of his sentence, in response to his petition for clemency.[2]

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[1] *Selected Decisions . . .*, vol. 1, pp. 109-112, paragraph 13.3.

[2] Dave Marais served out his sentence. He was subsequently released in February 1984 and allowed to return to South Africa.

Communication No. 55/1979

Submitted by: Alexander MacIsaac on 3 July 1979
Alleged victim: The author
State party: Canada
Date of adoption of views: 14 October 1982 (seventeenth session)

Subject matter: Forfeiture of parole

Procedural issues: Events prior to entry into force of Covenant—Unsubstantiated allegations—Inadmissibility ratione materiae—*Inadmissibility* ratione temporis—*Burden of proof*

Substantive issues: Concept of "victim"—Examination of law in abstracto—*Retroactivity of penal law—Lighter penalty—Penalty—Mandatory supervision —Judge's discretion*

Article of the Covenant: 15 (1)
Article of the Optional Protocol: 1

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 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 20 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 had 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 reserved in prison upon revocation of that parole, constitutes a lighter penalty within the meaning of article 15 of 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 it 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) 2 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 lighter 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 of 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 No. 50/1979[1]) 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 (No. 50/1979 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 should have 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

[1] *Selected Decisions . . .*, vol. 1, pp. 118-121.

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.

Communication No. 66/1980

Submitted by: Olga Machado de Cámpora (later joined by David Alberto Cámpora Schweizer, the author's husband) on 15 March 1980
Alleged victim: David Alberto Cámpora Schweizer
State party: Uruguay
Date of adoption of views: 12 October 1982 (seventeenth session)

Subject matter: Detention of Uruguayan citizen by military authorities

Procedural issues: Events prior to entry into force of Covenant—Continuing situation—Examination of case after victim's release—Confirmation of allegation by victim—Weight of evidence—Sufficiency of State party's reply under article 4 (2)—Adoption of views without submission on merits from State party—Withdrawal of communication from IACHR

Substantive issues: Derogation from Covenant—Prompt security measures—Arbitrary arrest—Ill-treatment of detainees—Torture—Delay in proceedings—Non bis in idem—*Prison conditions—Detention despite release order*—Habeas corpus—*Release of victim from imprisonment*

Articles of the Covenant: 7, 9 (1), (3), (4) and (7), 10 (1) and (3), 14 (3) (c) *and (7)*

Articles of the Optional Protocol: 1, 4 (2) and 5 (2) (b)

1. The initial author of this communication, Olga Machado de Cámpora (initial letter dated 15 March 1980) is a Uruguayan national, residing in the Federal Republic of Germany. She submitted the communication on behalf of her husband, David Alberto Cámpora Schweizer alleging that he was arbitrarily imprisoned in Uruguay and that he is a victim of a violation by Uruguay of his rights under the International Covenant on Civil and Political Richts.

2.1. The author described the relevant facts as follows.

2.2. David Alberto Cámpora Schweizer, a Uruguayan national (45 years old at the time of the submission of the communication), was arrested in March 1971 on grounds of "association to break the law" (article 150 of the Penal Code). In September 1971 he escaped from prison together with other political detainees, but in April 1972 he was re-arrested and detained incommunicado for several weeks. On 15 June 1972, he was transferred to the Batallón de Infantería No. 1 by the military authorities and allegedly subjected to severe torture.

2.3. The author further stated that a judge ordered her husband's release in May 1974 and that his request to leave the country was officially approved in November 1974. He was, however, kept imprisoned without charges at the disposal of the Executive authorities under the prompt security measures until August 1977. She stressed that, during this time, there were no legal remedies available to her husband. She adds that from March 1975 to August 1977, he was subjected to mistreatment at the barracks of Trinidad.

2.4. In August 1977, the trial (procesamiento) was continued before a military court after law No. 14.493 of December 1975 had retroactively placed all political crimes (chapter VI of the Military Penal Code) under military jurisdiction, including proceedings against civilians. In addition to being charged with the offences which had been investigated between 1971 and 1974, at this new stage of the proceedings, her husband was also prosecuted on the charge of "use of a false document" (article 237 of the Penal Code) which had not been included in the proceedings before the ordinary judge. His new place of detention was Libertad prison.

3.1. In a further letter dated 11 June 1980, replying to the secretariat's request for clarification as to whether the same matter had been submitted to the Inter-American Commission on Human Rights, the author stated that, at her request, IACHR had discontinued consideration of her husband's case.

3.2. She also informed the Committee that the indictment against her husband was issued on 15 March 1980, and that his lawyer, Dr. Juan P. Labat, presented his defence at the beginning of April 1980.

3.3. She enclosed in this connection a copy of a memorandum dated 24 March 1980 containing the indictment of her husband of 12 March 1980. The charges brought against him were: "association in order to commit criminal offences" (*asociación para delinquir*), "attack on the Constitution at the stage of conspiracy followed by preparatory acts" (*atentado a la Con-*

stitución en el grado de conspiración seguida de actos preparatorios), "falsification of public documents" (*falsificación de documentos públicos*) and "escape from prison" (*autoevasión*). The legal bases of these charges were the following articles of the Ordinary Penal Code: 150, 54, 56, 132, paragraph 6, 137, 237 and 184. The sentence asked for was eight years of imprisonment, taking into account his previous detention, and that David Alberto Cámpora Schweizer be declared a "habitual criminal" with a consequence of three to four years' precautionary detention (*medidas de seguridad eliminativas*; article 92 (4) of the Penal Code).

3.4. The author also enclosed with her letter of 11 June 1980, two testimonies, one from Dr. Alejandro Artucio dated 22 March 1978, and one from Julio César Modernell dated 13 September 1977.

3.5. Dr. Artucio states that he had represented persons who had been imprisoned together with the alleged victim and that for this reason he knew his case very well. The writer gives in particular a detailed legal background on David Cámpora's situation. He mentions that the judicial decision of 23 May 1974 providing for the provisional release of David Cámpora was based on the consideration that the deprivation of liberty already suffered by him was sufficient and that the punishment liable to be imposed on him would not exceed that period of three years. He also quotes the reasons given for the executive decision to keep David Cámpora in detention under prompt security measures: "Taking into account the background of the case, the fact that Cámpora is very dangerous and his recidivism, the Executive orders his detention . . ." Commenting on the continuation of the criminal proceedings against David Cámpora by military tribunals, he explains that, in December 1975, new legislation (Law No. 14.493) came into force in Uruguay, which retroactively established the jurisdiction of the military courts in all cases of so-called political offences (*lesa nación*). This law was also applicable in the case of the alleged victim. Dr. Artucio further mentions that he himself was detained in Uruguay in connection with his activities as a defence lawyer, and that he met David Cámpora in a Montevideo prison (building of the Batallón de Infantería No. 1, Florida) in 1972, where he claims to have witnessed the mistreatment and torture to which the alleged victim was subjected (giving details).

3.6. Julio César Modernell states in his testimony that he was imprisoned together with the alleged victim for two years in the buildings of the *Artillería de Trinidad* until his release in October 1976. He describes the general conditions of their imprisonment (extremely poor hygiene) and mentions, *inter alia*, that the treatment to which the prisoners were subjected worsened with the arrival of new military officials in February 1976. It was the systematic policy to provoke the prisoners, followed by new interrogations and mistreatment (*plantones*). The writer states in this context that David Cámpora was attacked one night and badly beaten by an official named Alférez Queirolo, who was briefly arrested upon the complaint by relatives of the prisoners, but then was allowed to continue with his mistreatment of prisoners. According to a carefully developed plan, a period of extremely harsh treatment would be followed by one of relative ease during which the prisoner was told that his release was imminent, thus creating false hope for him and his family. This treatment was aimed to "break" the prisoner psychologically.

4. By its decision of 21 July 1980, the Working Group of the Human Rights Committee, having decided that the author of the communication was justified in acting on behalf of the alleged victim, 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.

5. In a further letter dated on 8 October 1980, the author stated that the military tribunal of first instance had sentenced her husband to nine years of imprisonment and one or two years of precautionary detention (*medidas de seguridad eliminativas*). She informed the Committee that her husband's lawyer had already appealed the judgement rendered against her husband, to the Supreme Military Tribunal.

6. By a note dated 14 November 1980, the State party objected to the admissibility of the communication on the ground that domestic remedies had not been exhausted. In support of that objection, the State party confirmed that on 10 September 1980, the court of first instance had pronounced a sentence of nine years' rigorous imprisonment plus two years' precautionary detention (*medidas eliminativas*) in the case. The State party further added that under the provisions of article 489 of the Code of Military Penal Procedure, appeal is automatic for every final judgement imposing a prison sentence of more than three years, and, when the judgement in the second instance has been pronounced, there is still the possibility of applying for the remedies of annulment and review which are also provided for in the Code of Military Penal Procedure.

7. The author, in a further letter of 7 December 1980, stated that she had learned from her husband's lawyer that his trial before the Supreme Military Tribunal had taken place on 13 November 1980, that the court had ordered his immediate release, considering that he had served his sentence, without ordering any precautionary detention (*medida de seguridad*).

8. In an additional letter dated 12 January 1981, the author informed the Committee that her husband had arrived in Cologne, Federal Republic of Germany, on 14 December 1980. She stated that, on 12 December, at 5 p.m., her husband was taken out of Libertad prison and brought to the police headquarters in Montevideo, where the Ambassador of the Federal Republic of Germany in Uruguay, Mr. Marré, issued him a *fremdenpass* (travel document) of the Federal Republic of Germany with which he travelled on 13 December 1980 to the Federal Republic of Germany. The author added that, upon arrival in that country, her husband was brought to a sanatorium for two weeks because of his precarious state of health.

9. In an interim decision of 31 March 1981, the Human Rights Committee asked David Alberto Cámpora Schweizer whether he wished the Committee to pursue the matter. If in the affirmative, the alleged victim was requested to acquaint himself with the contents of the submissions previously made on his behalf and

the submissions made by the State party, with a view to: (*a*) correcting any inaccuracies which he might find in the submissions made on his behalf; (*b*) commenting as he deemed relevant on the submissions of the State party; (*c*) adding any further information which he might wish to place before the Human Rights Committee for consideration in his case.

10. In a reply dated 28 May 1981, David Cámpora informed the Committee that he wished to corroborate explicitly and entirely all the facts reported by his wife, the author of the communication, and to confirm the existence of the violations of rights recognized in the International Covenant on Civil and Political Rights, referred to by her. He further stated that the Committee should continue to consider his case until it reaches a decision on the substance of the matter.

11. In a further letter dated 1 July 1981, David Cámpora gives a description of the treatment to which prisoners were subjected in Military Detention Establishment No. 1 (Libertad prison) where he was held from August 1977 until his release in December 1980. He described the daily life of the prisoners, including their constant harassment and persecution by the guards; the régime of arbitrary prohibitions and unnecessary torments; the combination of solitude and isolation on the one hand and the fact of being constantly watched, listened to and followed by microphones and through peepholes on the other hand; the lack of contact with their families, aggravated by worries about the difficulties experienced and pressures exerted on their families; the cruel conditions in the punishment wing in which a prisoner might be confined for up to 90 days at a time; the breakdown of physical and mental health through malnutrition, lack of sunshine and exercise, as well as nervous problems created by tension and ill-treatment. In sum, he asserts that the Libertad prison is "an institution designed, established and operated with the exclusive objective of totally destroying the individual personality of everyone of the prisoners confined in it".

12. On 20 July 1981, the Committee decided:

(*a*) That the communication was admissible in so far as it related to events said to have occurred on or after 23 March 1976 (the date of the entry into force of the Covenant and the Optional Protocol for Uruguay);

(*b*) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(*c*) That the State party by informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to perform its responsibilities, it required specific responses to the allegations which had been made by the author of the communication and the State party's explanations of the actions taken by it. The State party was requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration.

13. On 18 February 1982, the time-limit for observations requested from the State party under article 4 (2) of the Optional Protocol expired. However, no submission has yet been received from the State party in addition to that received by the Committee prior to the decision on the admissibility of the communication. The Committee notes with concern the State party's failure to respond and its failure to furnish the Committee with relevant court orders and decisions.

14. 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.

15. The Committee decides to base its views on the following facts which are not in dispute or which are unrepudiated or uncontested by the State party except for denials of a general character offering no particular information or explanation.

16.1. *Events prior to the entry into force of the Covenant:* David Alberto Cámpora Schweizer was arrested in Uruguay in March 1971 on grounds of "association to break the law". In September 1971 he escaped from prison, but was re-arrested in April 1972.

16.2. In May 1974, a judge ordered David Cámpora's provisional release; his request to leave the country was approved in November 1974. At the same time, however, an order of detention under the rules of prompt security measures was issued against him so that he was kept imprisoned without any charges. There were no remedies available to him to challenge his prolonged detention. While he was kept at Trinidad barracks (since November 1974), he suffered ill-treatment.

17.1. *Events subsequent to the coming into force of the Covenant:* The detention under the régime of prompt security measures lasted until August 1977, when at that time the trial (*procesamiento*) was continued before a military tribunal in accordance with Law No. 14.493 of December 1975. David Alberto Cámpora Schweizer was transferred from Trinidad barracks to Libertad prison.

17.2. David Cámpora was charged anew before the competent military tribunal for the same acts which had already been investigated by an ordinary judge between 1971 and 1974, including, however, the charge of "use of a false document" (article 237 of the Penal Code) which had not been the object of the prior proceedings. In March 1980, the formal indictment against David Cámpora contained the following charges: "association in order to commit criminal offences" (*asociación para delinquir*), "attack on the Constitution at the stage of conspiracy followed by preparatory acts" (*atentado a la Constitución en el grado de conspiración seguida de actos preparatorios*), "falsification of public documents" (*falsificación de documentos públicos*) and "escape from prison" (*autoevasión*).

17.3. On 10 September 1980, a military court of first instance pronounced a sentence of nine years' rigorous imprisonment plus two years' precautionary detention (*medidas eliminativas*). On 13 November 1980, the Supreme Military Tribunal ordered David Alberto Cámpora Schweizer's release without ordering any precautionary detention (*medida de seguridad*), considering that he had served his sentence.

17.4. On 12 December 1980, he was taken out of Libertad prison and brought to the police headquarters in Montevideo. On 13 December 1980 he travelled to the Federal Republic of Germany where he joined his family.

17.5. On the basis of the information submitted by the initial author and later confirmed by David Alberto Cámpora Schweizer himself, it cannot be established whether the mistreatment complained of continued or occurred on or after 23 March 1976, the date on which the Covenant entered into force for Uruguay. As far as the period after the coming into force of the Covenant is concerned, both authors refer only in general terms to mistreatment without mentioning any specific incident. In his testimony of 13 September 1977, Julio César Modernell, who was imprisoned together with David Cámpora for two years until October 1976, describes an attack by a prison official which took place in February 1976 or later. It cannot be seen whether this incident took place before, on or after 23 March 1976. In the circumstances, the Committee cannot base a finding on the allegations of ill-treatment. The Committee is, however, in a position to conclude that the conditions of imprisonment to which David Cámpora was subjected at Libertad prison were inhuman (see, in particular, para. 11 above).

18.1. On the basis of the facts of the present case, the Human Rights Committee does not feel that it is in a position to pronounce itself on the general compatibility of the régime of prompt security measures under Uruguayan law with the Covenant. According to article 9 (1) of the Covenant, no one shall be subjected to arbitrary arrest or detention. Although administrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner, the Committee emphasizes that the guarantees enshrined in the following paragraphs of article 9 fully apply in such instances. In this respect, it appears that the modalities under which prompt security measures are ordered, maintained and enforced do not comply with the requirements of article 9.

18.2. Concerning the allegation that article 14 (7) of the Covenant has been violated by the State party, the Committee observes that, based on the authors' submission, the criminal proceedings initiated against David Cámpora in 1971 were not formally concluded at first instance until the military tribunal pronounced its judgement on 10 September 1980. Article 14 (7), however, is only violated if a person is tried again for an offence for which he has already been finally convicted or acquitted. This does not appear to have been so in the present case. Nevertheless, the fact that the Uruguayan authorities took almost a decade until the judgement of first instance was handed down indicates a serious malfunctioning of the judicial system contrary to article 14 (3) (*c*) of the Covenant.

19. 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 as found by the Committee, in so far as they continued or occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay), disclose the following violations of the International Covenant on Civil and Political Rights:

Of article 9 (3) and (4), because during the time spent in detention under the régime of "prompt security measures", David Alberto Cámpora Schweizer was not brought before a judge and could not take proceedings to challenge his arrest and detention;

Of article 10 (1), because he was detained under inhuman prison conditions;

Of article 14 (3) (*c*), because he was not tried without undue delay.

20. The Committee, accordingly, is of the opinion that the State party is under an obligation to provide the victim with effective remedies, including compensation, for the violations he has suffered.

Communication No. 74/1980

Submitted by: Miguel Angel Estrella on 17 July 1980
Alleged victim: The author
State party: Uruguay
Date of adoption of views: 29 March 1983 (eighteenth session)

Subject matter: Detention of Argentinian citizen in Uruguayan prison

Procedural issues: Competence of HRC—Jurisdiction of State—Submission to IACHR by unrelated third party—Examination of "same matter"—Weight of evidence—State party's duty to investigate—Adoption of views without submission on merits by State party

Substantive issues: Confession under duress—Torture—Ill-treatment of detainees—Right to choose own counsel—Fair trial—Fair and public hearing—Equality of arms—Trial in absentia*—Denial of defence facilities—Prison conditions—Correspondence of prisoners*

Articles of the Covenant: 2 (1), 7, 10 (1), 14 (1) and (3) (b), (d) *and* (g) *and 17*

Articles of the Optional Protocol: 1 and 5 (2) (a)

1.1. The author of the communication (initial letter dated 17 July 1980 and further submissions dated 8 November 1980, 9 and 15 July 1981 and 1 October 1982) is an Argentine national, a concert pianist by profession, at present living in France.

1.2. The author states that he became a member of the Movimiento Peronista in Argentina in 1966 because he wished to contribute to the wider dissemination of knowledge, in his case of music, among the deprived sectors of the population. His activities, which were unpaid, involved giving courses, lectures and public concerts. These activities were allegedly considered to be "subversive" by the new military Government which came to power in Argentina in 1976. In April 1977, the author found that his name was on a list of Argentine intellectuals who could not participate in activities under the bilateral agreements which his country had signed with other States and that he had been denounced as "a subversive member of the Montoneros Organization".[1] The author requested an investigation into these accusations and, on 7 December 1977, he was officially informed that no charges had been retained against him and that he could therefore exercise his profession freely and participate, in activities under the bilateral agreements.

1.3. The author explains that in 1977 he agreed to work in Montevideo, Uruguay, where he had been invited to give concerts and also refresher courses for Uruguayan pianists, and that he lived there most of the time with his two sons and three Argentine friends, Raquel Odasso, Luisana Olivera and Luis Bracony, in a house that he had rented. His friends were also working in Montevideo. In May 1977, the author's engagements with the SODRE[2] Symphony Orchestra were suddenly cancelled. Some weeks later he was officially informed by a Colonel (name is given) that he was under observation in Uruguay, that unfavourable reports had been received about him, that his position as a Peronist made it obvious that he was opposed to the Uruguayan Government, that however he had no recorded political activities in Uruguay, and that so long as that situation did not change, his safety was not in jeopardy. He was free to give private lessons to local pianists, but was told that he could not carry out any official concert or teaching activity. The author's concerts at the University were cancelled and a proposed professorship at the conservatory was withdrawn.

1.4. The author states that in November 1977, he toured Mexico and Panama. He then stayed in Buenos Aires from 5 to 10 December 1977 and on 10 December, he went to Montevideo to bring his children back and to hand over the house he had rented. He intended to move to Buenos Aires and spend some time in his country before travelling to Mexico and Canada on work assignments. He further states that when he reached Montevideo, on 10 December 1977, he found at his house an old friend, Carlos Valladares, allegedly a well-known Montonero leader. The author states in this connection:

> My friendship with him was of very long standing because he had worked with my father selling books. I invited him to dinner with me and my family and he left my house at midnight. He was also present the following day at a farewell lunch that I held at my home. Valladares left the same evening and I never saw him again.

The author mentions that from 11 December 1977, he noticed that he was constantly followed. However, as he was preparing his departure, this fact did not greatly disturb him. On 15 December, he completed the necessary customs and banking procedures and purchased the tickets to travel to Buenos Aires.

1.5. The author claims that on the evening of 15 December 1977, Raquel Odasso and Luisana Olivera were abducted only a few yards from his home in Montevideo. He was told about this incident by his neighbours who, despite the fact that the house was surrounded by a growing number of vehicles with armed individuals, showed total solidarity with him and helped him to get in touch with diplomat friends and colleagues. The author further claims:

> I was reassured by the fact that the people with whom I had managed to get into contact promised to ensure that these abnormal events were immediately made known abroad . . . After 11 p.m., some 15 strongly armed individuals in civilian clothes broke in, threatening us with death if we did not surrender. Bracony and I had remained in the house. We came out with our hands up, trying to tell them that there was no need for any violence. They punched and kicked me and knocked me down, chaining my feet and hands, and then blindfolded me, pulled a hood over my head and pushed me towards a vehicle where they began to kick me all over.

The author alleges that they were brought to a place probably near the airport where he recognized the voices of Raquel Odasso and Luisana Olivera.

1.6. The author claims that in that place, the four of them were subjected to torture:

> The tortures consisted of electric shocks, beatings with rubber truncheons, punches and kicks, hanging us up with our hands tied behind our backs, pushing us into water until we were nearly asphyxiated, making us stand with legs apart and arms raised for up to 20 hours, and psychological torture. The latter consisted chiefly in threats of torture or violence to relatives or friends, or of dispatch to Argentina to be executed, in threats of making us witness the torture of friends, and in inducing in us a state of hallucination in which we thought we could see and hear things which were not real. In my own case, their point of concentration was my hands. For hours upon end, they put me through a mock amputation with an electric saw, telling me, "we are going to do the same to you as Víctor Jara."[3] Amongst the effects from which I suffered as a result were a loss of sensitivity in both arms and hands for eleven months, discomfort that still persists in the right thumb, and severe pain in the knees. I reported the fact to a number of military medical officers in the barracks and in the "Libertad" prison.

The author alleges that he was interrogated for the purpose of forcing him to admit that he had been involved in plans to carry out armed operations in Uruguay and Argentina. He was repeatedly asked why he did not denounce Valladares and at one moment his interrogator allegedly said: "I keep telling you, you are unlucky. We know that you were not involved in this matter, but you are going to pay dearly for the fact that you let Montoneros come into your house.".

1.7. On 23 December 1977, the author was transferred to a military barracks, probably of Batallón 13, where he was kept blindfolded up to 20 January 1978 and subjected to ill-treatment during almost a month. The author mentions the following:

[1] An opposition movement which engaged in armed activities.

[2] According to the author, the official Uruguayan radio station.

[3] A well-known Chilean singer and guitarist who was found dead, with his hands completely smashed, at the end of September 1973 in a stadium in Santiago, Chile.

During my stay there, I suffered almost constantly from vomiting, diarrhoea and other digestive disorders, the result not merely of the state of insecurity I was in, but also the lack of hygiene and the food. I never received even the most rudimentary medical attention there. I was repeatedly threatened with death by an officer, who, on one occasion lifted my hood to hit me in the face; he was a lieutenant. He was beside himself with anger because I had been demanding insistently to be given a shower and to wash my clothes, which bore the marks of my intestinal problems and of torture. Other occasions on which I provoked his fury were when I asked the guards for medical attention, or to be allowed to write a letter to my family, to have news of what had happened to my children, for permission to attend Mass at Christmas or to see my family. . . .

On 20 January 1978, the author was taken to Libertad prison. He spent the first 10 days in solitary confinement in a cell which was a kind of cage in a section known as "La Isla". There he received visits from a military doctor. As he had lost 10 kilos, the doctor requested a special diet for him, which was refused. On 5 February his life as a prisoner became "normal". From that time he was kept in the cells (first floor A) and on that day he was able for the first time to walk in the open air for an hour and to have contact during that period with a fellow prisoner.

1.8. The author states that he was brought before a military court on three occasions (23 and 26 December 1977 and on 15 March 1978). On 23 December 1977, in the office where he was to see a court official, the author's hood was taken off and he recognized several of the individuals who had abducted him and taken part in the torture. That day also, he was given the possibility to choose an officially appointed lawyer, "who is really an officer of the armed forces or a civilian employed by them", either Mr. Severino Barbé or Colonel Alfredo Ramírez. The author opted for Mr. Barbé, whom he saw on that day and on 31 May 1978, 14 November 1978 and 12 February 1980. From the outset, Mr. Barbé allegedly adopted the attitude of a prosecutor in his relations with the author, who claims that, as a result, he was in fact denied the possibility of an effective defence. In particular, he states that on 31 May 1978, Mr. Barbé once again questioned the author's innocence, arguing that he had been accused by his friends and that he had not denounced Mr. Valladares. The author states that he asked to be confronted with his friends stressing that their reports had been made under torture. He further states that, although Mr. Barbé did nothing to arrange confrontations or to improve the conditions under which he was being held, his friends and colleagues outside Uruguay helped to speed up the processing of his case.

1.9. The author mentions that on 9 November 1978 he was confronted with Luis Bracony and Luisa Olivera, and on 14 November 1978 with Raquel Odasso who, in particular, retracted what she had been forced to sign against him. He states that on 29 August 1979, he was told by an official whom he met at the prison that he had been sentenced to four and a half years of imprisonment at a trial that was held *in camera*. That day the military court's judgement was read out to him, the basis for the verdict being the charges of "conspiracy to subvert, action to upset the Constitution and criminal preparations". The author further states that, on the morning of 12 February 1980, he and five other detainees were taken to Montevideo, "in the silence that is characteristic of any departure from prison". At the moment he and his friend Luis Bracony were brought into the courtroom of the Military Supreme Tribunal, he learned that there was going to be a trial. He states that his relatives were not allowed to attend the trial. He recalls that the military judge, Mr. Silva Ledesma, said that the charge of attempt to upset the Constitution could not be confirmed, that therefore they had served their sentences and that they would be expelled from the country for having exposed Uruguay to a risk of war against another State. The author further states that the following day, on 13 February 1980, he was suddenly taken to a punishment cell in "La Isla", but that around 7 p.m. he was driven to the Montevideo Police Headquarters. On 15 February 1980, he was taken to the airport, where he boarded an airplane bound for France.

1.10. In the second part of his communication (under cover of letters dated 9 and 15 July 1981), the author gives a detailed description of prison conditions at Libertad. He states, in particular, that five floors of the prison are divided into very small cells; that two detainees share each cell (except on the second floor, which is reserved for detainees held in solitary confinement); that these cells are so small that "when one detainee walks, the other has to sit"; that detainees are usually kept in their cells 23 hours per day, that they are not allowed to lie on their beds from 6.30 a.m. to 9 p.m. or to do any exercise and that they are allowed to go into the open air for only one hour per day, provided that they have not been punished. He further states that from time to time, detainees are allowed by the prison authorities to carry out some activities such as painting walls, cleaning, cooking, distributing food or books in the cells, etc. He maintains that most detainees wish to carry out such tasks despite the fact that they are continuously subjected to harassment by the prison guards. The author adds that, when detainees are carrying out these activities, they have to be very careful because they work in precarious safety conditions and accidents occur frequently. He gives the names of five detainees who suffered accidents while doing some work.

1.11. The author states that the reasons for punishment at Libertad prison are endless (for example, for calling a detainee by his name instead of using the number assigned to each detainee when entering at Libertad prison; for walking without having their hands behind their back; for looking directly at a prison guard; for trying to share food or clothes with a detainee; for drawing, for writing music, for not executing an order quickly enough, for asking for too much, etc.). He recalls that he was punished over and over again for saying "hello" with a smile to other detainees while distributing their breakfast. Punishments may consist of withholding permission to go into the open air for one or several weeks, or a ban on receiving correspondence or the suppression of visits. He further states that punishments could be entirely arbitrary. He mentions that once he had to remain in solitary confinement in a punishment cell for one month because "a group of European friends" had come to see him and the prison authorities had decided not to allow the visit. When the author had completed his 30 days' punishment, he was forced to sign a paper stating that the reason for his punishment was that he had tried to assault a guard.

1.12. The author maintains that in fact a policy of arbitrary sanctions is continually applied for the purpose of generating moments of hope followed by frustration. He alleges that the whole system at Libertad is aimed at destroying the detainees' physical and psychological balance, that detainees are continuously kept in a state of anxiety, uncertainty and tension and that they are not allowed to express any feeling of friendship or solidarity among themselves. He claims that many detainees are psychologically ill and that the present psychologist, Mr. Britos, is largely responsible for the policy of repression prevailing at Libertad prison. "They are professionals, like Mr. Britos, who use their skills in order to render thousands of individuals in this small country which is Uruguay unfit for reintegration into normal society". The author further claims that the state of anxiety prevailing among detainees is largely due to shooting exercises by the prison guards and alarm warnings. Up to three times a day during alarms, detainees have to lie down on the floor wherever they are, face downward, hands over their heads and any movement could mean being shot by a prison guard. Shooting exercises are carried out in the prison yard and the dummy targets wear exactly the same uniforms as the prisoners. The author also maintains that even Sunday masses were discontinued in 1975 for being moments shared by most detainees and he expresses the hope that, in the future, detainees will be allowed to go to mass and to receive spiritual assistance.

1.13. The author states that the detainees' correspondence is subjected to severe censorship, that they cannot write to their lawyers or to international organizations and that prison officials who act as "censors" arbitrarily delete sentences and even refuse to dispatch letters. He claims that during his entire detention he was given only 35 letters, though he certainly received hundreds. During a seven-month period he was given none. He states that Lieutenant Rodríguez and Lieutenant Curruchaga asked him to sign for the receipt of letters which he never saw.

1.14. The author mentions that detainees are in principle allowed two monthly visits of 45 minutes each. All visitors (including women) are thoroughly searched before the visits. During these visits, the prisoner and the visitors are in different rooms and they may communicate through a window; all conversation is taped, no reference can be made to current news, and at any moment prison guards may arbitrarily put an end to any visit. A feeling of tension is, therefore, always present.

1.15. The author emphasizes that, thanks to the international solidarity campaign organized of his behalf, he was a privileged detainee. In particular, he had the privilege of receiving some "special visits". For instance, in February 1979, he was suddenly taken to the third floor of the prison and pushed into a very nice cell with radio, tape-recorder and pictures of women on the walls. A few minutes later, the Deputy Governor of Libertad prison, Colonel H. Nieves, came in with a French lawyer, François Chéron. The author did not pay "too much attention" to the presence of prison officials while talking with Maître Chéron. He was afterwards punished for seven months (no mail, continuous harassment and searches, no recreation, etc.).

1.16. In the author's opinion, the prisoners suffer most from the total impossibility of being tried or defended "normally". He further alleges that individual freedoms and guarantees have been disregarded in Uruguay since 1973, the lawyers have been persecuted and imprisoned for defending persons considered as "anti-social" elements and that a new terminology has been created in judicial practice, mentioning as an example the concept of "moral conviction". He recalls in this connection an incident when one of his torturers said to him: "We know that you are not a guerrilla; even if you do not want to sign a declaration that you are one, you will remain imprisoned for several years because we have the 'moral conviction' that you are guilty of thinking as you think."

1.17. The author does not specify which provisions of the Covenant have allegedly been violated in his case.

2. By its decision of 24 October 1980, the Human Rights Committee decided that, when the second part of the author's communication had been received, the communication would be transmitted 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.

3. By a note dated 29 April 1981, the State party objected to the admissibility of the communication for the following reasons:

> The communication does not fulfil even the basic conditions for presentation to the Committee; in article 1 of the Optional Protocol, the competence of the Committee to receive and consider communications from individuals is recognized, provided that the communications fulfil the basic requirements of originating from individuals "subject to [the] jurisdiction [of a State Party] who claim to be etc. . . .". In this connection it should be stated that, in the case referred to in this communication, the situation envisaged in the abovementioned article does not arise. Once he had completed his sentence, Mr. Estrella was released and on 15 February 1980 left Uruguay for France, where he is now living; he is, therefore, outside the jurisdiction of the Uruguayan State. For these reasons, we consider that it is inappropriate for the Committee to deal with communications of this nature which run counter to its terms of reference and violate provisions of international instruments. The Government of Uruguay will accordingly make no answer concerning the substance of the matter on the understanding that Mr. Estrella does not have the right of recourse to the mechanisms provided for in the International Covenant and the Optional Protocol.

By a further note dated 28 September 1981 the State party reiterated the position stated in its note of 29 April 1981.

4.1. When examining the question of admissibility of the communication, the Human Rights Committee observed that the author referred to events which allegedly took place in Uruguay from December 1977 to February 1980; that is, under the jurisdiction of Uruguay, and that the State party itself had admitted that Miguel Angel Estrella completed his sentence in Uruguay. The Committee recalled that by virtue of article 2 (1) of the Covenant, each State party undertakes to respect and to ensure to "all individuals within its territory and subject to its jurisdiction" the rights recognized in the Covenant. Article 1 of the Optional Protocol was clearly intended to apply to individuals subject to the jurisdiction of the State party concerned at the time of the alleged violation of the Covenant, irrespective of their nationality. This was manifestly the

object and purpose of article 1. The Human Rights Committee further observed that the present communication fulfils the basic requirement of originating from an individual who claims that some of his rights have been violated by a State party to the Covenant and to the Optional Protocol and that, therefore, the alleged victim has the right of recourse to the mechanisms provided for in the International Covenant and the Optional Protocol.

4.2. With regard to article 5 (2) (*a*) of the Optional Protocol, the Human Rights Committee had the occasion in another case under the Optional Protocol, to ascertain that a case concerning Miguel Angel Estrella had been submitted to the Inter-American Commission on Human Rights (IACHR) as case No. 2570. By a further letter dated 8 November 1980, in reply to a request for clarification in this regard, Miguel Angel Estrella stated that he had no prior knowledge of case No. 2570 before the IACHR and, in spite of extensive inquiries on his part, he had been unable to find out who may have submitted that case to IACHR. He stated that he had, in this connection, contacted friends, relations and colleagues in several countries where committees had been formed with the aim of pleading for his release, but none of them could shed light on the matter. By letters dated 18 August and 18 November 1981, the secretariat of IACHR clarified that IACHR case No. 2570 concerning Miguel Angel Estrella was based on a complaint submitted by an unrelated third party on 21 December 1977 and that the case was still under consideration by IACHR.

4.3. The Committee observed that the provision of article 5 (2) (*a*) of the Optional Protocol, which lays down that the Committee cannot consider a communication under the Optional Protocol if the same matter is being examined under another procedure of international investigation or settlement, cannot be so interpreted as to imply that an unrelated third party, acting without the knowledge and consent of the alleged victim, can preclude the latter from having access to the Human Rights Committee. It therefore concluded that it was not prevented from considering the communication submitted to it by the alleged victim himself, by reason of a submission by an unrelated third party to IACHR. Such a submission did not constitute "the same matter", within the meaning of article 5 (2) (*a*).

4.4. With regard to article 5 (2) (*b*), on the basis of the information before it, the Committee was unable to conclude that in the circumstances of this case, there were effective remedies available to the alleged victim which he had failed to exhaust.

4.5. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (*a*) or 5 (2) (*b*) of the Optional Protocol.

4.6. The Committee noted that the facts and allegations, as submitted by the author, appeared to raise issues under various provisions of the Covenant, including articles 7, 9, 10 and 14, the determination of which depended on an examination of the merits of the case.

5. On 25 March 1982, the Human Rights Committee therefore decided:

(*a*) That the communication was admissible;

(*b*) That, in accordance with article 4 (2) of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(*c*) That the State party should be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to perform its responsibilities, it required specific responses to the allegations which had been made by the author of the communication and the State party's explanations of the actions taken by it. The State party was requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration.

6. By a note dated 27 August 1982, the State party reiterated the position stated in its notes dated 29 April and 28 September 1981. No further explanations were received from the State party pursuant to the Committee's decision of 25 March 1982. The Committee is seriously concerned over the State party's failure to fulfil its obligations under article 4 (2) of the Optional Protocol.

7. In his comments, dated 1 October 1982, the author states that the events that he had reported: "job discrimination, persecution, kidnapping, torture, detention, irregular legal procedures", took place when he was residing legally in Uruguay and he was therefore subject to that country's jurisdiction.

8.1. 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. The Committee bases its views on the following facts, which, in the absence of any substantive clarifications from the State party, are unrefuted.

8.2. Miguel Angel Estrella decided in 1977 to work in Montevideo, Uruguay, and he lived there with his two sons and three Argentine friends, Raquel Odasso, Luisana Olivera and Luis Bracony, in a house that he had rented.

8.3. On 15 December 1977, at a time when the author was about to leave Uruguay, he and his friend, Luis Bracony, were kidnapped at his home in Montevideo by some 15 strongly armed individuals in civilian clothes. They were brought blindfolded to a place where he recognized the voices of Raquel Odasso and Luisana Olivera. There the author was subjected to severe physical and psychological torture, including the threat that the author's hands would be cut off by an electric saw, in an effort to force him to admit subversive activities. This ill-treatment had lasting effects, particularly to his arms and hands.

8.4. On 23 December 1977, the author was transferred to a military barracks, probably of Batallón 13, where he continued to be subjected to ill-treatment. In particular, he was threatened with death and he was denied medical attention. On 20 January 1978 he was taken to Libertad prison. He spent the first 10 days in solitary confinement in a cell which was a kind of cage

in a section known as "La Isla". He remained imprisoned at Libertad until 13 February 1980.

8.5. At Libertad prison the author was subjected to continued ill-treatment and to arbitrary punishments including 30 days in solitary confinement in a punishment cell and seven months without mail or recreation and subjected to harassment and searches. His correspondence was subjected to severe censorship (see para. 1.13 above).

8.6. The author was brought before a military court on three occasions (23 and 26 December 1977 and 15 March 1978). On 23 December 1977, he recognized several of the individuals who had abducted him and who took part in the torture. That day also, he was given the possibility to choose an officially appointed lawyer, either Mr. Severino Barbé or Colonel Alfredo Ramírez. He opted for Mr. Barbé whom he saw that day and on 31 May 1978, 14 November 1978 and 12 February 1980. On 29 August 1979, the author was told by an official at Libertad prison that he had been sentenced to four and a half years of imprisonment at a trial that was held *in camera* on grounds of "conspiracy to subvert, action to upset the Constitution and criminal preparations". On 12 February 1980, he was brought before the Military Supreme Tribunal where he was informed by the military judge that the charge of attempt to upset the Constitution could not be confirmed, that he had served his sentence and that he would be expelled from Uruguay. On 15 February 1980, Miguel Angel Estrella was taken to the airport and he left Uruguay.

9.1. On the basis of the detailed information submitted by the author (see in particular paras. 1.10 to 1.16 above), the Committee is in a position to conclude that the conditions of imprisonment to which Miguel Angel Estrella was subjected at Libertad prison were inhuman. In this connection, the Committee recalls its consideration of other communications (see for instance its views on 66/1980[4] adopted at its seventeenth session) which confirm the existence of a practice of inhuman treatment at Libertad.

9.2. With regard to the censorship of Miguel Angel Estrella's correspondence, the Committee accepts that it is normal for prison authorities to exercise measures of control and censorship over prisoners' correspondence. Nevertheless, article 17 of the Covenant provides that "no one shall be subjected to arbitrary or unlawful interference with his correspondence". This requires that any such measures of control or censorship shall be subject to satisfactory legal safeguards against arbitrary application (see para. 21 of the Committee's views of 29 October 1981 on communication No. 63/1979[5]). Furthermore, the degree of restriction must be consistent with the standard of humane treatment of detained persons required by article 10 (1) of the Covenant. In particular, prisoners should be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, by correspondence as well as by receiving visits. On the basis of the information before it, the Committee finds that Miguel Angel Estrella's correspondence was censored and restricted at Libertad prison to an extent which the State party has not justified as compatible with article 17 read in conjunction with article 10 (1) of the Covenant.

10. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts, as found by the Committee, disclose violations of the International Covenant on Civil and Political Rights, in particular of:

Article 7, because Miguel Angel Estrella was subjected to torture during the first days of his detention (15-23 December 1977);

Article 10 (1), because he was detained under inhuman prison conditions;

Article 14 (1), because he was tried without a public hearing and no reason has been given by the State party to justify this in accordance with the Covenant;

Article 14 (3) (*b*) and (*d*), because he was unable to have the assistance of counsel of his own choosing to represent him and to prepare and present his defence;

Article 14 (3) (*g*), because of the attempts made to compel him to testify against himself and to confess guilt;

Article 17 read in conjunction with article 10 (1), because of the extent to which his correspondence was censored and restricted at Libertad prison.

11. The Committee, accordingly, is of the opinion that the State party is under an obligation to provide the victim with effective remedies, including compensation, for the violations he has suffered and to take steps to ensure that similar violations do not occur in the future.

[4] See above, p. 90.

[5] *Selected Decisions . . .*, vol. 1, pp. 101-105.

Communication No. 75/1980

Submitted by: Duilio Fanali in July 1980
Alleged victim: The author
State party: Italy
Date of adoption of views: 31 March 1983 (eighteenth session)

Subject matter: Denial of review of criminal sentence to Italian citizen

Procedural issues: Reservation by State party—Examination of "same matter" by European Commission—Reservation by State party—Competence of HRC

Substantive issues: Effective remedy—Right to appeal —Lex specialis—*Review of constitutionality of domestic laws—Review of conviction and sentence*

Articles of the Covenant: 2 (3) and 14 (5)
Article of the Optional Protocol: 5 (2) (a)

1. The author of the communication (initial letter dated July 1980) is Duilio Fanali, an Italian citizen residing in Rome, Italy. He submits the communication on his own behalf.

2. The author alleges that he is a victim of a breach by the Government of Italy of article 14 (5) of the International Covenant on Civil and Political Rights and requests the Human Rights Committee to examine his case.

3.1. The author, a retired air force general, states that having been sentenced by the Constitutional Court on 1 March 1979 to one year and nine months' imprisonment and to a fine of 200,000 lire, conditionally suspended, on the charge of corruption through actions contrary to the duties of office, he was denied the right to appeal against the allegedly unsubstantiated charges and related conviction. The criminal proceedings had taken place before the Constitutional Court, as part of a larger criminal suit involving also members of the Government for whom the Constitutional Court was the only competent tribunal. While the Italian Constitution provides that no appeal is allowed against decisions of the Constitutional Court in as far as they concern the President of the Republic and the Ministers, the "ordinary" law No. 20 of 25 January 1962 extends the above constitutional provisions of "no appeal" to "other individuals" sentenced by the Constitutional Court for crimes related to those committed by the President of the Republic or Ministers. The author claims that because No. 20 is not a constitutional law it should be rescinded and therefore is not applicable in his case.

3.2. Mr. Fanali submits that the Italian reservation with regard to the applicability of article 14 (5) of the International Covenant on Civil and Political Rights could not be regarded as valid because of defective Italian domestic procedures used in promulgating it. He further argues that, even if valid, the reservation did not apply in his case because it excludes Italy's obligation under the Covenant to grant the right to appeal only as far as the President of the Republic and Ministers are concerned.

3.3. The author states that the preliminary investigations and trial proceedings related to several politicians and some "laymen", such as the author himself, and were based on charges of corruption and abuse of public office in connection with the purchase by the Italian Government of military planes of the type Hercules C130 from the United States of America company, Lockheed.

3.4. The author claims that during the preliminary investigations and trial proceedings due process was not always observed. Most of these events took place before 15 December 1978, the date of entry into force for Italy of the Covenant and the Optional Protocol. However, the judgement by the Constitutional Court which the author claims has caused him severe material and moral damage and from which he had, contrary to article 14 (5) of the Covenant, no right to appeal, was rendered on 1 March 1979, as mentioned above.

3.5. The author finally states that the matter has not been submitted under any other procedure of international investigation or settlement.

4. By its decision of 24 October 1980, the Human Rights Committee transmitted the communication under rule 91 of its provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication.

5.1. In its submission dated 12 January 1981, the State party objected to the admissibility of the communication invoking (*a*) the specific reservation made by the Italian Government upon the deposit of the instrument of ratification of the Optional Protocol to the International Covenant on Civil and Political Rights, with respect to article 5 (2), that the Committee . . . "shall not consider any communication from an individual unless it has ascertained that the same matter is not being and has not been examined under another procedure of international investigation or settlement" and (*b*) the Italian declaration made upon deposit of the instrument of ratification of the Covenant on Civil and Political Rights with regard to article 14 (5) of the Covenant intended to protect the legality of the conduct, "at one level only, of proceedings before the Constitutional Court".

5.2. The State party submitted with regard to the condition stipulated in article 5 (2) (*a*) of the Optional Protocol, that verification of the statement of the author that he has not already submitted the "matter" to another international tribunal should not be restricted to the affirmation of this fact, "but must rather have the objective of ascertaining that the *'same matter'*, as prescribed by article 5, paragraph 2, *is not already being examined by another international body*

to which it might have been submitted by an *individual other than* the author of the communication addressed to this Committee". The State party then concluded that . . . "*the determining element is the 'matter'* submitted to the international body and *not the individual author of the communication or of the application* . . .".

5.3. The State party, then referring to the specific case of Duilio Fanali before the Human Rights Committee, pointed out that the former co-defendants of Mr. Fanali in the proceedings before the Constitutional Court had submitted "the same matter" to the European Commission of Human Rights, concerning several of the same alleged violations related to the procedure, competence and judgement of the Constitutional Court that have been put forward by Mr. Fanali.

5.4. In its note the Italian Government then referred to the Italian declaration with regard to article 14 (5) which . . . "clearly precludes the applicability of the principle of review by a higher court, contained in article 14, paragraph 5, to the above-mentioned proceedings, which took place before the Constitutional Court in accordance with the Italian legislation in force".

6.1. On 13 March 1981, the author of the communication forwarded his comments in reply to the State party's submission of 12 January 1981. He objected to the State party's contention of inadmissibility made with respect to the provisions of article 5 (2) (*a*) of the Optional Protocol and with regard to article 14 (5) of the Covenant. With regard to the first the author contested, *inter alia*, the argument of the Italian Government "that other individuals have filed an appeal before another international tribunal in connection with the same sentence and that this (cases-pendency) constitutes the preclusion contemplated by article 5 (2) of the Protocol". He argued that "cases-pendency" only exists when two or more distinct actions have been brought by the same individual before different tribunals.

6.2. Referring to the second contention of inadmissibility by the Italian Government on the grounds of the Italian declaration made with regard to the applicability of article 14 (5) of the Covenant to Italy, the author pointed out that the reservation regarding article 14, paragraph 5, of the Covenant did not apply to his status as a "layman" and "non-politician". He drew the attention of the Committee to the full text of the said reservation which reads as follows: "Article 14, paragraph 5, shall be without prejudice to the application of existing Italian provisions which, in accordance with the Constitution of the Italian Republic, govern the conduct, at one level only, of proceedings instituted before the Constitutional Court in respect of charges brought against the President of the Republic and its Ministers".

6.3. The author further argued that his right to appeal was not only confirmed by the inapplicability of the Italian reservation, but also by the provisions of article 2 (3) of the Covenant. He therefore could not be deprived of the right to appeal provided for in article 2 (3) of the Covenant even if the Italian reservation to article 14 (5) were applicable. The author stressed that no reservation was made by Italy with regard to article 2 (3) of the Covenant.

7.1. Having examined the information before it, the Committee concluded that it could not at that stage reject the communication as inadmissible on the basis of the Italian reservation to article 14 (5) of the Covenant, since the text of the reservation only referred to the President of the Republic and the Ministers and that, therefore, the communication was not, within the meaning of article 3 of the Optional Protocol, incompatible with the provisions of the Covenant read in conjunction with this reservation.

7.2. With regard to article 5 (2) (*a*) of the Optional Protocol, the Committee did not agree with the State party's contention that "the same matter" had been brought before the European Commission on Human Rights since other individuals had brought their own cases before that body concerning claims which appeared to arise from the same incident. The Committee held that the concept of "the same matter" within the meaning of article 5 (2) (*a*) of the Optional Protocol had to be understood as including the same claim concerning the same individual, submitted by him or someone else who has the standing to act on his behalf before the other international body. Since the State party itself recognized that the author of the present communication had not submitted his specific case to the European Commission of Human Rights, the Human Rights Committee concluded that the communication was not inadmissible under article 5 (2) (*a*) of the Optional Protocol.

8. On 28 July 1981 the Human Rights Committee therefore decided that the communication was admissible.

9.1. In its submission under article 4 (2) of the Optional Protocol, dated 15 February 1982, the State party reiterates its earlier contention that the communication is inadmissible, citing in support the decision of the European Commission of Human Rights in the "Lockheed Affair", on 18 December 1980, declaring inadmissible the case against Italy brought by Messrs. Crociani, Lefebvre, Palmiotti and Tanassi (former co-defendants of Mr. Fanali before the Constitutional Court).

9.2. The State party further points out that the purpose of Italy's reservation to article 14 (5) of the International Covenant on Civil and Political Rights was to safeguard existing provisions in Italian law such as article 49 of the Code of Criminal Procedure and law No. 20 of 25 June 1962 which allow for the conduct of proceedings before the Constitutional Court, at one level only. Article 49 of the Code of Criminal Procedure provides for a common trial for persons accused of the same crime; law No. 20 of 25 June 1962 extends in specific cases the competence of the Constitutional Court to persons other than the President of the Republic and Ministers.

9.3. Finally, the State party refutes the author's contention that law No. 20 of 25 June 1962 is unconstitutional, citing a judgement of the Constitutional Court on 2 July 1977 specifically upholding the constitutionality of the said law.

10.1. In his response dated 29 June 1982, commenting on the State party's submission under article 4 (2) of the Optional Protocol, Mr. Fanali maintains, *inter alia*, that the "one level only" proceedings before the Constitutional Court in the "Lockheed Affair" are widely recognized as having been unjust and that there are several draft bills and reports before the houses of the Italian Parliament proposing changes in the present juridical régime.

10.2. The author also rejects the interpretation placed by the State party upon its reservation to article 14 (5) of the International Covenant, holding it to be "extensive" and thus contrary to the generally accepted legal principle of "restrictive" interpretation of reservations.

11.1. The Human Rights Committee notes the decision of the European Commission on Human Rights of 18 December 1980 declaring inadmissible the cases of Messrs. Crociani, Lefebvre, Palmiotti and Tanassi. These applications concerned different allegations. Furthermore, the right of appeal is not granted under the European Convention of Human Rights. For the reasons stated in paragraph 7.2 above, the Human Rights Committee reaffirms its earlier decision that the communication brought by Duilio Fanali was admissible. It therefore has to examine the merits of the dispute which relates mainly to the effect of the Italian reservation.

11.2. As regards the merits of the present case, the Committee has examined the communication in the light of all information made available to it by the parties as provided for in article 5 (1) of the Optional Protocol.

11.3. The author of the communication alleges that the Italian juridical system which prevented him from appealing the judgement rendered by the Constitutional Court on 1 March 1979, is in violation of the provisions of article 14 (5) of the International Covenant on Civil and Political Rights. Article 14 (5) of the Covenant reads as follows:

> Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

11.4. The State party upon ratification of the Covenant has made a reservation with regard to article 14 (5) which it has now invoked. The Committee, therefore, has to decide whether this reservation applies to the present case. The Italian reservation reads as follows:

> Article 14, paragraph 5, shall be without prejudice to the application of existing Italian provisions which, in accordance with the Constitution of the Italian Republic, govern the conduct, at one level only, of proceedings instituted before the Constitutional Court in respect of charges brought against the President of the Republic and its Ministers.

11.5. The author contests the applicability of the reservation in his case. He objects to its validity and furthermore argues, *inter alia*, that he cannot be classified under either of the two categories referred to in the reservation.

11.6. In the Committee's view, there is no doubt about the international validity of the reservation, despite the alleged irregularity at the domestic level. On the other hand, its applicability to the present case depends on the wording of the reservation in its context, where regard must be had to its object and purpose. Since the two parties read it differently, it is for the Committee to decide this dispute.

11.7. The State party, in its submission under article 4 (2) of the Optional Protocol of 15 February 1982, asserts that the reservation is applicable in the present case, adducing the following grounds: The reference in the reservation to the "one-level only" proceedings before the Constitutional Court with respect to charges brought against the President of the Republic and the Ministers was a reflection of the provisions of article 134 of the Italian Constitution. Article 49 of the Code of Criminal Procedure established the rule of a common trial for persons accused of the same crime. Law No. 20 of 25 June 1962 provided for the application of this rule to the special proceedings instituted before the Constitutional Court in accordance with article 134 of the Constitution, thereby extending the proceedings to persons other than the President of the Republic and its Ministers, if they are charged with the same offences. The constitutionality of this law was upheld by a decision of the Constitutional Court of 2 July 1977.

11.8. The Committee observes that it is outside its competence to pronounce itself on the constitutionality of domestic law. Furthermore, the Committee notes that the reservation only partly excludes article 14 (5) from the obligations undertaken by Italy. The question is whether it is applicable only to the two categories mentioned, and not to the "layman", Mr. Fanali. A close reading of the text shows that a narrow construction of the reservation would be contrary both to its wording and its purpose. The reservation refers not only to the relevant rules of the Constitution itself, but to "existing Italian provisions . . . in accordance with the Constitution", thus clearly extending its scope to the implementing laws enacted by the ordinary legislator. As shown by the Government in its submission, it was also the purpose of the reservation to exclude proceedings before the Constitutional Court instituted in connection with criminal charges against the President of the Republic and its Ministers from Italy's acceptance of article 14 (5). Even when proceedings are brought against "laymen", as they were in the present case, they must therefore be described in the terms of the reservation as "proceedings before the Constitutional Court in respect of charges brought against . . . Ministers". This follows from the connection between the cases: the charges against the Ministers were the cause and the *conditio sine qua non* for the other charges and for instituting proceedings against all defendants. It must follow that all of the proceedings were in this sense brought "in respect of charges" against Ministers, because they related to the same matter, which under Italian law only, that Court was competent to consider. On the background of the applicable Italian law this is not only a possible reading, but in the Committee's view the correct reading of the reservation.

12. For these reasons the Human Rights Committee concludes that Italy's reservation regarding article 14 (5) of the Covenant is applicable in the specific circumstances of the case.

13. The author also argues, however, that his right to appeal is confirmed in article 2 (3) of the Covenant to which Italy has made no reservation. The Committee is

unable to share this view which seems to overlook the nature of the provisions concerned. It is true that article 2 (3) provides generally that persons whose rights and freedoms, as recognized in the Covenant, are violated "shall have an effective remedy". But this general right to a remedy is an accessory one, and cannot be invoked when the purported right to which it is linked is excluded by a reservation, as in the present case. Even had this not been so, the purported right, in the case of article 14 (5), consists itself of a remedy (appeal). Thus it is a form of *lex specialis* besides which it would have no meaning to apply the general right in article 2 (3).

14. Accordingly, 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 present case does not disclose any violation of the Covenant.

Communication No. 77/1980

Submitted by: Samuel Lichtensztejn on 30 September 1980
Alleged victim: The author
State party: Uruguay
Date of adoption of views: 31 March 1983 (eighteenth session)

Subject matter: Denial of passport to Uruguayan citizen

Procedural issues: Competence of HCR—Jurisdiction of State—Sufficiency of State party's reply under article 4 (2)—Failure by State party to make submission on merits

Substantive issues: Freedom of movement—Freedom of expression—Passport

Articles of the Covenant: 2 (1) and (3), 12 (2) and (3) and 19

Articles of the Optional Protocol: 1 and 4 (2)

1.1. The author of the communication (initial letter dated 30 September 1980 and further letter of 6 July 1981) is Samuel Lichtensztejn, a Uruguayan citizen at present residing in Mexico. The author, former director and Dean of the Faculty of Economic Sciences and Administration and Rector of the University of the Republic of Uruguay, submitted the communication on his own behalf, alleging that he is a victim of a breach by Uruguay of articles 12 and 19 of the International Covenant on Civil and Political Rights. He stressed the fact that, with regard to his specific complaint, he comes within the jurisdiction of Uruguay.

1.2. The author claims that a valid Uruguayan passport has been denied him by the Uruguayan authorities without any explanation, allegedly to punish him for the opinions which he holds and which he has expressed concerning human rights violations in Uruguay, and to prevent him from continuing to exercise his freedom of expression.

2.1. The author states that, in the years before he left Uruguay, he was closely connected with university affairs. From 1970 to 1971, he was director of the Institute of Economics in the Faculty of Economic Sciences and Administration. For the greater part of 1972, he was Dean of the Faculty, and in October of that year, he was elected Rector of the University of the Republic of Uruguay. He was Rector until October 1973, when the Government interfered with the University and military forces took over its premises. He alleges that because he was restricted in the exercise of his rights, both as Rector and as a private citizen, he left the country in January 1974. He has been living in Mexico since February 1974.

2.2. The author states that while in Mexico, he took an active part in campaigns for the respect of human rights in Uruguay through national and international organizations, and that he denounced the alleged violation in Uruguay of university autonomy and the persecution of professors and students for ideological reasons. He assumes that his spoken and written opinions on these matters have been the cause of the Uruguayan Government's decision to refuse him a passport.

2.3. He describes the facts of his case as follows:

(*a*) On 23 October 1968, I was granted passport No. 112-641 by the Uruguayan Ministry of Foreign Relations. On 27 December 1973, such passport was renewed by the Montevideo Police Headquarters for five years, finally expiring on 23 October 1978. In order to obtain a new passport, I went, on 16 October 1978, to the Consular Section of the Uruguayan Embassy in Mexico, and I completed the appropriate form of application. On 28 November 1978 I asked, in writing, for information on my application. On the same date, the person in charge of the Consular Section of the Uruguayan Embassy in Mexico, Mr. Juan D. Oddone, replied, in writing, that by "express order from the Chancellery, the granting of the passport was not authorized". On 12 December 1978, through the Uruguayan Embassy in Mexico, I sent a letter to the Uruguayan Minister of the Interior, General Linares Brum, asking him to reconsider the refusal to grant me a passport. Finally, on 30 March 1979, the Consular Section of the Uruguayan Embassy in Mexico informed me, in writing, that I "should rely on the refusal".

(*b*) I asked Mr. Oddone how I could appeal against these decisions, but I was told that there was no other way to do so. No domestic remedy is available for this injury. It must be pointed out that, the Uruguayan Government has, since 1973, practised legislation by decree immune from constitutional review and has arrested Uruguayan lawyers who bring cases against the Government. The inability of the courts in some cases to enforce their orders against other departments of the Government, and the use of the doctrine of State security to remove questions from the competence of these courts or to allow the introduction of evidence, which is not disclosed to the opposing party, lead inevitably to the conclusion that any attempt to resolve this problem within the domestic judicial system would be futile and a waste of time.

(*c*) On 15 December 1978, I received an identity and travel document from the Government of Mexico. Therefore, inasmuch as Uruguay's denial of a passport constitutes a denial of my rights under

article 12 (2), the violation may be considered to have ended on that date. However, the violation did occur after the Covenant came into effect and there is no requirement that communications under the Optional Protocol set forth continuing violations. It must be noted that the violation of my right to be free to leave any country did not cease as a result of any change in position on the part of Uruguay, but as the result of a humanitarian act on the part of Mexico.

2.4. The author further maintains that the punitive effect of the denial of a passport did not cease with the acquisition of a substitute document from the Government of Mexico, but constitutes a continuing violation of article 19 of the Covenant.

2.5. Finally, the author states that he has not submitted the same matter to another procedure of international investigation or settlement.

3. By its decision of 24 October 1980, 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.

4.1. By a note dated 5 June 1981, the State party objected to the competence of the Human Rights Committee to consider the communication, stating that "the communication does not fulfil even the basic requirements for submission to the Committee", . . . as "article 1 of the Optional Protocol only recognizes the competence of the Committee to receive and consider communications from individuals provided that these individuals fulfil the minimum requirement of being 'subject to its [the State Party's] jurisdiction' and this condition is not met by the present communication because Mr. Samuel Lichtensztejn was outside the jurisdiction of the Uruguayan State when his petition was submitted." The State party concludes that "it is therefore inadmissible that the Committee should deal with communications of this kind, which run counter to its terms of reference and violate provisions of international instruments".

4.2. However, the State party, while stressing its formal rejection of the admissibility of the communication before the Committee, then replies to the communication's content "strictly with a view to maintaining its continuing co-operation with the Committee in the promotion and defence of human rights . . ." and submits that the allegations of violations of articles 12 and 19 of the Covenant by Uruguay are totally unfounded. In substantiation of this submission, the State party draws the Committee's attention to the author's actual enjoyment of the right to freedom of movement and to his activities abroad, mentioning as an example his appearance on Cuban television on 12 May 1979, which in the State party's opinion negates the author's argument that he is prevented from travelling freely abroad. Reference is also made by the State party to the fact that the author freely left his country, Uruguay, through "normal channels" in January 1974, and that he has the constitutionally guaranteed right, as has every Uruguayan citizen, to return to his country, with or without a passport. It is further pointed out in the State party's submission that the charges made by the author of the communication, namely, that he has been denied the right to express his opinions while in Uruguay and that the Government of Uruguay has therefore violated article 19 of the Covenant are based "exclusively on strictly personal judgements" and that . . . "not the slightest evidence to prove and justify (the author's) allegations . . ." are provided in the text of the communication.

5.1. On 6 July 1981, the author of the communication forwarded his comments in reply to the State party's submission of 5 June 1981.

5.2. He rejects the State party's formal contention that the communication is incompatible with and therefore inadmissible under the provisions of article 1 of the Optional Protocol because he did not come within its jurisdiction in the matter concerned. He argues that the views expressed by the Government of Uruguay are not only in contradiction with international law and common international practice, but also in contradiction with existing Uruguayan law. On this last point the author refers (*a*) to Decree No. 614/967 of 12 September 1967, articles 1 and 6 (*b*), which provide that every citizen by birth has the right to a passport and that all the formalities required to obtain a passport can be completed outside Uruguay, and (*b*) to Decree No. 363/77 of 28 June 1977, article 1, which provides for the issue and renewal of passports for persons who "have permanent residence abroad". The author points out that the foregoing legal provisions make it clear that jurisdiction of the Uruguayan State, in the matter of issuing passports, does extend beyond its territory through its accredited consular offices abroad. He adds in this connection that it is the status of citizenship, and not that of residence, that is identified by a passport.

5.3. The author further states that he has never, through action or omission, raised any doubts with the Uruguayan authorities about his maintenance of Uruguayan citizenship. He furnishes copies of documents as proof that he fulfils whatever obligations concern him as a Uruguayan citizen abroad: one document, dated 30 November 1980, stating that he presented himself at the Uruguayan Consulate in Mexico to register legally his residence in Mexico, and the other document, dated 2 December 1980, to put on record his legitimate reason for not participating in the vote concerning the referendum held by the Government of Uruguay.

5.4. To complete his arguments, the author refers to the case of Guillermo Waksman (before the Human Rights Committee under case No. 31/1978[1]) which, similar to his own, concerned the renewal of a passport of a Uruguayan citizen living abroad and which, after being declared admissible by the Human Rights Committee, led to the issuance of a new passport to Mr. Waksman by the appropriate Uruguayan consular authorities. The author points out that the foregoing constitutes a conclusive precedent that, in a situation similar to his own, it has already been recognized by the Uruguayan authorities that Uruguayan citizens abroad are under the jurisdiction of their State as far as passports are concerned.

5.5. In his response to the State party's submission regarding the contents of his communication, the author does not refute the State party's contention that he had been in a position to travel abroad on a number

[1] *Selected Decisions . . .*, vol. 1, p. 9.

of occasions. He asserts, however, that this is due only to the issuance by the Mexican authorities, for humanitarian reasons, of an identity and travel document which cannot be regarded as an adequate substitute for a Uruguayan passport since it is subject to conditions and requirements which by no means remove the difficulties caused by the lack of a Uruguayan passport. He points out, for instance, that the Mexican document, which is issued to him as a foreigner at the discretion of the Mexican authorities, has only a short period of validity with no guarantee of renewal on its expiry, and that he has had difficulties in obtaining a visa for some other countries on the basis of it.

5.6. The author adds that the example of his appearance on Cuban television quoted by the State party in its submission in support of its assertion that he does undertake activities abroad and is in a position to travel freely, is not correct as he has never travelled to Cuba, his Mexican travel documents being available as a proof that he was in Mexico on the date indicated by the State party in its submission.

5.7. On commenting on the State party's assertion that he freely and through normal channels left his country in 1974, the author claims that although he left through normal channels he did not leave Uruguay "freely", but that he was driven to do so by the lack of guarantees in Uruguay for his rights as a citizen and Rector of the University and, by way of illustration, he refers to his detention in Uruguay for two months, without trial, and to the refusal of the Uruguayan authorities to re-instate him as Rector or Professor at the University and to allow him to publish articles in the press of his country.

5.8. The author further dismisses as irrelevant to his case the State party's contention that every Uruguayan citizen has the constitutional right to return to his country, because this does not address the point at issue in his communication, namely the right to enter and leave any country, including his own, with a valid Uruguayan passport.

5.9. The author also repeats the assumption, made in his initial communication, that the refusal by the Uruguayan authorities, without giving any reasons, to grant him a passport is motivated by his critical political attitude towards the Uruguayan Government and he maintains, therefore, that in addition to a breach of article 12, there has also been a breach of article 19 of the Covenant in his case.

6.1. When considering the admissibility of the communication, the Human Rights Committee did not accept the State party's contention that it was not competent to deal with the communication because the author did not fulfil the requirements of article 1 of the Optional Protocol. In that connection, the Committee made the following observations: article 1 applies to individuals subject to the jurisdiction of the State concerned who claim to be victims of a violation by that State of any of the Covenant rights. The issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is "subject to the jurisdiction" of Uruguay for that purpose. Moreover, a passport is a means of enabling him "to leave any country, including his own", as required by article 12 (2) of the Covenant. Consequently, the Committee found that it followed from the very nature of that right that, in the case of a citizen resident abroad, article 12 (2) imposed obligations both on the State of residence and on the State of nationality and that, therefore, article 2 (1) of the Covenant could not be interpreted as limiting the obligations of Uruguay under article 12 (2) to citizens within its own territory.

6.2. The Committee found, on the basis of the information before it, that it was not precluded by article 5 (2) (*a*) of the Optional Protocol from considering the communication. The Committee was also unable to conclude that, in the circumstances of this case, there were effective domestic remedies available to the alleged victim which he had failed to exhaust. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (*b*) of the Optional Protocol.

6.3. On 25 March 1982, the Human Rights Committee therefore decided:

(*a*) That the communication was admissible;

(*b*) That, in accordance with article 4 (2) of the Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(*c*) That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Protocol must primarily relate to the substance of the matter under consideration, and in particular the specific violations of the Covenant alleged to have occurred.

7. On 2 December 1982, the time-limit for the observations requested from the State party under article 4 (2) of the Optional Protocol expired. No further submission has been received from the State party.

8.1. 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.

8.2. The Committee decides to base its views on the following facts which appear to be uncontested: Samuel Lichtensztejn, a Uruguayan citizen residing in Mexico since 1974, was refused issuance of a new passport by the Uruguayan authorities when his passport expired on 23 October 1978. His application for a new passport at the Uruguayan Consulate in Mexico was rejected without any substantive reasons being given, it being merely stated that by "express order from the Chancellery, the granting of the passport was not authorized". He then requested reconsideration of this decision from the Uruguayan Minister of the Interior. He was subsequently informed by the Uruguayan Consulate in Mexico that he "should rely on the (earlier) refusal". In December 1978, the author was issued an identity and travel document by the Mexican authorities which, however, could not be regarded as a sufficient substitute for a valid Uruguayan passport (see para. 5.5 above).

8.3. As to the alleged violation of article 12 (2) of the Covenant, the Committee observed in its decision of 25 March 1982 (see para. 6.1 above) that a passport is a

means of enabling an individual "to leave any country, including his own" as required by that provision: consequently, it follows from the very nature of that right that, in the case of a citizen resident abroad, article 12 (2) imposes obligations on the State of nationality as well as on the State of residence and therefore article 2 (1) of the Covenant cannot be interpreted as limiting the obligations of Uruguay under article 12 (2) to citizens within its own territory. On the other hand, article 12 does not guarantee an unrestricted right to travel from one country to another. In particular, it confers no right for a person to enter a country other than his own. Moreover, the right recognized by article 12 (2) may, in accordance with article 12 (3), be subject to such restrictions as are "provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the Covenant". There are, therefore, circumstances in which a State, if its law so provides, may refuse passport facilities to one of its citizens. However, in the present case, the State party has not put forward any such justification for refusing to issue a passport to Samuel Lichtensztejn. The facilities afforded by Mexico do not in the opinion of the Committee relieve Uruguay of its obligations in this regard.

8.4. As to the allegations made by the author with regard to a breach of article 19 of the Covenant, which were refuted by the State party, the Committee observes that these allegations are couched in such general terms that it makes no findings in regard to them.

9. 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 found by it disclose a violation of article 12 of the Covenant, because Samuel Lichtensztejn was refused the issuance of a passport without any justification, thus preventing him from fully enjoying the rights under article 12 of the Covenant.

10. Accordingly, the Committee is of the view that the State party is under an obligation to provide Samuel Lichtensztejn with effective remedies pursuant to article 2 (3) of the Covenant.

Communication No. 80/1980

Submitted by: Sergio Vasilskis on 3 November 1980
Alleged victim: Elena Beatriz Vasilskis (author's sister)
State party: Uruguay
Date of adoption of views: 31 March 1983 (eighteenth session)

Subject matter: Detention of Uruguayan political activist—Tupamaros—Military tribunals

Procedural issues: Events prior to entry into force of Covenant—Continuing situation—Burden of proof —Sufficiency of State party's reply under article 4 (2) —Failure of investigation of allegations by State party

Substantive issues: Detention incommunicado—Confession under duress—Ill-treatment of detainees—Ex officio *counsel—Right to adequate counsel—Intimidation of counsel—Delay in proceedings—Fair trial—Public hearing*—Reformatio in pejus—*Torture—Prison conditions—Denial of defence facilities—State of health of victim*

Articles of the Covenant: 7, 10 (1) and 14 (1) and (3) (b), (c) *and* (d)
Article of the Optional Protocol: 4 (2)

1. The author of the communication (initial letter dated 23 November 1980 and further submissions dated 25 February and 28 November 1981 and 21 January 1983) is a Uruguayan national, residing at present in France. He submitted the communication on behalf of his sister, Elena Beatriz Vasilskis, a 29-year-old Uruguayan student at present imprisoned in Uruguay.

2.1. The author states that Elena Beatriz Vasilskis was arrested on 4 June 1972, on the charge of being a member of a clandestine group which was engaging in armed struggle as a form of political action (the *Tupamaros* National Liberation Movement). At this time she was allegedly tortured and forced to sign a confession which led to her conviction by a military tribunal of the first instance. The author claims that, in so far as the confession was illegally obtained and she is still suffering imprisonment, this violation of her rights has continued after 23 March 1976, the date of the entry into force of the Optional Protocol for Uruguay.

2.2. Elena Beatriz Vasilskis was allegedly held incommunicado for three months, whereas Uruguayan law only permits detention for 24 hours prior to being brought before a judge. Her case was not submitted to the miltiary courts until September 1972, whereas the Constitution and the Code of Military Criminal Procedure prescribe a maximum intervening period of 48 hours. In the first months after her arrest, she had no legal assistance.

2.3. The author bases his statements on the testimony of ex-prisoners who were in the same prison as his sister, who are now in Europe as refugees, and who allegedly witnessed the torture and maltreatment in prison at first hand and are prepared to testify to it, if necessary, before the Human Rights Committee. Furthermore, the author states that throughout the three months when she was held incommunicado, their father regularly visited her once a week to bring clean clothing and collect her laundry; this was done at a centralized

military office, since his sister's exact whereabouts were not known. During that time their father was given parcels of clothing stained with blood, excrement and hanks of hair.

2.4. Judgement was pronounced by the court of first instance on 14 December 1977. She was sentenced to 28 years of rigorous imprisonment and 9 to 12 years of precautionary detention, to be added to her sentence and served in the same prison, for offences against the Constitution, robbery, kidnapping, complicity in murder and criminal conspiracy. The trial, on appeal, which took place in May 1980 allegedly violated Uruguayan law by raising the sentence from the 18 years demanded by the prosecutor to 30 years and 5 to 10 additional years of precautionary detention (*medidas eliminativas de seguridad*).

2.5. At neither trial, the author claims, did his sister enjoy an adequate defence. Her first attorney, Dr. Carlos Martínez Moreno, allegedly had to flee the country to avoid his own arrest; her second attorney, Dr. Adela Reta, was a law professor who, in view of the political climate, was allegedly forced to abandon all defence work in political matters. Subsequently, the Military Court appointed Colonel Otto Gilomen as defence counsel, although he was not a lawyer, owing to the fact that lawyers for the defence can hardly be found in political cases in Uruguay. The colonel remained on the case until the final judgement. The trial took place in secrecy and not even the closest relatives of the accused were present.

2.6. With respect to the conditions of imprisonment, the author states that his sister is interned at the EMR No. 2 (*Penal Punta de Rieles*), which is used exclusively for the detention of women political prisoners and is not administered by special personnel instructed in the treatment of women prisoners, but by military personnel on short assignment. She occupies a cell with 14 other women prisoners. If she fails to perform her tasks, she is allegedly punished by solitary confinement for up to three months and by prohibition of visits, denial of cigarettes, etc. Visits may occur every 15 days and last only half an hour. The only persons authorized to visit her are close relatives, but no unrelated friends are allowed. The author claims that the worst part of his sister's imprisonment is the arbitrariness of the guards and the severity of the punishment for, *inter alia*, reporting to her relatives on prison conditions or speaking with other inmates at certain times. The inmates allegedly live in a state of constant fear of being again submitted to military interrogation in connection with their prior convictions or with alleged political activities in the prison. The author alleges that the penitentiary system is not aimed at reformation and social rehabilitation of prisoners but at the destruction of their will to resist. They are given a number and are never called by their name. Elena Beatriz Vasilskis is No. 433 of Sector B. Psychological pressures on the inmates are allegedly designed to lead them to denounce other inmates.

2.7. With respect to the state of health of his sister, the author states that she was in excellent physical health at the time of her arrest. He claims that as a direct consequence of torture and eight years' imprisonment (at the time of writing on 7 November 1980) she had diminished vision in both eyes and had lost 40 per cent of the hearing in her left ear. He states that she also suffers from Raynaud's disease, which may have been brought about by prolonged detention in a cold cell and by emotional pressure. Medicines sent to her for the relief of her condition were allegedly never delivered. The loss of hearing was established by a doctor at the Military Hospital between October and November 1979. Raynaud's disease was diagnosed by the cardio-vascular specialist at the military hospital in October 1979. Moreover, the food provided and the conditions of imprisonment are such that his sister has become extremely thin, has retracted gums and many cavities in her teeth. This is allegedly due to an unbalanced diet, deficient in protein and vitamins, and to the almost complete lack of exercise throughout the day, the intense cold (prisoners are forced to take cold baths in the dead of winter) and the total absence of natural light in the cells.

2.8. The author states that the same matter has not been submitted to any other international body.

2.9. The author alleges that the following articles of the Covenant have been violated: articles 2, 7, 10 and 14.

3. By its decision of 19 March 1981, the Working Group of the Human Rights Committee decided that the author was justified in acting on behalf of the alleged victim and 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. In its submission of 6 October 1981, the State party objected to the admissibility of the communication on the following grounds:

> The situation described in the communication does not constitute a violation occurring before the date on which the Covenant and the Optional Protocol entered into force and continuing after that date or having effects which in themselves constitute a violation. Miss Vasilskis was convicted of serious offences under Uruguayan criminal law. She is not a political prisoner, as is incorrectly stated in the communication, nor was she in any way induced to confess her guilt. The living conditions in Military Detention Establishment (EMR) No. 2 are those normally prevailing for all female prisoners, that is to say, she is not subject to the slightest discriminatory treatment and it is completely untrue to state that she receives insufficient food or is subject to ill-treatment. With regard to her state of health, she suffers from Raynaud's disease and is receiving the necessary medical treatment; her present condition can be described as compensated. The Government of Uruguay therefore rejects the assertions in the communication, which refer to non-existent violations of human rights.

5.1. On 28 November 1981, the author forwarded his comments in reply to the State party's submission of 6 October 1981. He reiterates the allegations made in his previous communications with respect to violations of articles 7 and 10 of the Covenant emphasizing that his sister has been imprisoned for nine and a half years, alleging that she is still subjected to cruel and degrading treatment such as endangers her life. He states further that during an inspection of her cell in October 1981, all reading material was taken away from her as well as all materials for manual labour which she had hitherto had. Family photographs sent to her since September 1981 by her parents are said not to have reached her. He rejects the State party's contention that his sister's situation does not constitute a violation of her rights subsequent to the entry into force of the Covenant and the Optional Protocol.

5.2. With respect to his allegation of discrimination, he indicates that he means discrimination with regard to political prisoners *vis-à-vis* common criminals, commenting that the former are subjected to worse treatment than the latter, and alleging in this connection violations of articles 2 and 26 of the Covenant.

5.3. With respect to his sister's state of health, the author deplores that the State party has not submitted any medical report.

6.1. With regard to article 5, paragraph 2 (*a*), of the Optional Protocol, the Human Rights Committee noted that the author's assertion that the same matter was not being examined under another procedure of investigation or settlement had not been contested by the State party.

6.2. With regard to the exhaustion of local remedies, the Committee was unable to conclude, on the basis of the information before it, that there were remedies available to the alleged victim which she should have pursued. Accordingly, the Committee found that the communication was not inadmissible under article 5, paragraph 2 (*b*), of the Optional Protocol.

6.3. On 25 March 1982, the Committee decided:

(*a*) That the communication was admissible in so far as it related to events said to have occurred on or after 23 March 1976 (the date of the entry into force of the Covenant and the Optional Protocol for Uruguay);

(*b*) That, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter; that the State party be requested in this connection to enclose: (i) copies of any court orders or decisions relevant to this case, including the decision of the Supreme Military Tribunal, referred to in the communication; and (ii) further information concerning the state of health of Elena Beatriz Vasilskis, including copies of the existing medical reports referred to in the communication.

7.1. In its submission under article 4, paragraph 2, of the Optional Protocol, dated 27 October 1982, the State party rejected the author's allegations that his sister was subjected to torture and ill-treatment and that her conviction was based on a forced confession, asserting that her confession was obtained without coercion and that her conviction rested on other evidence duly confirmed by means of proper procedures which according to Uruguayan law do not entail public trial by jury. With respect to the delay in commencing her trial, the State party referred to the extraordinary load placed on the Uruguayan judicial system by the numerous proceedings during the period of high seditious activity. Defence lawyers were not persecuted and those who left the country frequently did so because of their links with subversive groups. The increase of Miss Vasilskis' sentences was attributable to the emergence of fresh evidence which made the type of offence more serious.

7.2. The State party also rejects the author's description of Miss Vasilskis as a "political prisoner", emphasizing that she was involved in crimes such as murder, kidnapping and robbery.

7.3. With regard to her state of health, the State party indicates that she is submitted to periodical medical and dental examinations, and that she receives special medical care where necessary, including treatment for Raynaud's disease.

7.4. Prison conditions are responsive to sociological and psychological studies intended to facilitate the rehabilitation of the prisoners, who are not subjected to a climate of arbitrariness or to forced labour.

8.1. In a further letter dated 21 January 1983, the author refers to the State party's submission under article 4, paragraph 2, and claims that it does not adequately answer the specific complaints of violations raised in his communication, which the State party simply rejects without giving any explanation. He reiterates that his sister was tortured, forced to confess, kept incommunicado, that her trial was unduly delayed and that defence attorneys have been so intimidated by the Uruguayan authorities that they are no longer willing to defend persons like Miss Vasilskis.

8.2. With respect to her state of health, the author indicated that the State party has failed to identify the medication given to Miss Vasilskis and complains that medication prescribed for her by French doctors and forwarded to her was not allowed by prison authorities. In substantiation of his allegations that prison conditions are such as to cause a worsening of her state of health, the author quotes a long statement by Renata Gil, a former cell-mate of Miss Vasilskis, according to which the prisoners are deprived of natural light and fresh air except during one hour per day, and all windows have been covered with plastic sheets.

8.3. With respect to the treatment of prisoners at Punta de Rieles, the author refers to the sanctions imposed on some of them following the visit there in January 1982 of Mr. Rivas Posada, Special Representative of the Secretary-General of the United Nations. According to Mrs. Zdenka Starke, the mother of one of the prisoners there, many of the prisoners were beaten up with clubs, items of their personal property were confiscated, and their food was thrown on the floor of the cells. Such punishment was inflicted because the prisoners had made declarations to Mr. Rivas Posada.

9.1. The Human Rights Committee, having examined the present communication in the light of all the information made available to it by the parties as provided in article 5, paragraph 1, of the Optional Protocol, hereby decides to base its views on the following facts, which have not been contradicted by the State party.

9.2. *Events prior to the entry into force of the Covenant*: Elena Beatriz Vasilskis was arrested on 4 June 1972 on the charge of being a member of the Tupamaros National Liberation Movement. She was held incommunicado for three months and her case was not submitted to the military courts until September 1972.

9.3. *Events subsequent to the entry into force of the Covenant*: Judgement was pronounced by the court of first instance on 14 December 1977. She was sentenced to 28 years of rigorous imprisonment and 9 to 12 years of precautionary detention. The trial on appeal took place in May 1980 and the sentence was raised to 30 years and 5 to 10 additional years of precautionary

detention (*medidas eliminatives de seguridad*). The Military Court appointed Colonel Otto Gilomen as defence counsel, although he was not a lawyer. The trial took place in secrecy and not even the closest relatives of the accused were present.

10.1. In formulating its views, the Human Rights Committee also takes into account the following considerations, which reflect a failure by the State party to furnish the information and clarifications necessary for the Committee to formulate final views on a number of important issues.

10.2. In operative paragraph 2 of its decision of 25 March 1982, the Committee requested the State party to enclose: (*a*) copies of any court orders or decisions relevant to the case, and (*b*) further information concerning the state of health of Elena Beatriz Vasilskis, including copies of the existing medical reports. The Committee notes with regret that it has not received any of these documents.

10.3. With respect to the state of health of the alleged victim, the Committee finds that the author's precise allegations, which include allegations that her treatment in prison has contributed to her ill-health, called for more detailed submissions from the State party. While regard to general prison conditions, the State party has made no attempt to give a detailed description of what it believes the real situation to be. Similarly, with respect to general prison conditions and the serious allegations of ill-treatment made by the author, the State party has adduced no evidence that these allegations have been adequately investigated. A refutation of these allegations in general terms, as contained in the State party's submissions, is not sufficient.

10.4. With regard to the burden of proof, the Committee has already established in its views in other cases (e.g., 30/1978[1]) that said burden cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is explicitly stated in article 4, paragraph 2, of the Optional Protocol that the State party concerned has the duty to contribute to clarification of the matter. In the circumstances, the appropriate evidence for the State party to furnish to the Committee would have been the medical reports on the state of health of Elena Beatriz Vasilskis specifically requested by the Committee in its decision of 25 March 1982. Since the State party has deliberately refrained from providing such expert information, in spite of the Committee's request, the Committee cannot but draw conclusions from such failure.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee, in so far as they continued or occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay), disclose violations of the International Covenant on Civil and Political Rights, particularly of:

Articles 7 and 10, paragraph 1, because Elena Beatriz Vasilskis has not been treated in prison with humanity and with respect for the inherent dignity of the human person;

Article 14, paragraph 1, because there was no public hearing of her case;

Article 14, paragraph 3 (*b*) and (*d*), because she did not have adequate legal assistance for the preparation of her defence;

Article 14, paragraph 3 (*c*), because she was not tried without undue delay.

12. The Committee, accordingly, is of the view that the State party is under an obligation to take immediate steps (*a*) to ensure strict observance of the provisions of the Covenant and to provide effective remedies to the victim, and, in particular, to extend to Elena Beatriz Vasilskis treatment as laid down for detained persons in article 10 of the Covenant; (*b*) to ensure that she receives all necessary medical care; (*c*) to transmit a copy of these views to her; (*d*) to ensure that similar violations do not occur in the future.[2]

[1] *Selected Decisions . . .*, vol. 1, pp. 109-112, para. 13.3.

[2] By note, dated 25 March 1985, the State party informed the Committee that Miss Elena Vasilskis had been released on 12 March 1985, pursuant to the Amnesty Act of 8 March 1985.

Communication No. 83/1981

Submitted by: Victor Martínez Machado on 24 February 1981
Alleged victim: Raúl Noel Martínez Machado (author's brother)
State party: Uruguay
Date of adoption of views: 4 November 1983 (twentieth session)

Subject matter: Trial of Uruguayan civilian by military court—Tupamaros

Procedural issues: Events prior to entry into force of the Covenant—Exhaustion of domestic remedies—Review of admissibility decision—Continuing situation—Weight of evidence

Substantive issues: Detention incommunicado—Access to counsel—Ex-officio *counsel*—Habeas corpus—*Delay in proceedings—Disappeared persons—Right to choose own counsel*

Articles of the Covenant: 10 (1) and 14 (3) (b) *and* (c)
Articles of the Optional Protocol: 4 (2) and 5 (2) (b)

1.1. The author of the communication (initial letter dated 24 February 1981 and further submissions dated 18 and 28 June 1981, 27 September 1981 and 12 August 1982) is a Uruguayan national, residing at present in France. He submits the communication on behalf of his brother, Raúl Noel Martínez Machado, who is imprisoned in Uruguay.

1.2. The author states that his brother, a teacher of history, born on 7 July 1949 was arrested in Uruguay on 16 October 1971 by members of the armed forces. In 1974, his brother had come under the jurisdiction of the military courts. In 1979—eight years after his arrest—he was sentenced to nine and a half years' imprisonment. His defence lawyer, Dr. Rodríguez Gigena, abandoned the case after fruitless attempts to remedy the irregularities of the procedure.

1.3. On 26 November 1980, Raúl Martínez was transferred from Libertad prison, where he had been held since January 1973, and was kept at an unknown place of detention for five months. During this period his family had no contact with him and felt great concern for his state of health. The remedy of *habeas corpus* was not available to them because Raúl Martínez was subject to military jurisdiction.

1.4. The author states that on 26 November 1980, his brother "disappeared". On 26 September 1980, the detainee, Mario Teti Izquierdo, was taken out of Libertad prison to an unknown destination. On 25 November 1980, the public was informed by the authorities of a suspected subversive conspiracy which included the invasion of Uruguay and which was allegedly planned and directed by detainees in Libertad prison. The allegation implied, according to the author, the involvement of relatives, including children, of the detainees as a link for communicating with the outside world. The author points out that anybody who knows the prison will realize that this was impossible. He stresses that the disappearance of his brother has to be seen in this context. He adds that during the first weeks of December 1980, Orlando Pereira Malanolti and other detainees also disappeared from Libertad. The author further states that in the last days of November and in the first days of December 1980, several relatives of political detainees were arrested. On 20 December 1980, an official communiqué announced that Raúl Noel Martínez Machado, Orlando Pereira and others were the leaders of the alleged invasion plan. The author also observes that the disappearance of his brother and other detainees was no doubt linked to the fact that all of them were soon to complete their prison sentences.

1.5. The author further alleges that his brother's disappearance violated the internal laws of Uruguay, because detainees who were serving their sentences were theoretically at the disposal of a judge and could not be transferred or held incommunicado without an order of the judge and then only subject to the limitations imposed by the law of the country.

1.6. The author submits that on 16 May 1981, his brother was seen again when, as a result of growing international protest, a French lawyer who had travelled to Uruguay specifically to take up his brother's case was granted a "visit" with him at the No. 4 Infantry Batallion barracks in the Department of Colonia. This visit took place in an atmosphere of tension and pressure and lasted for only five minutes, during which the two were allowed to speak only of the detainee's health and family.

1.7. Subsequently, Raúl Martínez was taken back to Libertad prison, where, on 18 June 1981, he received a family visit. The author submits that during this visit, his brother informed his relatives that he had been retried (*reprocesado*) and that at the court of first instance he had been sentenced to a year's detention in a military prison, plus three months' precautionary detention (*medidas de seguridad*) and six years' "conditional liberty". The author adds that his family did not know the "charges" which had been brought against his brother. He also states that his brother's physical condition had noticeably deteriorated after six months of torture and "disappearance", but that he was apparently mentally well.

1.8. As to the question of admissibility, the author states that he has not submitted the same matter to another procedure of international investigation or settlement and that domestic remedies were not available in his brother's case.

1.9. The author claims that his brother is a victim of violations of articles 6, 7, 10 (1) and 14 of the International Covenant on Civil and Political Rights.

2. By its decision of 17 March 1981, 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 admissibility of the communication and asking for: (*a*) copies of any court orders or decisions relevant to this case and (*b*) information as to the whereabouts of Raúl Noel Martínez Machado.

3. In its notes dated 14 August and 6 October 1981 and 2 June 1982, the State party objected to the admissibility of the communication on the ground that since domestic remedies had not been exhausted, it did not fulfil the requirements of article 5, paragraph 2 (*b*), of the Optional Protocol. The State party informed the Committee that any person on Uruguayan territory has free access to the public and administrative courts and authorities and is free to invoke all the remedies guaranteed by the domestic legal system. The State party also stated that in mid-December 1980, the population was informed of the discovery of plans for the reactivation of the Tupamaros National Liberation Movement, reorganized under the name of "seispuntista", from within Military Detention Establishment No. 1. At that time, the identity of several of the conspirators was made known and information was given on each one's legal status. Raúl Noel Martínez Machado, allegedly a subversive and one of the ringleaders of the movement operating from within the establishment, was brought to trial (*procesado*) on 11 May 1981 for the offence of "conspiracy to subvert". The State party added that the accused, under military justice, had access to the following internal remedies: appeal against the decision to refuse to allow a trial (*procesamiento*), appeal, complaint for refusal of leave to appeal, appeal for annulment, and the special remedies of appeal to vacate a judgement and appeal for review.

4.1. In his comments dated 27 September 1981 and 12 August 1982, the author reiterates that, in his brother's case, no domestic remedies were available which could have been invoked. He recalls that his brother had been detained incommunicado for several months (after 26 November 1980) and thus he was deprived not only of free access to the administrative authorities and courts, but of any opportunity to give anyone a sign of life or of his whereabouts, that he had been at the mercy of his captors who did not admit that they were holding him. Thus, the author claims his brother had been cut off from any contact with the outside world and deprived of all rights, including the right to security of life. In such circumstances any recourse to internal remedies had been made virtually impossible.

4.2. In connection with the alleged participation of his brother in an alleged plan to reactivate the MLN-Tupamaros, the author stressed again that, after the plebiscite held on 30 November 1980 and due to the fact that the majority of the Uruguayan population voted against the draft Constitution proposed by the authorities, a policy of repression was directed against political prisoners and their relatives. This led to new arrests and trials. He considers that in such context of repression and of non-respect for the law, his brother's re-trial (*reprocesamiento*) can only be seen as illegal. The author also affirms that his brother was denied a proper defence since his *ex officio* defence counsel, Colonel Ramírez, was a member of the armed forces who had to obey his superiors rather than defend his brother's interests. He adds that, although the Government stated that his brother was re-tried on 11 May 1981, his family had been assured by his defence counsel that he was not re-tried but would be released in October 1982. The author expresses the hope that this would prove true.

4.3. In summary, the author maintains that his brother's re-trial (*reprocesamiento*) took place after six months of "disappearance" during which he had been subjected to torture; that he was "brought to trial" (*procesado*) on 11 May 1981 although he had completed his prison sentence on 16 April 1981; that he had no possibility of a fair defence; and that he was a victim of the arbitrariness of military judges.

4.4. In substantiation of his allegations, the author submits various enclosures (approximately 200 pages), in particular two publications, entitled "Les camps de concentration" and "La politique de rejugement", from the Comité des Familles des Prisoniers Politiques Uruguayens (FPPU, Paris, 26 November 1981). It is stated therein, *inter alia*, that in 1979 Raúl Martínez was sentenced to nine years and six months' imprisonment on grounds of attempt against the Constitution, unlawful association, deprivation of freedom and co-author of theft; that as in the cases of other detainees he is subject to inhuman prison conditions at Libertad (a detailed description of such conditions is given); and that in November-December 1979, he had been taken urgently to the military hospital due to inhuman treatment inflicted upon him.

5. With regard to article 5 (2) (*a*), the Committee noted that the author's assertion that the same matter had not been submitted to any other procedure of international investigation or settlement had not been contested by the State party.

6. With regard to article 5, paragraph 2 (*b*), the Human Rights Committee took note of the State party's assertion that Raúl Noel Martínez Machado had not yet exhausted the domestic remedies available to him. In this connection, the Committee understood that the State party's assertion related merely to the proceedings which were initiated or took place on 11 May 1981 and not to events prior to that date. However, in the absence of any specific indications as to which remedies would have been applicable in the particular circumstances of this case, the Committee was unable to conclude that Raúl Noel Martínez Machado had failed to exhaust domestic remedies. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (*b*). It observed that this decision, in so far as it related to events after 11 May 1981, could be reviewed in the light of further explanations which the State party might submit under article 4 (2) of the Optional Protocol, giving details of any domestic remedies claimed to have been available to the alleged victim, together with evidence that there would be a reasonable prospect that such remedies would be effective.

7. On 15 October 1982, the Human Rights Committee therefore decided:

(*a*) That the communication was admissible in so far as it related to events said to have continued or taken place on or after 23 March 1976, the date on which the Covenant and the Optional Protocol entered into force for Uruguay;

(*b*) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(*c*) That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that in order to perform its responsibilities, it required specific responses to the allegations which had been made by the author of the communication, and the State party's explanations of the actions taken by it. The State party was requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration.

8. By a note dated 22 November 1982, relating to the author's submission of 12 August 1982, the State party reiterates that Mr. Martínez Machado was one of the principal leaders of the Seispuntista Movement. It points out "that the action taken with respect to the emergence of the subversive organization concerned was based on investigations carried out in accordance with the requirements of the law. Mr. Martínez Machado was not the subject of a 'forced disappearance', as suggested in the author's communication, but was merely moved from his place of imprisonment for security reasons, with a view to frustrating the Seispuntismo plan by thus impeding communication among its members. While Mr. Martínez Machado's unconditional release might have been effected recently, the

discovery of his participation in this movement made it necessary to institute new proceedings which prevented its materialization." With respect to the conduct of the *ex officio* defending counsel, the State party further points out that the persons concerned are independent lawyers who are not subject to the military hierarchy in the performance of their technical functions. "These were in strict conformity with the principles that should regulate any counsel of a technical and legal nature."

9. In its submission under article 4 (2) of the Optional Protocol dated 4 October 1983, the State party rejects—without providing additional facts—the author's contention that his brother was subjected to ill-treatment, that he "disappeared", that he has been denied a proper defence and that the effective application of domestic remedies available under the procedural laws of the country is not possible. The State party reiterates that military tribunals enjoy total independence in the exercise of their judicial function and it asserts that procedural guarantees are duly observed during all stages of the proceedings and that the defence may apply for such remedies as its considers appropriate.

10. When adopting its decision on admissibility on 15 October 1982, the Committee observed that this decision, in so far as it related to events after 11 May 1981, could be reviewed in the light of further explanations which the State party might submit under article 4 (2) of the Optional Protocol. The Committee notes that, despite the receipt of the State party's most recent submission, no details have been furnished to it of any domestic remedies claimed to have been available to the alleged victim, together with evidence that there would be a reasonable prospect that such remedies would be effective. The Committee therefore sees no reason for reviewing its decision on admissibility.

11.1. The Committee decides to base its views on the following facts which have been either essentially confirmed by the State party or are uncontested except for denials of a general character offering no particular information or explanation.

11.2. Raúl Noel Martínez Machado was arrested on 16 October 1971. In January 1973, he was transferred to Libertad prison. In 1974 he came under the jurisdiction of the military courts. In 1979 he was sentenced to nine and a half years' imprisonment. He was to have completed the sentence on 16 April 1981. On 26 November 1980, he was moved from Libertad prison to another detention establishment for interrogation in connection with his alleged involvement in operations aimed at reactivating a subversive organization (the "Tupamaros" movement) from within Libertad prison. From November 1980 to May 1981 he was held incommunicado. On 11 May 1981, Raúl Martínez was again brought to trial (*procesado*) for the offence of "conspiracy to subvert". His *ex-officio* lawyer is Colonel Ramírez.

12.1. In formulating its views, the Human Rights Committee takes into account, in particular, the following consideration.

12.2. In operative paragraph 3 of its decision of 15 October 1982, the Committee requested the State party to submit copies of any court orders or decisions of relevance to the matter under consideration. The Committee notes with regret that it has not been furnished with any of the relevant documents or with any information about the outcome of the criminal proceedings commenced against Raúl Noel Martínez Machado in 1971 and 1981. Taking into account the delay in the first trial, it must be concluded in this respect that he has not been tried without undue delay as required by article 14 (3) (*c*) of the Covenant.

13. 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 as found by the Committee, in so far as they continued or occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay), disclose violations of the International Covenant on Civil and Political Rights, particularly of:

Article 10 (1), because Raúl Martínez was held incommunicado for more than five months;

Article 14 (3) (*b*), because the conditions of his detention from November 1980 to May 1981 effectively barred him from access to legal assistance;

Article 14 (3) (*c*), because he was not tried without undue delay.

14. The Committee, accordingly, is of the view that the State party is under an obligation to take immediate steps to ensure strict observance of the provisions of the Covenant and in particular (i) that Raúl Martínez Machado is treated with humanity as required by article 10 (1) of the Covenant; (ii) that the guarantees prescribed by article 14 are fully respected and, in so far as this has not been done in any proceedings already taken, an effective remedy will be applied; and (iii) that a copy of these views be transmitted to him.

Communication No. 84/1981

Submitted by: Hugo Gilmet Dermit on 27 February 1981
Alleged victims: Guillermo Ignacio Dermit Barbato and Hugo Haroldo Dermit Barbato (author's cousins)
State party: Uruguay
Date of adoption of views: 21 October 1982 (seventeenth session)

Subject matter: Detention of Uruguayan citizens in political prison—Tupamaros

Procedural issues: Exhaustion of domestic remedies —Sufficiency of State party's reply under article 4 (2) —Failure of investigation of allegations by State party—Burden of proof—Withdrawal of communication from IACHR—Effective remedy

Substantive issues: Death of victim—Right to life—Detention incommunicado—Habeas corpus—*Prompt security measures—Delays in proceedings —Military tribunals—Detention after serving sentence—Compensation*

Articles of the Covenant: 2 (3), 6 (1), 7, 9 (3) and (4) and 14 (3) (c)

Articles of the Optional Protocol: 4 (2) and 5 (2) (a) *and* (b)

1.1. The author of the communication (initial letter dated 27 February 1981 and further letters dated 30 September 1981 and 28 July 1982) is a Uruguayan citizen at present living in Sweden. He submitted the communication on behalf of his cousins, Hugo Haroldo Dermit Barbato and Guillermo Ignacio Dermit Barbato, alleging that Hugo Dermit died in detention in Uruguay between 24 and 28 December 1980 and that Guillermo Dermit is at present imprisoned in Uruguay.

1.2. The author states that his cousin Guillermo Dermit, a 30-year-old Uruguayan medical doctor, disappeared on 2 December 1980. His abandoned car was found in a street with doors wide open. For 17 days all attempts to find out his whereabouts were in vain; in particular, no confirmation could be obtained from the authorities as to whether he was detained. On 19 December 1980, an official communiqué was published in Montevideo announcing Guillermo Dermit's detention. He was described as belonging to a group of relatives of prisoners who had carried out "agitation and propaganda activities". The alleged victim's place of detention was not disclosed in the communiqué, and he continued to be detained incommunicado. For some time, his closest relatives did not know where he was detained. The author claims that the real motive for Guillermo Dermit's arrest was the fact that he was the brother of a political prisoner, Hugo Dermit, and that no illegal activities could be imputed to him.

1.3. The author claims that Guillermo Dermit is a victim of violations of a number of provisions of the International Covenant on Civil and Political Rights, including article 9 (1), because he was arbitrarily arrested; article 9 (2), because he was not promptly informed of the reasons for his arrest; article 9 (3), because he was not brought promptly before a judge, within the period of 10 days laid down in Uruguayan law; article 9 (4), because he was kept incommunicado and was thus unable to take his case before any judicial authority and because his family could not make use of the recourse of *habeas corpus*; article 10, because the treatment of detainees in Uruguay did not conform to this provision of the Covenant, more detailed information not being available because of Guillermo Dermit's being incommunicado; article 14, because he was not brought before a court, and that if and when this happened, it would be before a military tribunal lacking in procedural guarantees and impartiality.

1.4. As to Hugo Dermit, a 32-year-old Uruguayan student of medicine at the time of his death, the author states that he was arrested in 1972, that he came under the jurisdiction of the military courts and that, after lengthy proceedings, he was sentenced to eight years' imprisonment. He had served his sentence in July 1980 but was not released. Instead, he was informed that he would be released only if he left the country, a condition which, according to the author, was not mentioned in the judgement, nor was it based on any rule of law. After he had obtained an entry visa from the Swedish Government, the authorities informed him that he was due to be released on 11 December 1980. In September 1980, Hugo Dermit was transferred from the *Establecimiento Militar de Reclusión No. 1* (*Libertad* prison, Department of San José) to the barracks of the Fourth Mechanized Cavalry Regiment situated in Montevideo (Camino Mendoza and Avenida de las Instrucciones). On 13 November 1980, he signed the option to leave the country for Sweden. At the end of that month, he was transferred to the Montevideo Police Headquarters. On 9 December 1980, the police authorities made it known that he would not be granted permission to leave the country. His whereabouts were unknown to his relatives until 28 December 1980. The author alleges that, during the period in question, Hugo Dermit was once more transferred to the quarters of the Fourth Mechanized Cavalry Regiment, where he was seen by other prisoners and was reported to have been in good spirits, in spite of the interruption in the preparations for his release and departure from Uruguay. He was last seen alive on 24 December 1980. On 28 December 1980, his mother was called to the Military Hospital without any explanation. There she was shown the dead body of her son for identification purposes. The death certificate stated as cause of death "acute haemorrhage resulting from a cut of the carotid artery" and his mother was told that he had committed suicide with a razor blade. The writer claims that this explanation is false and that Hugo Dermit died as a consequence of the mistreatment and torture to which he had allegedly been subjected.

1.5. The author claims that Hugo Dermit was a victim of violations of articles 6, 7, 9, 10, 12, 14 and 17 of

the International Covenant on Civil and Political Rights.

1.6. With regard to the question of admissibility, the author stated that he had not submitted either case to another procedure of international investigation or settlement. He alleged there were no further domestic remedies which could be invoked. In the case of Hugo Dermit, the remedies through proceedings before the Military Tribunals had been exhausted. The eight-year sentence imposed on him resulted from a decision of the Supreme Military Tribunal. His continued detention after completion of his sentence was based on "prompt security measures". The author claims that the only remedy available in that situation was the option to leave the country. He alleges that no procedural possibilities existed to oblige the authorities to respect this constitutional option. The author further claims that although the alleged violations of human rights in the case of Hugo Dermit commenced before 23 March 1976, they continued to occur after that date.

2. By its decision of 18 March 1981, 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. It also requested the State party to provide the Committee with (*a*) copies of any court orders or decisions relevant to the case, and (*b*) copies of the death certificate and medical report and of the report of whatever inquiry had been held in connection with the death of Hugo Dermit.

3. In a note dated 24 August 1981, the State party disputed the admissibility of the communication on the grounds that: (*a*) concerning Hugo Dermit, the same matter had been submitted to the Inter-American Commission on Human Rights as case No. 7710, and (*b*) with regard to Guillermo Dermit, the remedies available under domestic law had not yet been exhausted, and the State party had repeatedly informed the Committee of all the remedies available to everyone in Uruguayan territory. The Government did not furnish the Committee with copies of any court orders or decisions relevant to the case of Guillermo Dermit nor did it mention any proceedings pending against the alleged victim, any specific remedies available to him, or refer to any other facts concerning his case.

4. In his letter of 30 September 1981, the author informed the Committee that the case of Hugo Dermit had been submitted to the Inter-American Commission on Human Rights by a third party. He attached a copy of a letter dated 25 September 1981, sent by the person responsible for submitting case No. 7710 to the Inter-American Commission requesting its withdrawal. With regard to the case of Guillermo Dermit, the author asserted once again the lack of any domestic remedies that could have been exhausted. He informed the Committee that Guillermo has been subjected to military judicial proceedings. He again claimed that Guillermo is a victim of violations of article 14 of the Covenant and alleged that the military judges are neither independent nor impartial.

5.1. With regard to article 5, paragraph 2 (*a*), the Human Rights Committee noted that case No. 7710, concerning Hugo Dermit, had been withdrawn from the Inter-American Commission on Human Rights (IACHR). This had been confirmed by the secretariat of IACHR. The Committee also notes that, with regard to Guillermo Dermit, the State party has not disputed the author's contention that the case has not been submitted to any other procedure of international investigation or settlement.

5.2. With regard to article 5, paragraph 2 (*b*), the Human Rights Committee took note of the State party's assertion that Guillermo Dermit has not yet exhausted the domestic remedies available to him. However, the State party did not give details of the remedies which may be invoked in the particular circumstances of this case; nor did it specify which of the alleged violations could have been effectively remedied within the established military judicial process. On the basis of the information before it, the Committee was unable to conclude that there were remedies available to Guillermo Dermit which he should have pursued.

5.3. On 28 October 1981, the Human Rights Committee therefore decided:

(*a*) That the communication was admissible;

(*b*) That, in accordance with article 4 (2) of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and to enclose copies of any court orders or decisions of relevance to the matter under consideration, and, in the case of Hugo Dermit, to enclose copies of the death certificate and medical report and of the reports on whatever enquiries were held into the circumstances surrounding his death.

6.1. In its submission under article 4 (2) of the Optional Protocol, dated 1 June 1982, the State party forwarded a transcript of the autopsy report concerning Hugo Dermit which reads as follows:

Death certified on 28 December 1980. Cause: suicide. Result of the autopsy: on 28 December 1980, an autopsy was carried out on the body of Hugo Dermit Barbato, white, male, 32 years old, general health good, thin. Blood on the face, neck, front of the thorax and upper limbs, mainly on the left side. On the left-hand side of the neck, a clean cut 40 mm long with sanguineous infiltration at the edges. The wound runs obliquely from the thyroid cartilage outwards and downwards to the middle of the external cleidomastoid muscle. Immediately above it, another clean cut 10 mm long with sanguineous infiltration at the edges. On the right forearm, 4 cm from the wrist joint, a 30 mm oblique cut running from the outer edge to the middle of the forearm (and being, at this point, 6 cm from the wrist). On the left forearm, a similar, but shorter (20 mm), wound. The remainder of the external examination showed no special peculiarities.

Internal examination: neck—dissection of the areas corresponding to the wound in the left side of the neck showed that the internal jugular vein was completely severed, with a wound 1 mm in diameter in the left common carotid artery. Recent sanguineous infiltration in adjacent areas. The upper wound showed that the middle thyroid artery had been severed. Thorax and abdomen—pleura and lungs: lungs normal, with collapsed alveoli. Abdomen: normal. General paleness of the viscera. Upper limbs: the wounds in both forearms show that the middle veins had been partly severed. Summary: from the preceding study, it is evident that the cause of death was anaemia as a result of acute haemorrhage caused by the severing of the left carotid vessels. By the pathological anatomy service, Haydee Klempert, First Lieutenant, Medical Corps.

6.2. With respect to Guillermo Dermit, the State party asserts that he was brought to trial because "it was proved that he had been involved in the offences of con-

spiracy to subvert and action to upset the Constitution in the degree of conspiracy, followed by criminal preparations on 23 March 1981. The aforementioned person was one of the subversive members of the so-called 'seispuntista' movement, which tried to reactivate the subversive 'Tupamaros' movement from within the prison, with the help of elements outside it." The Government reiterated its rejection of the admissibility of this case on the grounds of non-exhaustion of internal remedies available under criminal military law. These remedies are: "appeal against the decision to refuse to allow a trial, application to set aside the ordinary appeal for review, remedy of appeal, complaint for refusal of leave to appeal, appeal for annulment and the special remedies of appeal to vacate a judgement and appeal for review."

7.1. In a further letter dated 28 July 1982, the author refers to the State party's submission under article 4 (2) and claims that it does not answer the specific complaints of violations raised in his communication.

7.2. With respect to Hugo Dermit, the author states in particular:

In its submission, the Government of Uruguay gives no explanations concerning the complaints I made in my communication of 27 February 1981 to the effect that my cousin was arbitrarily deprived of his right to life; was not treated with humanity and respect for his dignity, but, rather, subjected to torture and cruel, inhuman and degrading treatment; was, without any doubt, unlawfully deprived of his liberty after he had served his sentence and was denied the constitutional right to choose to leave the national territory; was subjected to criminal proceedings riddled with procedural errors constituting violations of article 14 of the Covenant, to arbitrary interference with his family and to unlawful attacks on his honour and reputation.

With regard to the merits of the case, the Government of Uruguay merely states that it is "transmitting the report on the autopsy carried out on the body of the victim on 28 December 1980 . . ." The results of the autopsy in no way indicate beyond any doubt that the cause of my cousin's death was "suicide", as the Government of Uruguay claims. The autopsy was carried out by military medical personnel before the victim's relatives were informed of his death and they had no opportunity to have the autopsy carried out by doctors of their own choice. The victim's body, which was handed over to his relatives in the afternoon of 28 December 1980, showed signs of having undergone a tracheotomy, as well as signs that it had been kept refrigerated, since it was initially bloated and then deflated, with a substantial loss of water during the period preceding burial.

The Government of Uruguay states that the victim's death was certified on 28 December 1980. It provides no explanation of the circumstances in which the death was certified (place, hour, who found the body, whether or not the sharp object or objects with which the victim supposedly committed suicide were found in the same place). The Government of Uruguay has not provided the Committee with any information concerning any investigation into the circumstances of the death. In view of this and the fact that the victim was seen alive as late as 24 December, in circumstances which in no way indicated that he had even the slightest intention of committing suicide, particularly since he should have been happy and optimistic about his situation and the prospect of his forthcoming release, the official explanation is implausible and unacceptable. The complete absence of any investigation into the responsibility of the officials who held him in their custody, of any reference to possible penalties resulting therefrom and of any inquiry into the circumstances and the way in which the death occurred show that, instead of seeking clarification and justice, the authorities are trying to cover up the violent acts committed in their name. I must repeat that, even if the victim did actually commit suicide, the most serious responsibility would have been incurred: the only possible reason why he might have decided to commit suicide is that he was forced to do so by threats or violence, with the result that he found any thought of the future unbearable, when, in fact, he had every reason to be optimistic about it. And the fact that he might actually have committed suicide while under arrest would have called for an investigation and the punishment of those who were responsible, except that it is the authorities themselves who are responsible.

7.3. With respect to Guillermo Dermit, the author states in particular:

The Government of Uruguay has given no explanation concerning the complaints made in the first communication of 27 February 1981 to the effect that the violations which occurred included the following: the victim's arrest was arbitrary; he was not allowed to take legal action or proceedings; he was not promptly informed of the charges against him; he was not brought promptly before a judge within the maximum time-limit of 10 days: he was held incommunicado with no possibility of appealing to any judicial authority on his own initiative; he was not treated with due respect for the inherent dignity of the human person; and he was denied the constitutional right to choose to leave the national territory. With regard to the merits of the case, the Government of Uruguay merely reports that the victim "was brought to trial because it was proved that he had been involved in the offences of conspiracy to subvert, and action to upset, the Constitution in the degree of conspiracy, followed by criminal preparations on 23 March 1981". It is also claimed that the victim was "one of the subversive members of the so-called 'Seispuntista' movement, which tried to reactivate the subversive 'Tupamaros' movement from within the prison, with the help of elements outside it".

The Government attaches no copies of the court orders and decisions relating to the case under consideration. Since the Government has failed to provide any evidence to the contrary, I wish to repeat my assertion that the real motive for the arrest of Guillermo Ignacio Dermit Barbato is that he is the brother of a political prisoner, Hugo Haroldo Dermit Barbato, and that there are no grounds for the proceedings against him.

The fact that the military courts have been involved makes it necessary to state again that this procedure is still in violation of article 14 of the Covenant because these courts do not provide the guarantees stipulated in that article, since they lack independence and impartiality, and also because of the shortcomings in the procedure which they apply.

7.4. With respect to the admissibility of the communication relative to Guillermo Dermit, the author disputes the State party's assertion that the defendant did not exhaust the internal remedies purportedly available under criminal military law and examines said remedies as follows:

"*Appeal against a decision to refuse to allow a trial.*" Like all other remedies in question, this one is totally inapplicable to the victim's case. Article 178 of the Code of Organization of the Military Courts (COTM) provides that an appeal may be lodged against a decision to refuse to allow a trial. It will, however, be quite clear to the Committee that this has nothing to do with my cousin's case, in which there was no refusal to allow a trial. As shown in the report itself, he was actually brought to trial. There is, moreover, no point in referring to this possible remedy. It is the public prosecutor's department that can, as stated in article 178, lodge such an appeal, whose object is to bring a person to trial when a military court has refused to do so and has released the person.

In any event, it is not this remedy, but, rather, the remedy of appeal against the indictment, to which the Government might justifiably have referred. The Government report does not mention the latter remedy, which is entirely theoretical and has proven to be totally ineffective because it has never, since it was provided for by law, been used in any case; and because the proceedings never take less than one year and often quite a bit more and, during that time, it is, in practice, impossible to obtain a decision on any application for pre-trial release.

"*Application to set aside an ordinary appeal for review.*" These are remedies against specific court decisions, as clearly stated in COTM, article 475. The Government does not say which decisions were not appealed in the victim's case and, in fact, there were no such decisions: the only decision in this case was the one ordering him to be brought to trial, in accordance with the special régime provided for in article 178.

The "*remedy of appeal*" is inappropriate in this case because it applies only to final decisions (COTM, article 481). There has been no decision even in first instance, in the victim's case, as shown in the report.

"*Complaint for refusal of leave to appeal.*" . . . This remedy is, as its name indicates, one that is available in the particular situation when a decision has been appealed and the court which made it considers that it cannot be appealed. Its object is to obtain a decision from a higher court concerning the admissibility of the appeal (COTM, article 492). Since there has been no decision in my cousin's case, he could hardly have appealed against it. Consequently, there could have been no "complaint" for refusal of leave to appeal when no appeal could be lodged.

The "*appeal for annulment*" is not applicable in my cousin's case because it also assumes that a decision has been made (article 503); it must be lodged together with the appeal—something that is, as has been seen, quite impossible.

"*Special remedies of appeal to vacate a judgement and appeal for review.*" . . . These are remedies against decisions by a court of second instance (article 507) and, in the victim's case, there still has been no decision by the court of first instance. According to article 460, these remedies still do not prevent the decision that is being contested from becoming a final decision: "Decisions are final and enforceable: 1. When the law allows no other instance or ordinary appeal in the case".

It may be said that, although these remedies are totally inapplicable at this time and at this stage in the proceedings, they might be applicable later on and that they may therefore be regarded as "remedies that have not been exhausted".

This view does not apply to the first of the above-mentioned remedies since there has never been a decision "to refuse to allow a trial". The other remedies on the list, which are not applicable now, may, however, be used in the future.

It is, therefore, essential to look at the entire procedure and to see whether, for the Committee's purposes, it will be necessary to wait until the proceedings have been completed. Since the remedies in question are available only in respect of the final decision or the decision of second instance, it would be essential to await the outcome of the proceedings if they had to be exhausted before the Committee could act. In fact, there was a four-month delay before the victim's case was brought before a "judicial authority". He has been detained for 20 months and it will be a long time before a decision is made by the court of first instance. There are prisoners in Uruguay who have been waiting for as long as eight years for their decisions of second instance.

Accordingly, to claim that the proceedings must be completed in order to apply for—and exhaust—the remedies that are theoretically available would mean postponing action by the Committee for an unacceptable amount of time, particularly since failure to make a decision within a reasonable time is one of the violations that has been reported and one of the most obvious causes of what has happened. In other words, the possibility of instituting unacceptably lengthy proceedings, which is in itself a violation of the Covenant, would make the Government think that it was not subject to the Committee's jurisdiction. This can hardly be the intention of the Covenant.

8.1. The Human Rights Committee has to consider this communication, under article 5 (1) of the Optional Protocol, in the light of all written information made available to it by the author and the State party. It therefore bases its views on the following facts, which have not been contradicted by the State party.

8.2. Hugo Haroldo Dermit Barbato was arrested in 1972 and subsequently sentenced to eight years' imprisonment. He completed serving his sentence in July 1980 and thereafter was kept in detention pursuant to the "prompt security measures". He was informed that he would be released only if he left the country, a condition which was not mentioned in the judgement against him. After he had obtained an entry visa from the Swedish Government, the Uruguayan authorities informed him that he was to be released on 11 December 1980. Yet, on 9 December 1980, he was told that he would not be granted permission to leave the country. His whereabouts were unknown to his relatives until 28 December 1980, when his mother was called to the Military Hospital to identify his body. His mother was told that he had committed suicide.

8.3. Guillermo Ignacio Dermit Barbato, Hugo's younger brother, disappeared on 2 December 1980. His detention was officially acknowledged on 19 December 1980, but he continued to be held incommunicado. He was not brought before a judicial authority until 23 March 1981 when he was brought before a military tribunal. After some 20 months, there does not appear to have been any decision taken and the State party gives no evidence of any such decision.

9.1. In formulating its views, the Human Rights Committee also takes into account the following considerations, which reflect a failure by the State party to furnish the information and clarifications necessary for the Committee to formulate final views on a number of important issues.

9.2. In operative paragraph 2 of its decision of 28 October 1981, the Committee requested the State party to enclose copies of the death certificate and medical report and of the reports on whatever inquiries were held into the circumstances surrounding the death of Hugo Dermit. Only a transcript of the autopsy report has been submitted. The State party has not submitted any report on the circumstances in which Hugo Dermit died or any information as to what inquiries have been made or the outcome of such inquiries. Consequently, the Committee cannot help but give appropriate weight to the information submitted by the author, indicating that a few days before Hugo's death he had been seen by other prisoners and was reported to have been in good spirits, in spite of the interruption of the preparations for his release and departure from Uruguay. While the Committee cannot arrive at a definite conclusion as to whether Hugo Dermit committed suicide, was driven to suicide or was killed by others while in custody, the inescapable conclusion is that in all the circumstances, the Uruguayan authorities either by act or by omission were responsible for not taking adequate measures to protect his life, as required by article 6 (1) of the Covenant.

9.3. In the same operative paragraph, the Committee requested the State party to furnish copies of any relevant court orders or decisions. The Committee is seriously concerned by the fact that, in this case and in a number of other cases, the State party has failed to furnish the texts of court decisions.

9.4. As to the question of exhaustion of domestic remedies in the case of Guillermo Dermit, the Committee also takes into account the following considerations: the remedies listed by the State party as unexhausted, cannot be considered available to the alleged victim in the circumstances of his case. They are either inapplicable *de jure* or *de facto* and do not constitute an effective remedy, within the meaning of article 2 (3) of the Covenant, for the matters complained of. There are therefore no grounds to alter the conclusion reached in the Committee's decision of 28 October 1981, that the communication is not inadmissible under article 5 (2) (*b*) of the Optional Protocol.

9.5. No attempt has been made by the State party to show that the delay in trying Guillermo Dermit could be justified by the difficulties of the case.

9.6. With regard to the burden of proof, the Committee has already established in its views in other cases (e.g., No. 30/1978[1]) that said burden cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities.

10. 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 communication discloses violations of the Covenant, in particular:

(*a*) With respect to Hugo Haroldo Dermit Barbato:

Of article 6, because the Uruguayan authorities failed to take appropriate measures to protect his life while he was in custody;

(*b*) With respect to Guillermo Ignacio Dermit Barbato:

Of article 9 (3), because he was not promptly brought before a judge;

Of article 9 (4), because he was held incommunicado and effectively barred from challenging his arrest and detention;

Of article 14 (3) (*c*), because he has not been tried without undue delay.

11. The Committee, accordingly, is of the view that the State party is under an obligation to take effective steps (*a*) to establish the facts of Hugo Dermit's death, to bring to justice any persons found to be responsible for his death and to pay appropriate compensation to his family; (*b*) with respect to Guillermo Dermit, to ensure strict observance of all the procedural guarantees prescribed by article 14 of the Covenant as well as of the rights of detained persons set forth in articles 7, 9 and 10 of the Covenant; (*c*) to transmit a copy of these views to Guillermo Dermit; and (*d*) to take steps to ensure that similar violations do not occur in the future.

[1] *Selected Decisions . . .*, vol. 1, p. 109.

Communication No. 85/1981

Submitted by: Nelly Roverano de Romero on 2 March 1981
Alleged victim: Héctor Alfredo Romero (author's husband)
State party: Uruguay
Date of adoption of views: 29 March 1984 (twenty-first session)

Subject matter: Trial of Uruguayan citizen by military authorities—Tuparamos

Procedural issues: Events prior to entry into force of Covenant—Withdrawal of communication from IACHR—Failure of investigation of allegations by State party—Sufficiency of State party's reply under article 4 (2)—Burden of proof—Weight of evidence

Substantive issues: Detention incommunicado—Ill-treatment of detainees—Prison conditions—Detention after serving sentence—Prompt security measures

Article of the Covenant: 10 (1)
Articles of the Optional Protocol: 4 (2) and 5 (2) (a)

1. The author of the communication (initial letter dated 2 March 1981 and further letters dated 15 October 1982, 7 June 1983 and 22 February 1984) is a Uruguayan national, residing at present in Sweden. She submitted the communication on behalf of her husband, Héctor Alfredo Romero, who is detained at Libertad prison (EMR No. 1), in Uruguay. The author does not specify which articles of the International Covenant on Civil and Political Rights have been allegedly violated.

2.1. In describing her husband's situation, the author relies partly on information provided by Edgardo Carvalho, a former Uruguayan defence lawyer now residing in Spain, and on a more recent report given to her by David Cámpora Schweizer,[1] who in December 1980 arrived from Uruguay in the Federal Republic of Germany, and according to whom Héctor Alfredo Romero was being detained in a cell alone at Libertad prison and had been subjected during the entire month of November 1980 to punishment at a cell called "La Isla", where rainwater filters in and one lives in the midst of human excrement.

2.2. It is stated that Mr. Romero was a worker at an industrial plant, a militant trade unionist, and a member of the Resistencia Obrero Estudiantil, a leftist organization which was declared illegal by the military government in Uruguay in December 1973. He was reportedly

[1] The Committee's views in the Cámpora Schweizer case are reproduced in this volume, at pp. 90-93.

arrested for the first time in September 1970 on charges of attempted robbery and illicit association. He subsequently escaped from prison in September 1971 and was rearrested in December 1971. At the end of 1975, he was sentenced to a five-year prison term which, counting the time he had already spent in detention, was soon finished and his release was ordered. However, he was immediately transferred by order of the military authorities to the central police prison where he allegedly was held at the disposal of the executive authorities. His application to opt to leave Uruguay (a right applicable to a person so held and still valid at present) was rejected. From then on, Héctor Romero was allegedly transferred from one police detention centre to another, held incommunicado, and during that time allegedly subjected to torture and ill-treatment in order to have him confess crimes he had not committed. At the end of May 1976, Héctor Romero, together with other political prisoners, was brought briefly before journalists in order to silence rumours from abroad that he and other political prisoners had disappeared in Uruguay.

2.3. According to José Valdes Pieri, a former Uruguayan prisoner at present residing in Spain, Héctor Romero was transferred by the military in November 1976 to an unknown place and kept incommunicado until the middle of 1977, when he again appeared in Libertad prison, awaiting another trial before a military tribunal. The author alleges that the new trial was a travesty of justice.

3. By its decision of 18 March 1981, the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party, requesting information and observations relevant to the admissibility of the communication and asking for copies of any court orders or decisions relevant to that case.

4. By a note of 3 June 1981, the State party objected to the admissibility of the communication on the ground that the same matter was already being examined by the Inter-American Commission on Human Rights (IACHR) as case No. 3106.

5. Further proceedings before the Human Rights Committee were delayed until it was ascertained that the case had been effectively withdrawn from IACHR pursuant to a written request by the author, dated 4 May 1982, subsequently confirmed by IACHR in September 1982. The State party was informed of the withdrawal by note of 1 March 1983.

6. In its reply dated 4 May 1983 the State party submitted

that the person in question was arrested because of his links with the Tupamaros National Liberation Movement and while attacking a branch office of a bank. A sentence of second instance has been handed down in the case of Mr. Romero: he was sentenced to 25 years' imprisonment and to from 1 to 5 years' precautionary detention, having been found guilty of the offences of "criminal conspiracy", "aggravating circumstances", "action to upset the Constitution amounting to a conspiracy followed by criminal preparations", "co-perpetration of robbery", "co-perpetration of deprivation of freedom", "co-perpetration of the use of bombs, mortars or explosives in order to cause fear in the community", "co-perpetration of usurpation of functions" and "co-perpetration of damage", all offences in the Ordinary Criminal Code.

Mr. Romero is currently imprisoned in EMR No. 1. The criminal trial was held in accordance with the relevant legal provisions. What the author wrongly presents as a travesty of justice is the stage in the trial when the sentence of first instance was handed down, and not a new trial. Finally, Mr. Romero was at no time subjected to physical maltreatment. In Uruguay, the integrity of prisoners is protected by strict provisions of positive law and also in fact.

7. In a further submission dated 7 June 1983, the author alleges that, according to information obtained through the Swedish Embassy in Uruguay, her husband has been subjected to three judicial proceedings, two under civilian and one under military justice, and that he has been sentenced to 25 years' imprisonment and to 1 to 5 years' precautionary detention.

8.1. With regard to article 5 (2) (*a*) of the Optional Protocol, the Committee ascertained from the secretariat of the Inter-American Commission on Human Rights that the case concerning Héctor Alfredo Romero, submitted to the Commission by a close family member on 20 July 1979 and registered under number 3106, had been withdrawn from active consideration in September 1982. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (*a*) of the Optional Protocol.

8.2. With regard to the exhaustion of local remedies, the Committee was unable to conclude, on the basis of the information before it, that there were effective remedies available to the alleged victim which he should have pursued. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (*b*) of the Optional Protocol.

9. On 22 July 1983, the Human Rights Committee therefore decided:

(1) That the communication was admissible in so far as it related to events which allegedly continued or took place on or after 23 March 1976, the date on which the Covenant and the Optional Protocol entered into force for Uruguay;

(2) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(3) That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to perform its responsibilities, it required specific responses to the allegations which had been made by the author of the communication, and the State party's explanations of the actions taken by it. The State party was requested, in this connection, (i) to enclose copies of any court orders or decisions of relevance to the matter under consideration and in particular to Mr. Romero's continued detention after he had served a five-year prison term to which he was sentenced in 1975, (ii) to inform the Committee of the reasons for his continued detention and of any further proceedings against him, and (iii) to inquire into the allegations made concerning the conditions in which Mr. Romero has been detained (paras. 2.1, 2.2 and 2.3

above) and to inform the Committee of the result of its inquiries.

10.1. In its submission under article 4 (2) of the Optional Protocol, dated 23 January 1984, the State party reiterated what was stated in its reply to the Committee dated 4 May 1983, explaining the grounds on which Mr. Romero was imprisoned. The State party also reiterated "that the conditions to which prisoners are subject have been observed by international officials and diplomats accredited in Uruguay, in the course of numerous visits made by them to the various prison establishments".

10.2. In her letter of 22 February 1984, the author maintains her allegations and points out that the State party has not specified who are the international officials and diplomats who have visited the prison establishments, whereas she mentions all her witnesses by name, e.g., Edgardo Carvalho, David Cámpora Schweizer and José Valdes Pieri.

11.1. The Human Rights Committee, having examined the present communication in the light of all the information made available to it by the parties as provided in article 5 (1) of the Optional Protocol, hereby decides to base its views on the following facts, which appear uncontested.

11.2. Héctor Alfredo Romero was a militant trade unionist and member of the Resistencia Obrero Estudiantil; he was arrested for the first time in September 1970 on charges of attempted robbery and illicit association; in second instance, he was sentenced to 25 years' imprisonment and 1 to 5 years' precautionary detention; from November 1976 to the middle of 1977, he was held incommunicado at an unknown place of detention.

12.1. In formulating its views, the Human Rights Committee also takes into account the following considerations.

12.2. In operative paragraph 3 of the Working Group's decision of 18 March 1981 and again in operative paragraph 3 of the Committee's decision of 22 July 1983, the State party was requested to enclose copies of any court orders or decisions of relevance to the case, and in particular with respect to Mr. Romero's continued detention after he had served a five-year prison term to which he had been sentenced in 1975. The State party was also requested to investigate the author's allegations with regard to the conditions of Mr. Romero's detention (paras. 2.1, 2.2 and 2.3 above) and to inform the Committee of the result of its inquiries. The Committee notes with regret that it has not received the requested information.

12.3. With regard to the burden of proof, the Committee has already established in other cases (e.g., No. 30/1978)[2] that this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities and to furnish to the Committee the information available to it. In cases where the author has submitted to the Committee allegations supported by witness testimony, as in this case, and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party.

13. 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 as found by the Committee, in so far as they continued or occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay), disclose violations of:

Article 10, paragraph 1, of the International Covenant on Civil and Political Rights, because Héctor Alfredo Romero has not been treated with humanity and with respect for the inherent dignity of the human person, in particular because he was kept incommunicado at an unknown place of detention for several months (from November 1976 to the middle of 1977) during which time his fate and his whereabouts were unknown.

14. The Committee, accordingly, is of the view that the State party is under an obligation to ensure that Héctor Alfredo Romero is henceforth treated with humanity, and to transmit a copy of these views to him.

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[2] *Selected Decisions . . .*, vol. 1, p. 109.

Communication No. 88/1981

Submitted by: Daniel Larrosa on 14 March 1981
Alleged victim: Gustavo Raúl Larrosa Bequio (author's brother)
State party: Uruguay
Date of adoption of views: 29 March 1983 (eighteenth session)

Subject matter: Trial of Uruguayan citizen by military court—Tupamaros

Procedural issues: Events prior to entry into force of Covenant—Failure of investigation of allegations by State party—Sufficiency of State party's reply under article 4 (2)—Withdrawal of communication from IACHR—Burden of proof—Effective remedy—Admissibility decision without rule 91 submission from State party.

Substantive issues: Detention incommunicado—Ill-treatment of detainees—Solitary confinement—Prison conditions—Torture—State of health of victim

Articles of the Covenant: 7 and 10 (1)
Articles of the Optional Protocol: 4 (2) and 5 (2) (a)

1. The author of the communication (initial letter dated 14 March 1981 and further submissions dated 25 March, 21 July, 29 August and 15 December 1981 and 16 November 1982) is a Uruguayan national, residing at present in France. He submitted the communication on behalf of his brother, Gustavo Raúl Larrosa Bequio, a 38-year-old Uruguayan national at present imprisoned in Uruguay.

2.1. The author states that his brother, who had been an active member of the political organization Frente Amplio, was arrested in Uruguay on 30 May 1972 because he was suspected of being a member of the Movimiento de Liberación Nacional (Tupamaros). The author further alleges that his brother was kept incommunicado for a long period of time, that he has been held in several military prisons, that he is at present detained at the Penal de Libertad and that he has been subjected to torture and inhuman prison conditions. The author mentions that his brother has lost his hearing in one ear because of the beatings inflicted upon him, that his sight has diminished to an extent that he now needs glasses and that owing to the insufficient food he has lost much weight during his imprisonment. The author also mentioned that his brother is not allowed to do any exercise, to read or to write and that his mental health has suffered accordingly.

2.2. With respect to the judicial proceedings against his brother, the author states that he was charged by the Military Criminal Investigation Court of First Instance (file No. 2216, vol. 4, p. 75) with the offences of conspiracy to upset the Constitution, aiding and abetting the escape of prisoners, manufacturing or being in possession of explosive substances and kidnapping. After the pre-trial proceedings, he was prosecuted by the Military Prosecutor of First Instance, Captain (R) Roberto A. Reinoso (Navy), and convicted of the offences of kidnapping, attempts to upset the Constitution, both as an accessory and in conspiracy with others, and criminal conspiracy (under articles 61 and 281, 62 and 132, 137 and 150 of the Penal Code).

2.3. The First Military Judge of First Instance rejected the twelve-year sentence requested by the Military Prosecutor on the grounds that it had been miscalculated and reduced it to a nine-year sentence.

2.4. The sentence was appealed and the case went to the Supreme Court of Military Justice, which upheld the decision of the Court of First Instance on 11 September 1979 but increased the prison term to 10 years and imposed security measures for one to five years. The judgement by the Supreme Military Court can be considered final since no further remedies at law are available to modify it. Moreover, because security measures have been imposed, it is impossible to obtain release from custody or release on parole, since the security measures have to be served once the main term is completed, and these can last for up to five years.

2.5. With respect to the conditions of his imprisonment, the author alleges that his brother has been removed from prison on several occasions in order to be tortured, that he is often punished by the prison authorities and not allowed to receive visits or parcels. He adds that his brother was punished in mid-October 1980 for unknown reasons and that since then, up to March 1981, he has been allowed to receive only one visit on 21 February 1981. He has also been held in what is called "La Isla", a prison wing of small cells without windows, where the artificial light is left on 24 hours a day and there is a cement bed and a hole in the floor for a WC; the prisoner was kept in solitary confinement there for more than one month; there are cases of people who have spent more than 90 days in "La Isla".

2.6. By letter of 21 July 1981, the author informed the Committee that he had withdrawn his complaint to the Inter-American Commission on Human Rights and enclosed a copy of his withdrawal.

2.7. The author claims that his brother is a victim of violations of articles 2 (1) and (3), 6, 7, 10 and 14 of the International Covenant on Civil and Political Rights.

3. By its decision of 13 October 1981, 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. The Working Group also requested the State party to give the Committee information on the state of health of Gustavo Raúl Larrosa Bequio.

4. By a further letter of 15 December 1981, the author requested that his brother be furnished with copies of the material pertaining to the proceedings in the case.

5. The Human Rights Committee took note that no submission had been received from the State party concerning the question of the admissibility of the communication. On the basis of the information before it, the Committee found that it was not precluded by article 5 (2) (a) of the Optional Protocol from considering the communication. The Committee was also unable to conclude that, in the circumstances of this case, there were effective remedies available to the alleged victim which he had failed to exhaust. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (*b*) of the Optional Protocol.

6. On 2 April 1982, the Human Rights Committee therefore decided:

(*a*) That the Communicat was admissible in so far as it related to events said to have occurred on or after 23 March 1976, the date on which the Covenant and the Optional Protocol entered into force for Uruguay;

(*b*) That, in accordance with article 4 (2) of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(*c*) That the State party should be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate

primarily to the substance of the matter under consideration. The Committee stressed that, in order to perform its responsibilities, it required specific responses to the allegations which had been made by the author of the communication and the State party's explanations of the actions taken by it. The State party was requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration;

(*d*) That the State party should be requested to furnish the Committee with information on the present state of health of Gustavo Larrosa and the medical treatment given to him;

(*e*) That the State party should be requested to transmit copies of the material pertaining to the case of Gustavo Larrosa and to grant him the opportunity to communicate directly with the Committee.

7.1. On 18 June 1982, 17 days after the transmittal to the State party of the decision on admissibility, the State party submitted a note which appears to be a late submission under rule 91, asserting, *inter alia*, that the communication contains serious errors:

> First, it is stated that Mr. Larrosa was tried in September 1979, i.e., seven years after his arrest. This is completely untrue. The actual date of the proceedings against Mr. Larrosa was 4 September 1972. The date mentioned by the complainant is the one on which the judgement of second instance was rendered. At that time the sentence was increased from 9 to 10 years as a result of the appearance of fresh evidence of the offences provided for in articles 150 and 132 (6) of the Ordinary Penal Code: criminal conspiracy and action to upset the Constitution. In other words, the increased sentence was not arbitrary but was based on new and duly substantiated facts. . . . With regard to the allegations of ill-treatment, the Government of Uruguay rejects the assertions made in this communication.

7.2. By a note of 24 June 1982, the State party supplemented its earlier submission without, however, referring to the Committee's decision on admissibility. It stated, *inter alia*, that

> as a member of the subversive organization Movimiento de Liberación Nacional, (National Liberation Movement) enrolled in Column 15, services sector, this person set up a mechanic's workshop for the purpose of concealing certain of that organization's activities. What is known in subversive jargon as a "*berretín*" was constructed on the premises; i.e., an underground hiding place for weapons or persons. A photographer from Police Headquarters in Montevideo was abducted and held prisoner there by the subversives.

7.3. By a note of 23 August 1982, the State party referred to its previous submission of 24 June 1982 as a response to the Committee's decision on admissibility.

8.1. In his submission under rule 93 (3), dated 16 November 1982, the author states that his brother was retried on 2 June 1982 without, however, appearing before a judge; that the tribunal was neither competent nor independent and that he had no opportunity to prepare his defence properly, to communicate with counsel of his own choosing, or to present witnesses on his behalf.

8.2. With respect to his brother's state of health, the author deplores that the State party has not complied with the Committee's specific request for information.

8.3. With respect to the current treatment of his brother at Libertad Prison, the author indicates that the State party has not commented on his initial allegation, in particular, that the Uruguayan Government has not explained why Gustavo Larrosa has been subjected to frequent punishment, nor indicated when his visiting rights were suspended and the reason for taking that step.

8.4. The author also deplores that, according to the information available to him, the State party has not complied with the Committee's request that copies of the material pertaining to this case should be transmitted to Gustavo Larrosa and that he should be granted the opportunity to communicate directly with the Committee.

9. The 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.

10.1. The Committee decides to base its views on the following facts which have either been essentially confirmed by the State party or are uncontested except for denials of a general character offering no particular information or explanation.

10.2. *Events prior to the entry into force of the Covenant*: Gustavo Raúl Larrosa Bequio was arrested on 30 May 1972 as a suspected member of the Movimiento de Liberación Nacional (*Tupamaros*). Criminal proceedings were instituted against him on 4 September 1972.

10.3. *Events subsequent to the entry into force of the Covenant*: On 11 September 1979, the Supreme Court of Military Justice upheld the decision of the Court of First Instance, but increased the prison term to 10 years and imposed security measures from one to five years. Gustavo Larrosa has been frequently punished at the prison, and from October 1980 to March 1981 he was allowed to receive only one visit. He has also been held in what is called "La Isla", a prison wing of small cells without windows, where the artificial light is left on 24 hours a day and the prisoner was kept in solitary confinement for over a month.

11.1. In formulating its views, the Human Rights Committee also takes into account the following considerations, which reflect a failure by the State party to furnish the information and clarifications necessary for the Committee to formulate final views on a number of important issues.

11.2. In operative paragraphs 3, 4 and 5 of its decision on admissibility of 2 April 1982, the State party was requested to enclose copies of any court orders or decisions relating to this case, to furnish information on the present state of health of Gustavo Larrosa, to transmit copies of the Committee's case file to Gustavo Larrosa and to grant him the opportunity to communicate directly with the Committee. The Committee notes with regret that it has not received the information requested nor any confirmation that Gustavo Larrosa has been informed of the proceedings before the Committee and given the possibility of communicating directly with the Committee.

11.3. With respect to the state of health of the alleged victim, the Committee finds that the author's allegations as to his brother's loss of hearing in one ear, loss of weight and impaired vision called for more precise information from the State party. Similarly, with respect to general prison conditions and the allegations of ill-treatment made by the author, the State party has adduced no evidence that these allegations

have been adequately investigated. A refutation of these allegations in general terms, as contained in the State party's submissions, is not sufficient.

11.4. With respect to the author's allegations that his brother has been retried, the Committee does not have sufficient information from the author or from the State party to make a finding on this point. The Committee notes, however, that if Gustavo Larrosa was retried on 2 June 1982, this fact should have been mentioned in the State party's subsequent submissions.

11.5. With regard to the burden of proof, the Committee has already established in its views in other cases (e.g., No. 30/1978)[1] that said burden cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities.

[1] See *Selected Decisions . . .*, vol. 1, p. 109, para. 13.3.

12. 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 as found by the Committee, in so far as they continued or occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay), disclose violations of the International Covenant on Civil and Political Rights, particularly of:

Article 7 and 10 (1), because Gustavo Raúl Larrosa Bequio has not been treated in prison with humanity and with respect for the inherent dignity of the human person.

13. The Committee, accordingly, is of the view that the State party is under an obligation to take immediate steps (*a*) to ensure strict observance of the provisions of the Covenant and provide effective remedies to the victim, in particular, to extend to Gustavo Larrosa treatment as laid down for detained persons in article 10 of the Covenant; (*b*) to ensure that he receives all necessary medical care; (*c*) to transmit a copy of these views to him; and (*d*) to take steps to ensure that similar violations do not occur in the future.

Communication No. 89/1981

Submitted by: Paavo Muhonen on 28 March 1981
Alleged victim: The author
State party: Finland
Date of adoption of views: 8 April 1985 (twenty-fourth session)

Subject matter: Conscientious objection to military service

Procedural issue: Exhaustion of domestic remedies

Substantive issues: Military service—Conscientious objector—Freedom of conscience—Election of remedy—Effective remedy—Requirements for "miscarriage of justice"—Extraordinary remedy—Presidential pardon—Compensation—Equity

Articles of the Covenant: 14 (6) and 18

Article of the Optional Protocol: 5 (2) (b)

1. The author of the communication (initial letter dated 28 March 1981 and further submissions of 20 September 1981 and 25 January 1982) is Paavo Muhonen, a Finnish citizen, born on 17 February 1950, employed as a librarian in Finland. He states that he is a conscientious objector to military service and, alleging that his ethical conviction has not been respected by the Finnish authorities, claims to be a victim of an infringement of the right to freedom of conscience, in violation of article 18, paragraph 1, of the International Covenant on Civil and Political Rights. The facts of the claim are as follows:

2.1. In August 1976, at that time eligible for military service, Mr. Muhonen applied to the Military Service Examining Board to be permitted, on profound ethical grounds and in accordance with existing law (Unarmed and Alternative Service Act, 1969), to do alternative service subject to the civil authorities, instead of armed or unarmed service in the armed forces. By its decision of 18 October 1977, the Examining Board rejected the application on the ground that Mr. Muhonen had not proved that serious moral considerations based on ethical conviction prevented him from doing armed or unarmed military service and ordered that he should do armed service (with the details of posting and the time for reporting for duty to be communicated to him at a later date). The proceedings before the Examining Board were conducted in writing. Mr. Muhonen did not avail himself of the opportunity to appear personally before the Examining Board, both because it was inconvenient for him to travel a long distance for a hearing and also because the Examining Board had indicated to him that a decision could be taken in his absence. Mr. Muhonen therefore concluded that his presence was not necessary and that his absence would not affect the disposition of the matter. Being dissatisfied with the decision of the Examining Board, Mr. Muhonen (as he was entitled to under the law) appealed to the Ministry of Justice to change the decision of the Examining Board. By a decision of 21 November 1977, the Ministry of Justice concluded that "no cause for changing the decision of the Military Service Examining Board [had] been shown" and upheld the

decision of the Examining Board. The text of the decision of the Ministry of Justice also states that under the law "this decision is not subject to appeal".

2.2. On 13 February 1978, Mr. Muhonen resubmitted to the Military Service Examining Board a declaration of refusal to bear arms. The Examining Board decided, on 1 September 1978, not to examine Mr. Muhonen's renewed declaration, "as the Ministry of Justice [had] already adopted a decision in this case". Mr. Muhonen again appealed to the Ministry of Justice, asking that he be called up for alternative service. In a decision of 3 November 1978, the Ministry of Justice, taking the view that the Examining Board should not have left Mr. Muhonen's declaration without a hearing on the grounds invoked, decided not to return the matter to the Board in view of the fact that the circumstances of the case were already clarified, but to give it direct consideration, reaching the conclusion that no cause had been shown for changing the final decision which the Examining Board had reached in its decision of 18 October 1977 and on the appeal against which the Ministry of Justice had adopted a decision on 21 November 1977. Again, the text of the decision of the Ministry of Justice stated that it was not subject to appeal.

2.3. In the mean time, i.e. before the Examining Board and the Ministry of Justice acted on his submission of 13 February 1978, Mr. Muhonen was called up for military service (15 February 1978). He reported to the military unit where he had been posted and there refused to do any military service. He was furloughed the same day. Criminal court proceedings were then initiated against Mr. Muhonen for refusal to do military service and an ordinary court of first instance sentenced him to 11 months' imprisonment on 13 December 1978. The Eastern Finland Higher Court confirmed that verdict on 26 October 1979, and Mr. Muhonen started to serve his sentence on 4 June 1980.

2.4. In the autumn of 1980, Mr. Muhonen applied for a new hearing before the Military Service Examining Board, which acceded to this request and now found in favour of Mr. Muhonen. In a decision of 2 February 1981 the Examining Board stated as follows:

> The Military Service Examining Board, having studied the documents relating to the original refusal to bear arms which are in the possession of the Ministry of Justice, and having provided Mr. Paavo Juhani Muhonen with an opportunity to explain his convictions personally to the Board, has considered Mr. Muhonen's application and has found that Mr. Muhonen who, as may be believed on the basis of a conversation which has now taken place, has an ethical conviction within the meaning of the Unarmed and Alternative Service Act (132/69) which prevents him from doing armed or unarmed service in the armed forces and who, having already reached the age of 30, may not be called up for service.
>
> Accordingly, this case requires no further action by the Military Service Examining Board.

2.5. At this stage (2 February 1981) Mr. Muhonen had already been serving his 11 months' prison sentence since 4 June 1980. It is stated on his behalf that a number of persons then requested a presidential pardon in his case; that the case was handed over by the Ministry of Justice to the Highest Court of Finland; and that, as a result, Mr. Muhonen was pardoned on 27 March 1981 and released from prison two weeks later. It is claimed, however, that Mr. Muhonen has not been allowed any monetary relief for the wrongs which he has allegedly suffered. The facts, as submitted, do not indicate which steps, if any, have been taken by Mr. Muhonen, or on his behalf, to obtain such monetary relief.

2.6. As stated above (see para. 1), Mr. Muhonen claims that the facts, as described, make him a victim of a violation by Finland of his right protected by article 18, paragraph 1, of the International Covenant on Civil and Political Rights reading as follows:

Article 18

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

3. The Committee was of the opinion that, in so far as the decisions of the Military Service Examining Board and of the Ministry of Justice in 1977 and 1978, refusing Mr. Muhonen's application to be exempted from service in the armed forces on ethical grounds, raised a question of compliance with article 18, paragraph 1, of the Covenant, the subsequent decision of the Examining Board of 2 February 1981 had already provided an answer in that respect and that consequently no further question of violation of that article arose. Therefore, the question whether article 18, paragraph 1, guaranteed a right of conscientious objection to military service did not have to be determined by the Committee in the present case. It observed, however, that the facts of the case might still raise an issue under article 14, paragraph 6, of the Covenant which the Committee should consider.

4.1. On 28 July 1982, the Human Rights Committee therefore decided to transmit the communication to the State party concerned under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility, in so far as the communication might raise issues under article 14, paragraph 6, of the International Covenant on Civil and Political Rights, which reads as follows:

Article 14

> . . .
>
> 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

4.2. In response, the State party, on 29 October 1982, objected to the admissibility of the communication on the ground that "in so far as the communication refers to decisions of the Ministry of Justice, all local remedies have not been exhausted in this case, since the possibility of seeking the annulment of the decision in the Supreme Administrative Court, which is open to the author of the communication, has not yet been used".

5.1. In considering that the successive decisions of the Ministry of Justice handed to Mr. Muhonen had already stated that there was no appeal from the decisions of the Ministry of Justice, the Human Rights Committee requested further clarifications from the

State party as to the nature of the remedy which it now said had been available to Mr. Muhonen.

5.2. The State party's response, dated 21 June 1983, reads as follows:

According to paragraph 6 of the Act on Extraordinary Remedies in Administrative Affairs (200/66), the extraordinary remedy of seeking the annulment of an administrative decision can be used:

1. If a procedural fault has been made in the case that may have essentially affected the decision;
2. If the decision is based on an apparently faulty application of law or on a mistake that may have essentially affected the decision;
3. If such new information has been obtained in the case that might have essentially affected the decision and the appellant is not responsible for the omission to present such information on time.

In the case of this extraordinary remedy, an application must be lodged with the supreme administrative court within five years from the entry into effect of the decision. If particularly weighty grounds exist, an extraordinary remedy may be used after the set period of five years.

The Ministry of Justice of Finland considers that in the present case where normal procedure of appeal is not available, an extraordinary remedy such as seeking the annulment of decision(s) of the Ministry of Justice could have been an effective local remedy. Owing to the fact that a decision of the Ministry of Justice under section 6 of the Unarmed and Alternative Service Act cannot be subject to appeal, similar cases have previously been brought up in the Supreme Administrative Court on the basis of paragraph 6 of the Act on Extraordinary Remedies in Administrative Affairs referred to above and have been decided upon by the Court.

The Ministry of Justice of Finland considers that article 14, paragraph 6, of the Covenant does not apply in the case of the decision of the city court of Joensuu of 13 December 1978 based on act No. 23 of 1970 on the punishment of certain conscripts refusing to do regular military service, since the decision was not in itself wrong. The Ministry of Justice states that Mr. Muhonen could possibly have avoided the process through the use of the extraordinary remedy of seeking the annulment of the decisions of the Ministry of Justice.

6.1. When considering the admissibility of the communication, the Committee noted, with regard to article 5, paragraph 2 (*b*), of the Covenant, that it could not accept the State party's contention that the communication should be declared inadmissible on the ground that the extraordinary remedy indicated by it had not been used. In the first place, the author of the communication had clearly been given to understand that there was no further remedy. Secondly, having regard to the limited scope of the extraordinary remedy in question, the State party did not show that there were grounds for believing that the remedy could be or could have been effective in the particular circumstances of the case.

6.2. With regard to the State party's contention that article 14, paragraph 6, of the Covenant is inapplicable in the circumstances of the present case, the Committee observed that that was a matter for consideration on the merits of the communication.

7. On 6 April 1984 the Human Rights Committee therefore decided:

(*a*) That the communication was inadmissible in so far as it related to an alleged breach of article 18, paragraph 1, of the International Covenant on Civil and Political Rights, in view of the remedy obtained by the author of the communication on 2 February 1981 (see paras. 2.4, 2.6 and 3 above);

(*b*) That the communication was admissible, in so far as it raised issues under article 14, paragraph 6, of the Covenant;

(*c*) That, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it.

8. In its submission under article 4, paragraph 2, of the Optional Protocol, dated 22 October 1984, the State party again reviewed the facts of the communication and concluded:

The author of communication No. 89/1981 had been sentenced by a court of law on the basis of the law concerning the punishment of certain conscripts who decline to do military service (23/72). The legality of the sentence had been considered and confirmed at the highest level of judicial review. The fact that the Military Service Examining Board, by its decision of 2 February 1981, considered that the convictions of the applicant had now been established does not indicate that its earlier decisions or those of the Ministry of Justice would have been at fault. Under no circumstances can the validity of the decisions of the courts of law in this matter be questioned.

According to article 29 (1) of the Constitution Act (94/19) if, due to changed circumstances, compliance with a valid court decision is no longer equitable, the President can, in an individual case, having received the opinion of the Supreme Court, pardon the person concerned or make his sentence lighter. This is precisely what happened in the case of the author of communication No. 89/1981.

There was no "miscarriage of justice" during the process. Therefore, article 14, paragraph 6, of the Covenant does not apply. Nor has the applicant the right to compensation under the Law on Compensation to Persons Who Have Been Innocently Imprisoned or Convicted (422/74).

9. The State party's submission was duly forwarded to the author of the communication. No further comments have been received from Mr. Muhonen.

10. The Committee, having considered the present communication in the light of all information made available to it by the parties as provided for in article 5 (1) of the Optional Protocol, decides to base its views on the facts as submitted by the parties, which are not in dispute.

11.1. In considering the merits of the communication, and bearing in mind the decision on admissibility, the Human Rights Committee starts from the premise that existing Finnish law grants certain categories of persons an option to do alternative service instead of armed or unarmed service in the Finnish Armed Forces. While Finland does have legislation allowing such an exemption, the Committee recognizes that only the Finnish authorities are responsible for evaluating each application for exemption under Finnish law.

11.2. The Committee's task is limited to determining whether, in the particular circumstances of the case, Mr. Muhonen was entitled to receive compensation in accordance with article 14, paragraph 6, of the Covenant. Such a right to compensation may arise in relation to criminal proceedings if either the conviction of a person has been reversed or if he or she "has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice". As far as the first alternative is con-

cerned, the Committee observes that Mr. Muhonen's conviction, as pronounced in the judgement of the city court of Joensuu on 13 December 1978 and confirmed by the Eastern Finland Higher Court on 26 October 1979, has never been set aside by any later judicial decision. Furthermore, Mr. Muhonen was not pardoned because it had been established that his conviction rested on a miscarriage of justice. According to the relevant Finnish statute, the law concerning the punishment of certain conscripts who decline to do military service (23/72), whoever refuses military service not having been recognized as a conscientious objector by the Examining Board commits a punishable offence. This means that the right to decline military service does not arise automatically once the prescribed substantive requirements are met, but only after due examination and recognition of the alleged ethical grounds by the competent administrative body. Consequently, the presidential pardon does not imply that there had been a miscarriage of justice. As the State party has pointed out in its submission of 22 October 1984, Mr. Muhonen's pardoning was motivated by considerations of equity.

11.3. To be sure, Mr. Muhonen's conviction came about as a result of the decision of the Examining Board of 18 October 1977, denying him the legal status of conscientious objector. This decision was based on the evidence which the Examining Board had before it at that time. Mr. Muhonen succeeded in persuading the Examining Board of his ethical objection to military service only after he had personally appeared before that body following his renewed application in the autumn of 1980, while in 1977 he had failed to avail himself of the opportunity to be present during the Examining Board's examination of his case.

12. Accordingly, the Human Rights Committee is of the view that Mr. Muhonen has no right to compensation which the Finnish authorities have failed to honour and that consequently there has been no breach of article 14 (6) of the Covenant.

Communication No. 90/1981

Submitted by: Luyeye Magana ex-Philibert on 30 March 1981
Alleged victim: The author
State party: Zaire
Date of adoption of views: 21 July 1983 (nineteenth session)[1]

Subject matter: Detention of Zairian civilian by military police

Procedural issues: Admissibility decision without rule 91 submission from State party—Failure of investigation of allegations by State party—Adoption of views without State party's submission on merits—Burden of proof

Substantive issues: Arbitrary arrest—Ill-treatment of detainees—Habeas corpus—*Effective remedy—Delays in proceedings—Review of conviction and sentence*

Articles of the Covenant: 2 (3), 9 (1), (2), (3) and (4), 10 (1) and 17

Articles of the Optional Protocol: 4 (2) and 5 (2) (b)

1. The communication (initial letter dated 30 March 1981 and further letter dated 15 February 1982) is submitted by Luyeye Magana ex-Philibert through his legal representative, Michael P. D. Ellman. The alleged victim, a civil servant born on 22 February 1929, is a citizen of Zaire domiciled in that country. It is claimed that Mr. Luyeye is a victim of breaches by Zaire of articles 2 (3), 9, 10 and 17 of the International Covenant on Civil and Political Rights.

2.1. It is alleged that, on 3 June 1967, Mr. Luyeye was arrested by the Sûreté Nationale, deported to the island of Mbula-Mbemba in Lower Zaire, and then transferred to the prison Osio in Upper Zaire where he was detained until 30 August 1968 without ever being charged or informed of the reason for his detention. He was rearrested on 24 March 1977 when, at 4.30 a.m., three agents of the Centre National de Documentation, furnished with a search warrant, came to his house to carry out a search for no apparent reason. They seized documents written by the alleged victim, cinematographic films and magnetic tapes. Following the search, though without any warrant of arrest or summons, they requested him to accompany them to the Centre National de Documentation to provide further information. Once there, he was introduced to Citizen Kisangani, one of the directors, who, without any further proceedings, simply ordered him to be kept in detention. While in detention, he was kept in a cell, locked in from morning to night, sleeping on the ground; he was deprived of all contact with his family and provided with only 200 g of rice and/or 100 g of chikwangue and a ladle of beans from midday to midday; he was refused all medical attention. On 6 April 1977, without his knowledge or that of his family, the Centre National de Documentation sent three agents to the village of his birth, Kintambu in Lower Zaire, to search his country house where they removed his Scout's Certificate. His detention continued until 9 January 1978 when he was released following an amnesty pronounced by the President of the Republic, without ever having been interrogated or given any document relating to the detention, though a decree of 22 April 1961 (l'arrêté ministériel No. 05/22) provided

[1] Following his appointment to the Court of Appeal of the Supreme Court of Ontario, Mr. Walter Surma Tarnopolsky did not participate in the adoption of views at the Committee's nineteenth session.

that the agents of the Sûreté Nationale can detain people for inquiry for five days only, after which they must be served with an internment order. It is further alleged that during his detention, five members of his immediate family died and were buried without his having been able to be present at the funerals. His children were expelled from school because of the lack of finance while he was detained.

2.2. It is maintained that by the aforesaid, the alleged victim's rights to liberty and security of person, to freedom from arbitrary arrest or detention, to be informed at the time of arrest of the reasons for his arrest and of any charges against him, to be brought promptly before a judge or other officer authorized by law to exercise judicial power and to compensation for unlawful arrest or detention (art. 9 of the Covenant) have been infringed; that his rights not to be subjected to arbitrary or unlawful interference with his privacy, home or correspondence nor to unlawful attacks on his honour and reputation but to have the right of protection of the law against such interference or attacks (art. 17 of the Covenant) have been infringed and that he was not treated with humanity while in detention (art. 10).

2.3. As to the exhaustion of domestic remedies, it is claimed that Mr. Luyeye has brought an appeal against his detention by writing to the Administrateur général who interviewed him on 20 September 1979, i.e., after his release. His appeal during detention had been without result. It is alleged that there is no other provision of any appeal in the law of Zaire, though Mr. Luyeye did in fact write to the Head of State by letter of 9 January 1978 (to which he did not receive a reply), as the only extrajudicial remedy open to him. He has therefore attempted to bring his complaint before the domestic tribunals of Zaire without success and claims that, accordingly, the Republic of Zaire is in breach of its obligations under article 2 (3) of the Covenant, namely to ensure that if any person's rights or freedom as therein recognized are violated, he shall have an effective remedy notwithstanding that the violation has been committed by persons acting in an official capacity.

2.4. It is further stated that the same matter has not been submitted for examination under another procedure of international investigation or settlement.

3. By its decision of 7 April 1982, 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. The State party was in particular requested, if it contended that domestic remedies had not been exhausted, to give details of the effective remedies available to the alleged victim in the particular circumstances of his case and, if it objected that the same matter is being examined under another procedure of international investigation or settlement, to give details including information on the stage reached in such proceedings. The State party was also requested to provide the Committee with copies of any court orders or decisions relevant to the case. The State party was informed that its reply should be furnished to the Committee not later than 18 July 1982. No reply was received from the State party.

4. The Human Rights Committee took note that no submission had been received from the State party concerning the question of the admissibility of the communication. On the basis of the information before it, the Committee found that it was not precluded by article 5 (2) (*a*) of the Optional Protocol from considering the communication. The Committee was also unable to conclude that, in the circumstances of this case, there were effective remedies available to the alleged victim which he had failed to exhaust. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (*b*) of the Optional Protocol.

5. On 21 October 1982, the Human Rights Committee therefore decided:

(*a*) That the communication was admissible in so far as it related to events said to have occurred on or after 1 February 1977, the date on which the Covenant and the Optional Protocol entered into force for Zaire;

(*b*) That, in accordance with article 4 (2) of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and to enclose copies of any court orders or decisions relevant to the case.

6. On 22 May 1983, the time-limit for the observations requested under article 4 (2) of the Optional Protocol expired. No submission has been received from the State party. The Committee observes that, in accordance with article 4 (2), the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities and then to submit its explanations and statements to the Committee. In operative paragraph 2 of the Committee's decision on admissibility of 21 October 1982, the State party was also requested to furnish to the Committee copies of any court orders or decisions relevant to the case. The Committee notes with regret that it has not received the information requested. In the absence of any submission from the State party, the Committee cannot but draw its conclusions on the basis of information before it from other sources.

7.1. The Human Rights Committee, having examined the present communication in the light of all the information made available to it as provided in article 5, paragraph 1, of the Optional Protocol, hereby decides to base its views on the following facts, which, in the absence of any observations by the State party, are uncontradicted by it.

7.2. Luyeye Magana ex-Philibert was arrested on 24 March 1977 when three agents of the Centre National de Documentation furnished with a search warrant, came to his house to carry out a search for no apparent reason. They seized documents written by the alleged victim, cinematographic films and magnetic tapes. Following the search, though without any warrant of arrest or summons, they requested him to accompany them to the Centre National de Documentation to provide further information. Once there, he was introduced to Citizen Kisangani, one of the directors, who, without any further proceedings, simply ordered him to be kept in detention. While in detention, he was kept in a cell, locked in from morning to night, sleeping on the

ground; he was deprived of all contact with his family and he was refused all medical attention. On 6 April 1977, without his knowledge or that of his family, the Centre National de Documentation sent three agents to the village of his birth, Kintambu in Lower Zaire, to search his country house where they removed his Scout's Certificate. His detention continued until 9 January 1978 when he was released following an amnesty pronounced by the President of the Republic, without ever having been interrogated or given any document relating to the detention, though a decree of 22 April 1961 (l'arrêté ministériel No. 05/22) provided that the agents of the Sûreté Nationale can detain people for inquiry for five days only, after which they must be served with an internment order. During his detention he appealed without result to the Administrateur général and, by letter, to the Head of State. No other remedy was available to him. It is further alleged that during his detention, five members of his immediate family died and were buried without his having been able to be present at the funerals. His children were expelled from school because of the lack of finance while he was detained.

8. 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 as found by the Committee, in so far as they continued or occurred after 1 February 1977 (the date on which the Covenant and the Optional Protocol entered into force for Zaire), disclose violations of the International Covenant on Civil and Political Rights, particularly of:

Article 9 (1), because Luyeye Magana ex-Philibert has been subjected to arbitrary arrest and detention;

Article 9 (2), because he was not informed, at the time of his arrest, of the reasons for his arrest and of any charges against him;

Article 9 (3) and (4), because he was not brought promptly before a judge and no court decided within a reasonable time on the lawfulness of his detention;

Article 10 (1), because, while in detention, he was not treated with humanity;

Article 2 (3), because there was no effective remedy under the domestic law of Zaire against the violations of the Covenant complained of.

9. The Committee, accordingly, is of the opinion that the State party is under an obligation (*a*) to investigate the complaints made and to provide Luyeye Magana ex-Philibert with effective remedies for the violations he has suffered, including compensation and the return of his property to him, and (*b*) to take steps to ensure that similar violations do not occur in the future.

Communication No. 92/1981

Submitted by: Laura Almirati García on 5 June 1981
Alleged victim: Juan Almirati Nieto (author's father)
State party: Uruguay
Date of adoption of views: 25 July 1983 (nineteenth session)

Subject matter: Trial of Uruguayan citizen by military court—Tupamaros—Martial Law

Procedural issues: Exhaustion of domestic remedies —Events prior to entry into force of Covenant—Admissibility decision without rule 91 submission from State party—Sufficiency of State party's reply under article 4 (2)—Failure of investigation of allegations by State party—Available remedy—Unsubstantiated allegations

Substantive issues: Ill-treatment of detainees—Torture—State of health of victim—Prison conditions —Access to counsel—Denial of defence facilities—Equality of arms—Fair trial—Fair hearing—Non bis in idem—*Delays in proceedings*

Articles of the Covenant: 2 (1), 10 (1), 14 (3) (b) *and* (d), *14 (7) and 26*

Article of the Optional Protocol: 4 (2)

1.1. The author of the communication (initial letter dated 5 June 1981 and further submissions dated 22 October 1981 and 11 May 1982) is a Uruguayan national, resident at present in Belgium. She submitted the communication on behalf of her father, Juan Almirati Nieto.

1.2. The author states that her father, a Uruguayan Civil Engineer (born on 23 June 1932), was arrested in 1970 because he was alleged to be a member of the Movimiento de Liberación Nacional. Criminal proceedings were then initiated against him for the following offences: association to break the law, conspiracy to overthrow the Constitution, use of false identity papers, robbery and other lesser offences such as resistance to authority. In May 1971, he escaped from prison but on 14 April 1972 he was rearrested, kept incommunicado and allegedly subjected to severe torture. He was then brought before the same judge who had been conducting his trial; after examining the situation, this judge added to the list of offences already mentioned that of collaborating in a mass escape of political prisoners (women) which had occurred a few months before. The author adds that her father was held for

[1] Following his appointment to the Court of Appeal of the Supreme Court of Ontario, Mr. Walter Surma Tarnopolsky did not participate in the adoption of views at the Committee's nineteenth session.

short periods of time at several detention places and then transferred to the Penal de Libertad, where he is detained at present.

1.3. The author mentions that, on the night of 14 April 1972, the same day that her father was rearrested, the Executive authorities declared the "internal state of war" and, as a consequence thereof, martial law became applicable to all political offences. The author describes the general situation as follows:

> In July 1972, the Parliament, subjected to strong pressures and faced with open threats of dissolution by force, agreed to approve law No. 14,068 concerning "Security of the State and the Internal Order", which increased the authority of the military judges by converting the political offences referred to in the Ordinary Penal Code into military offences and incorporating them in the Military Penal Code, regardless of whether those committing such offences were military personnel or civilians, thereby violating the Constitution which did not allow civilians to be judged by military judges. . . . On 29 December 1975, the Council of State (appointed by the Executive and claiming to take the place of the Parliament elected by the people, which was dissolved at the time of the coup d'état of June 1973) approved law No. 14,493. That law broadened the sphere of action of the military judges, granting them retroactive competence to deal with political offences committed even before 14 April 1972 and entrusting to them the responsibility for dealing with all cases in progress before the ordinary courts in which a definite and final decision had not yet been reached. . . .
>
> When martial law was applied throughout the country, all kinds of defects and irregularities became evident in the procedures of the military courts, which made a mockery of the right to a fair and equitable trial and the right of defence in criminal proceedings.

The author claims that all these developments adversely affected her father's situation.

1.4. She states that her father continued to be under the authority of the civil judges for a long time, because he had been arrested one day before the military judges were empowered to try those suspected of political offences. She further submits that her father was sentenced by the civil judiciary, after an irregular trial marked by the restriction of procedural rights and guarantees, to a 10-year term of imprisonment. She informs the Committee that although her father finished serving his sentence in March 1981 (in a further submission of 11 May 1982 she mentions 14 April 1982 as the date for this),[3] he is still in prison. The author then relates the events leading to her father's continuing imprisonment: "Suddenly, in December 1980, new criminal proceedings were started against Almirati, this time by the military judiciary and based on the same facts as those for which he had already been tried and sentenced. There were no new elements or new offences other than those which had already been investigated; some of the new accusations had already been made in the past by the police and the security services of the armed forces and had been rejected by the civil judiciary. Thus the sacred principles of *res judicata* and ***non bis in idem*** have been violated, for my father is being tried a second time for the same acts, and all this started 10 years later, when the prisoner had three months to go to finish serving his entire sentence. The military prosecutor is now asking that Juan Almirati should be sentenced to 22 years' imprisonment. I must inform the Committee that, given the situation prevailing in Uruguay, I have not been able to obtain more information, nor, of course, a copy of the military prosecutor's indictment, and I would therefore suggest that the Committee should ask the Uruguayan Government to provide it and to inform it exactly what Almirati's legal situation is, what stage this second trial has reached and by virtue of what legal rules it is being conducted."

1.5. The author maintains that the military judiciary lacks certain essential attributes, that it is not independent since it depends on the Executive, that it is not impartial since the judges are military officials who are acting temporarily in this capacity, and that it is not competent since the judges and prosecutors are not required to be lawyers or practitioners of the law but merely military officers of a certain rank, according to the importance of the court. She further maintains that the domestic remedies which are provided for in the Uruguayan legislation cannot protect her father, because none of them is allegedly applicable in practice if the human rights violation has been committed by military personnel or by members of the police in connection with State security as interpreted by the military forces.

1.6. The author alleges that her father has been arrested, tortured, ill-treated, tried, sentenced and kept in detention only because of his political ideas and that, under the conditions in which political prisoners like her father are detained, he has no possibility of recourse either to domestic remedies or to an international body to seek redress for the violation of his rights.

1.7. The author alleges that at the Penal de Libertad her father is subjected to inhuman prison conditions. She stresses in this connection, the following points: "My father shares a cell measuring 2 m by 3.50 m with another detainee, and they are kept in it continuously for 23 hours a day; if the weather is good and they are not being punished, they are taken out for one hour in the open air. Since he is being held in the part of the prison set aside for those the military have classified as 'dangerous', my father is never taken out of his cell to work, to eat or for anything other than exercise and visits. It should be pointed out that the qualification 'dangerous', is the result of an evaluation, not by the judge but by the prison commandant. The conditions applied in this sector (the second floor of the prison) are much harsher even than those applied to other detainees located in other sectors (the prison population amounts at present to some 1,100 political prisoners), which are already harsh enough. My father can study or read books only if the commandant on duty feels like allowing it, and books are frequently confiscated without any explanation. In any case he can read only those books which pass the military censorship. . . . My father is not allowed to read newspapers because they are all prohibited, whether national or foreign; he cannot listen to the radio, because this, too, is prohibited; all of which naturally means that he is cut off from the world at large, thus aggravating the tensions which are natural in a prison and forcing him to live disconnected from the outside world." The author further alleges that detainees live under constant fear and are subject to harassment by the guards who are at liberty to impose sanctions on prisoners for petty contraventions (such as speaking with other inmates at certain times); that from

[3] The discrepancy in the dates appears to be due to the fact that the author either counted from her father's first arrest in 1970 or from his rearrest on 14 April 1972.

time to time a prisoner is taken out of prison and brought to military quarters in order to be interrogated and tortured again, either in connection with his prior conviction or with alleged political activities in prison, and that because of this situation the physical and mental health of detainees is seriously endangered. The author also alleges that, because of insufficient food, her father has lost more than 15 kilos during his imprisonment. She claims that the treatment inflicted upon her father amounts to mental torture.

1.8. The author states that the same matter has not been submitted to another procedure of investigation or settlement.

1.9. The author claims that her father is a victim of violations of articles 2 (1) and (3), 7, 10 (1) and (3), 14 (1), (2), (3) and (7) and 26 of the International Covenant on Civil and Political Rights.

2. By its decision of 23 July 1981, the Human Rights Committee, having decided that the author of the communication was justified in acting on behalf of the alleged victim, 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. The Human Rights Committee also requested the author of the communication to explain in detail which of the alleged events had taken place after 23 March 1976 (the date of the entry into force of the Covenant and Protocol for Uruguay), including the treatment and conditions of imprisonment of her father after that date and his access to legal counsel in connection with the charges brought against him in the new proceedings initiated in December 1980.

3. In a futher letter, dated 22 October 1981, submitted by the author in reply to the Committee's request for additional information, she repeated that the conditions in which her father was serving his term of imprisonment constituted a deliberate form of cruel, inhuman and degrading treatment and that although this treatment began before, it had continued after March 1976 and was still continuing. She also repeated that the new criminal proceedings conducted against him violate the principles of *res judicata* and *non bis in idem*. The author further stated that, when the second proceedings were begun in December 1980, her father's defence lawyer was not informed, that he was later presented with "faits accomplis" and that, in August 1981, when her father was taken before the First Military Court to be interrogated for the purposes of the second trial, everything was done without the knowledge of his defence lawyer and consequently without any possibility of his participating and defending her father's interest.

4. The Human Rights Committee, taking note that no submission has been received from the State party concerning the question of the admissibility of the communication, on the basis of the information before it, found that it was not precluded by article 5 (2) (*a*) of the Optional Protocol from considering the communication. The Committee was also unable to conclude that in the circumstances of this case there were effective remedies available to the alleged victim which he had failed to exhaust. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (*b*) of the Optional Protocol.

5. On 25 March 1982, the Human Rights Committee therefore decided:

(*a*) That the communication was admissible in so far as it related to events said to have occurred on or after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay) or which, although occurring before that date, continued or had effects alleged to constitute a violation after that date;

(*b*) That, in accordance with article 4 (2) of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(*c*) That the State party should be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to perform its responsibilities, it required specific responses to the allegations which have been made by the author of the communication and the State party's explanations of the actions taken by it. The State party was requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration.

6. In a further letter, dated 11 May 1982, the author stressed that, as a result of the treatment inflicted upon her father at Libertad, his health had been declining continuously and that he was in a state of chronic malnutrition and had serious eye problems. She further stated that:

> After ten years of imprisonment, fresh inquiry proceedings have been initiated against him; this is the third time that his trial has been started anew. They want to accuse him of new offences and for this the military need witnesses to accuse him. We all know that the passage of time is not sufficient to protect prisoners from new offences; when a prisoner is of interest to the military intelligence services, particularly when they have not managed to cow him, as is the case with my father, completion of sentence does not lead to release, because under this infernal machine, in which the prisoner is at the mercy of his tormentors, he may be taken out of the prison to torture and interrogation centres and then returned to Military Detention Establishment No. 1 with offences on his file that equal the number of years the régime wishes to keep him in prison.

7. In its submission under article 4 (2) of the Optional Protocol, dated 13 August 1982, the State party referred to the contents of an earlier note, dated 1 July 1982, which appeared to be a late submission under rule 91 of the provisional rules of procedure. The text of this note reads as follows: ". . . the Government of Uruguay wishes to stress that this communication is based on an unacceptable premise in describing the person with whose situation it is concerned as a 'political prisoner'. Mr. Almirati was a member of the MLN subversive group and participated actively in it, serving as co-ordinator of one of the sections into which this organization was divided, known as the 'North column'. He directed the construction of '*berretines*'—hiding-places for the concealment of weapons or persons and premises for the movement. He

was responsible for the operation in which Paysandú airport was attacked and surrounded. He took part in the raid on an important local enterprise, subduing the caretakers under threat of firearms. He took part in the operation for the escape of prisoners from the women's prison. On that occasion, he assaulted and forcibly subdued one of the police officers on guard. It is obvious that acts of this kind cannot be considered to constitute 'political activities', nor can their perpetrator be regarded as a victim of persecution. Further proceedings were taken against Mr. Almirati on 8 October 1981 for the offences of 'robbery' and 'assault on the safety of transport'. In this communication, it is asserted that the principles of *res judicata* and of *non bis in idem* have been violated. This is untrue, since the proceedings concerned were brought because of the emergence of fresh evidence regarding the commission of the above offences. The fact that these offences had been investigated by the police authorities in no way signifies that there was any repetition of proceedings; no proceedings had been instituted on that account, since the authorities did not possess the evidence now available. The Government of Uruguay also wishes to stress that this communication contains completely unfounded and meaningless statements; for example, the assertion that martial law was introduced in Uruguay or that the Uruguayan Parliament acted under threats. Despite the information supplied, this Government maintains that with reference to the second proceedings, use has not been made of the domestic remedies available to the accused such as appeal and review."

8. In a further submission under article 4 (2) of the Optional Protocol, dated 11 October 1982, the State party . . . "categorically rejects the term 'concentration camp' used to describe Detention Establishment No. 1. In fact, far from having such an evil status, the standard in this establishment is above the international average for detention establishments. The system is the normal one, and every prisoner, without exception, is given the necessary food and attention to keep him in good physical and mental condition. Secondly, it is emphasized that the terms 'terrible harassment' and 'taken away and tortured', used to describe alleged treatment to which Mr. Almirati had been or was about to be subjected, are untrue and malicious. It must be stated categorically that no type of physical or mental coercion is used in Uruguay on persons under detention and that Mr. Almirati is in prison and is unable to enjoy normal relations with his family, not because the Government of Uruguay so wishes, but because, as a member of the subversive Tupamaros NLM, he committed numerous offences classified by the Uruguayan legal system and he was duly tried and sentenced for them. It should be emphasized, however, that the relatives of every prisoner are permitted to make fortnightly visits, and the visiting hours are even adjusted for those who, for employment reasons, are unable to attend on working days. With respect to Mr. Almirati's present state of 'chronic malnutrition', we wish to state that the diets in Uruguayan detention establishments are prepared by professional dietitians on the staff of such establishments. It is further pointed out that the prisoners themselves participate in the tasks of preparing their food, on a group rota system. Mr. Almirati is in good health and he has recently had a number of clinical examinations and blood pressure tests."

9.1. The Committee decides to base its views on the following facts which have been either essentially confirmed by the State party or are uncontested except for denials of a general character offering no particular information or explanation.

9.2. *Events prior to the entry into force of the Covenant:* Juan Almirati Nieto was arrested in Uruguay in 1970. Criminal proceedings were then initiated against him for the following offences: association to break the law, conspiracy to overthrow the Constitution, use of false identity papers, robbery and other lesser offences such as resistance to authority. In May 1971, he escaped from prison. On 14 April 1972, he was rearrested. The judge added to the list of offences already mentioned that of collaborating in a mass escape of women detainees. He was held for short periods of time at several detention places and he was then transferred to Libertad. He was sentenced by the civil judiciary to 10 years of imprisonment.

9.3. *Events subsequent to the entry into force of the Covenant:* Towards the end of 1980, shortly before he was due for release upon the completion of his term of imprisonment, new criminal proceedings were started against Juan Almirati Nieto by the military judiciary without the knowledge of his defence lawyer for offences alleged to have been committed prior to his imprisonment and in respect of which new evidence was alleged to have emerged. The military prosecutor has asked that Juan Almirati Nieto should be sentenced to 22 years' imprisonment. The Committee has received no information as to the outcome of these proceedings or that they have been concluded.

10.1. In formulating its views, the Human Rights Committee also takes into account the following considerations.

10.2. In its decision of 25 March 1982, the Committee requested the State party to submit copies of any relevant court orders or decisions. The Committee notes with regret the failure of the State party to respond to this request.

10.3. The Committee notes that it has been informed by the State party, in submissions of 1 July and 13 August 1982, that with reference to "the second proceedings, use has not been made of the domestic remedies available to the accused such as appeal and review". The Committee is unable to conclude, however, that these remedies are available in respect of the particular violations of the Covenant which it finds in the present case.

10.4. The Committee observes that the State party, in its submission of 11 October 1982, refuted only in general terms the author's detailed allegations that her father is held under inhuman prison conditions at Libertad (see para. 1.7 above). 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[3] that a practice of inhuman treatment

[3] For the views of the Committee, see communication No. 66/1980 (Cámpora Schweizer v. Uruguay) and communication No. 74/1980 (Miguel Angel Estrella v. Uruguay) in this volume, pp. 90 and 93.

existed at Libertad prison during the period to which the present communication relates and that it has come to this conclusion on the basis of specific accounts by former detainees themselves. The Committee concludes that in the present case also Juan Almirati Nieto has not been treated with humanity and with respect for the inherent dignity of the human person as required by article 10 (1) of the Covenant.

10.5. Concerning the allegation of the author that article 14 (7) of the Covenant has been violated by the State party because the new criminal proceedings, started by the military judiciary against her father in December 1980, were based on the same facts as those for which he had been tried and sentenced to 10 years of imprisonment by the civil judiciary, the State party in its submissions dated 1 July and 13 August 1982 refuted this allegation on the ground that "the proceedings concerned were brought because of the emergence of fresh evidence regarding the commission of the offences of 'robbery' and 'assault on the safety of transport' ". The Committee observes, in this connection, that the State party has not specified what the new evidence was which prompted the Uruguayan authorities to initiate new proceedings. In the absence of information, as to the outcome of those proceedings, the Committee makes no finding on the question of a violation of article 14 (7), but it is of the view that the facts indicate a failure to comply with the requirement of article 14 (3) (*c*) of the Covenant that an accused person should be tried "without undue delay".

10.6. As to the allegations made by the author with regard to breaches of articles 2 (1) and 26 of the Covenant, they are in such general terms that the Committee makes no finding with regard to them.

11. 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 as found by the Committee, in so far as they continued or occurred after 3 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay), disclose violations of the International Covenant on Civil and Political Rights, particularly of:

Article 10 (1), because Juan Almirati Nieto has not been treated in prison with humanity and with respect for the inherent dignity of the human person;

Article 14 (3) (*b*) and (*d*), because he has not had adequate facilities for the preparation of his defence and he has been unable to defend himself through legal assistance;

Article 14 (3) (*c*), because he was not tried without undue delay.

12. The Committee, accordingly, is of the view that the State party is under an obligation to take immediate steps to ensure strict observance of the provisions of the Covenant and in particular (*a*) that Juan Almirati Nieto is treated with humanity as required by article 10 of the Covenant, and (*b*) that the guarantees prescribed by article 14 are fully respected and, in so far as this has not been done in any proceedings already taken, an effective remedy will be applied.

Communication No. 103/1981

Submitted by: Estela Oxandabarat on 30 June 1981
Alleged victim: Batlle Oxandabarat Scarrone (author's father)
State party: Uruguay
Date of adoption of views: 4 November 1983 (twentieth session)

Subject matter: Trial of Uruguayan citizen by military court—Tupamaros

Procedural issues: Events prior to entry into force of Covenant—Failure of investigation of allegations by State party—Sufficiency of State party's reply under article 4 (2)—Burden of proof

Substantive issues: Right to adequate counsel—Ex officio *counsel—Delay in proceedings—Torture—State of health of victim*

Articles of the Covenant: 10 (1) and 14 (3) (b) *and* (c)
Article of the Optional Protocol: 4 (2)

1.1. The author of the communication (initial letter dated 30 June 1981 and further letter dated 23 September 1982) is Estela Oxandabarat, a Uruguayan national residing at present in Spain. She submitted the communication on behalf of her father, Batlle Oxandabarat Scarrone, alleging that he is imprisoned in Uruguay and that he is a victim of a breach by Uruguay of several articles (specified by the author) of the International Covenant on Civil and Political Rights.

1.2. The author states that her father, a 57-year-old Uruguayan national, had been personnel chief of the electric shop at the Administración Nacional de Combustibles, Alcohol y Portland, co-founder of the Federación de Empleados de ANCAP and President of the Convención Nacional de Trabajadores for the Salto district. She states that because of his trade union activities, he was arrested in June 1972 and kept incommunicado for six months at the Unidad Militar de Infanteria in Salto, where he was allegedly subjected to torture, including physical beatings, electric shocks (*picana*) and immersion in water (*submarino*). He was then taken to the "Penal de Libertad" and submitted to military justice. Since he was detained under "prompt security measures", recourse to *habeas corpus* was not available. The author does not mention when sentencing by the military tribunal of first instance took place.

A final sentence of 13 years' imprisonment was imposed in 1980 by the Supreme Military Tribunal of second instance. The author alleges that her father did not commit any act punishable under the law and that his trade union activities were protected by the Uruguayan constitution.

1.3. The author also submitted a copy of a statement written by Dr. J. J. Arén, a medical doctor who was himself a detainee at the Penal de Libertad, where he had the opportunity to examine several prisoners, including the alleged victim. The report states that in 1976-1977, Batlle Oxandabarat suffered a cranio-encephalic traumatism, and that since then his faculty of perceiving time and space is impaired. Moreover, as a result of prolonged imprisonment and ill-treatment, Batlle Oxandabarat suffers from physical and mental deterioration, anaemia and premature aging.

2. The author states that domestic remedies have been exhausted and indicates that the same matter has not been submitted under any other procedure of international investigation or settlement. She claims that her father is a victim of violations of articles 7, 9 (1), (2), (3) and (4), 10 (1) and (3), 14, 15, 17, 19, 21, 22 and 26 of the Covenant.

3. By its decision of 13 October 1981, 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. The Working Group also requested the State party to transmit to the Committee any copies of court decisions against Batlle Oxandabarat Scarrone, and to give the Committee information of his state of health.

4. In a submission dated 29 June 1982, the State party informed the Committee that Batlle Oxandabarat "was lawfully detained after being found to have committed offences expressly defined in the Ordinary Penal Code in force in Uruguay since 1934. Contrary to what was stated by the author of the communication, Oxandabarat was not harassed or arrested on account of his trade union activities; he had been a member of the Tupamaros National Liberation Movement since 1968 and his criminal activities included participation in the raid on the Salto branch of the Banco de la República and in the escape of two prisoners from Salto gaol. He was sentenced on 4 March 1980 by the court of second instance to 13 years' rigorous imprisonment and to precautionary detention (*medidas de seguridad eliminativas*) of 1 to 2 years for the following offences: 'Criminal conspiracy' with the aggravating circumstances as set out in article 151 (1), (2) and (3), 'action to upset the Constitution in the degree of conspiracy followed by criminal preparations', 'disloyal assistance and counselling', 'escape from custody', 'receiving stolen goods', 'theft', all in the Ordinary Penal Code." The State party further informed the Committee that the present state of health of Batlle Oxandabarat is good.

5.1. In a further letter dated 23 September 1982, the author claims that since the end of 1975, her father had not had counsel of his choice but a court-appointed lawyer; that the lawyer never visited her father nor informed him of developments in his case; that the conditions of his imprisonment have remained inhuman and have led to her father's progressive physical and mental deterioration, alleging that the prison régime to which her father is subjected is not designed to produce any kind of reform or rehabilitation but aims at his psychological and physical annihilation. She further alleges that many times when she went to the penitentiary to visit her father, she was informed that he was being held incommunicado and could not be visited. She claims that medical care for the prisoners is inadequate, and resubmits a copy of the statement by Dr. J. J. Arén on her father's state of health (paragraph 1.3 above).

5.2. With respect to the criminal proceedings against her father, the author claims that although they started before the entry into force of the Covenant for Uruguay (23 March 1976), the critical phase of the trial, evaluation of evidence allegedly obtained by torture, and sentencing took place after the Covenant had entered into force.

6. On the basis of the information before it, the Committee found that it was not precluded by article 5 (2) (*a*) of the Optional Protocol from considering the communication, as there was no indication that the same matter had been submitted to another procedure of international investigation or settlement. The Committee was also unable to conclude that in the circumstances of this case there were effective remedies available to the alleged victim which he had failed to exhaust. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (*b*) of the Optional Protocol.

7. On 27 October 1982, the Human Rights Committee therefore decided:

(1) That the communication was admissible so far as it related to events which allegedly continued or took place after 23 March 1976, the date on which the Covenant and the Optional Protocol entered into force for Uruguay;

(2) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(3) That the State party be informed that the written explanations or the statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter now under consideration. The Committee stressed that, in order to perform its responsibilities, it required specific responses to the allegations which had been made by the author of the communication, and the State party's explanations of the actions taken by it;

(4) That the State party be again requested to furnish the Committee with (*a*) specific information on the state of health of Batlle Oxandabarat and the medical treatment given to him, and (*b*) copies of any court decisions taken against Batlle Oxandabarat, including the decision of the military court of first instance.

8.1. In its submission under article 4 (2) of the Optional Protocol, dated 27 May 1983, the State party informed the Committee "that Mr. Oxandabarat Scar-

rone was at no time subjected to physical maltreatment and that he was detained not because of his trade union activities, but after being found to have committed offences established by the Uruguayan legal system, about which the Committee has already been informed. With regard to Mr. Oxandabarat's health, on 26 December 1975 he was discharged after having been treated with Calciparine and Tromexan for a pulmonary illness. Check-ups on his health were subsequently made at the polyclinic of EMR No. 1. In December 1981 he was treated at the surgical polyclinic for haemorrhoidal prolapse. A haemorrhoidectomy was carried out, with good post-operative recovery, and a rectosigmoidoscopy showed no pathological lesions. He continues to undergo examinations and is being treated with Fluxan and Hemuval. The finding of the latest general examination is that he is in good health."

8.2. No additional information or observations have been received from the author in this connection.

9.1. The Human Rights Committee, having examined the present communication in the light of all the information made available to it by the parties as provided in article 5 (1) of the Optional Protocol, hereby decides to base its views on the following facts, which appear to be uncontested.

9.2. Batlle Oxandabarat was a trade-union leader and had been a member of the Tupamaros National Liberation Movement since 1968. He has been kept in detention continuously since he was arrested in June 1972. A final sentence of 13 years' imprisonment was imposed on 4 March 1980 by the court of second instance. He did not have counsel of his choice, but a court-appointed lawyer, who did not visit him or inform him of developments in the case.

10.1. In formulating its views, the Human Rights Committee also takes into account the following considerations, which reflect a failure by the State party and by the author to furnish the information and clarifications necessary for the Committee to formulate final views on all allegations.

10.2. In operative paragraph 4 of its decision of 13 October 1981 and again in operative paragraph 4 of its decision on admissibility of 27 October 1982, the Committee requested the State party to enclose copies of any court decisions taken against Batlle Oxandabarat, including the decision of the military court of first instance. The Committee notes with deep concern that in spite of its repeated requests in this case and in many other cases, no such documents have ever been received from the State party. The Committee recalls in this connection the assurances given to it by the Representative of the Government of Uruguay on 8 April 1982 (see summary record of the Committee's 359th meeting, document CCPR/C/SR.359, para. 17) that these documents are readily available to any interested party. In the light of these assurances given before the Committee by the Representative of the Government of Uruguay, assurances the Committee does not wish to doubt were given in good faith, it is all the more disturbing that, 18 months later, not a single such document has been received from the State party, in spite of the Committee's continued and repeated requests. In these circumstances, and considering that the State party has never offered any explanation as to why the documents in question have not been made available to the Committee, the failure to produce these documents inevitably raises serious doubts concerning them. If reasoned decisions exist, it is not understandable why such pertinent information is withheld. The lack of precise information seriously hampers the discharge of the functions of the Committee under the Optional Protocol.

10.3. With respect to the state of health of the alleged victim, the Committee finds that the information before the Committee in regard to the treatment of Mr. Oxandabarat after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay) does not justify a finding of a violation of article 10 (1) of the Covenant.

11. 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 as found by the Committee, in so far as they continued or occurred after 23 March 1976, disclose violations of the International Covenant on Civil and Political Rights, particularly of:

Article 14, paragraph 3 (*b*), because Batlle Oxandabarat did not have adequate legal assistance for the preparation of his defence;

Article 14, paragraph 3 (*c*), because he was not tried without undue delay.

12. The Committee, accordingly, is of the view that the State party is under an obligation to provide Batlle Oxandabarat with effective remedies, and, in particular, to ensure that he continues to receive all necessary medical care and to transmit a copy of these views to him.

Communication No. 105/1981

Submitted by: María A. Cabreira de Estradet on 7 August 1981
Alleged victim: Luis Alberto Estradet Cabreira (author's son)
State party: Uruguay
Date of adoption of views: 21 July 1983 (nineteenth session)[1]

Subject matter: Trial of Uruguayan citizen by military court—Tupamaros

Procedural issues: Events prior to entry into force of Covenant—Sufficiency of State party's reply under article 4 (2)—Burden of proof

Substantive issues: Torture—State of health of victim—Ill-treatment of detainee—Prison conditions—Detention incommunicado

Articles of the Covenant: 2 (3), 10 (1) and 14
Article of the Optional Protocol: 4 (2)

1. The author of the communication (initial letter dated 7 August 1981 and further submissions dated 5 June and 3 September and one postmarked 23 September 1982) is a Brazilian national, residing at present in the Netherlands. She submitted the communication on behalf of her son, Luis Alberto Estradet Cabreira.

2.1. The author states that her son (born on 14 August 1947) was arrested in Uruguay on 13 July 1972. During the first six months he was allegedly kept incommunicado and subjected to torture ("*picana eléctrica*", "*submarino*", "*platones*", beatings and lack of food).

2.2. The author further states that, from January 1973 to the present, her son has been detained at the Penal de Libertad, a prison which is allegedly only for political detainees and which is run by army personnel. The author describes her son's present conditions of imprisonment as follows: he shares a cell measuring 2 m by 3.50 m with another detainee; he is kept in his cell 23 hours each day; he is allowed to go into the open air only one hour per day, provided that he is not being punished. He is not allowed to work, to read newspapers or to listen to the radio. The author further states that visits may take place every 15 days and last only for 20 minutes. The only persons authorized to visit him are close relatives. The visitors and the alleged victim are separated by a thick window and the conversations are conducted by telephone and can be followed by the prison guards. The author claims that the worst part of her son's imprisonment is the continuous harassment by the guards and the severe punishment for such actions as reporting to relatives on prison conditions or speaking with other inmates without authorization. Punishments may amount to detainees being held at "La Isla", a punishment cell, in solitary confinement as long as 90 days. The author alleges that the penitentiary system is not aimed at the reformation of prisoners but at the destruction of their resistance. As soon as they enter at Libertad, their heads are shaved, they are given a number and they are never called by their names. The author further alleges that detainees are continuously kept in a state of anxiety and tension because they live in constant fear of being again interrogated in connection with their prior convictions or with purported political activities in prison. Because of this situation, the physical and mental health of detainees is seriously endangered and the author gives the names of three detainees who were going to be re-tried and recently died, and of five other detainees in poor health, who also died. She refers also to the case of Rafael Wins, who tried to commit suicide in the beginning of 1982.

2.3. With respect to the judicial proceedings against her son, the author states that on 24 January 1973 her son was charged on grounds of offences against the security of the State (arts. 281, 324, 344, 132 (6), and 137 of the Ordinary Penal Code and 60 (*v*) of the Military Penal Code) for being a member of a clandestine political organization, the Movimiento de Liberación Nacional-Tupamaros (MLN-T). She further states that her son was sentenced to nine years of imprisonment and in addition to six months to three years of precautionary detention (*medidas de seguridad eliminativas*) by a military tribunal of first instance. On appeal, the Supreme Military Tribunal increased the prison term to 12 years and imposed the same security measures. The author alleges that the judgement of the Supreme Military Tribunal (of 15 February 1977) contained grave technical defects (e.g. with regard to offences which could not be proven, offences not mentioned in the indictment and acts for which her son was allegedly punished twice). Because of this, the defence lawyer submitted an appeal (*recurso de casación*) which, however, was dismissed. The author further alleges that her son's conviction was based on confessions that were extracted from him under torture. She claims that, although the torture took place before 23 March 1976 (the date on which the Covenant entered into force for Uruguay), it has had effects up to date, because it was on the basis of the confessions made under torture that her son was sentenced to 12 years of imprisonment which he continues to serve at present. She emphasizes that all charges against her son stem from his political activities and that he is therefore a political prisoner. In particular she states that article 2 (1) and article 26 of the Covenant have been violated "since he has been made a victim of discrimination on the ground of his political opinions, having been treated far worse than the perpetrator of an ordinary offence".

2.4. The author claims that domestic remedies have been exhausted. She maintains that the domestic remedies which are provided for in the Uruguayan legislation cannot protect her son, because none of them is allegedly applicable in practice, if the human rights violation has been committed by military personnel or by members of the police in connection with State security as interpreted by the military forces. She further alleges that military judges are not impartial and in

[1] Following his appointment to the Court of Appeal of the Supreme Court of Ontario, Mr. Walter Surma Tarnopolsky did not participate in the adoption of views at the Committee's nineteenth session.

particular that they conceal continuous illegal acts to which political detainees are subjected.

2.5. The author expresses deep concern about her son's state of health. She mentions that he suffers from a heart disease, that he has been operated on twice, that he urgently needs a third operation and that he is denied proper medical attention.

2.6. The author states that the same matter is not being examined under another procedure of international investigation or settlement since she has expressly withdrawn her complaint submitted to the Inter-American Commission on Human Rights.

2.7. The author claims that her son is a victim of violations of articles 2 (1) and (3), 7, 10 (1) and (3), 14 (1) and 26 of the International Covenant on Civil and Political Rights.

3. By its decision of 14 October 1981, the Working Group of the Human Rights Committee decided that the author was justified in acting on behalf of the alleged victim and 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. The Working Group also requested the State party to provide the Committee with information on the state of health of Luis Alberto Estradet Cabreira.

4. By a note dated 25 June 1982, the State party informed the Committee that Luis Alberto Estradet was arrested on 13 July 1972 and that, contrary to the author's statement, he is not a political prisoner. It stated that in 1969 Luis Estradet became a member of the Movimiento de Liberación Nacional and he had taken part in terrorist activities. On 24 January 1973, he was charged by a military judge on grounds of offences contained in articles 281, 324, 344 and 132 (6) of the Ordinary Penal Code and article 60 (*v*) of the Military Penal Code (i.e. mainly on grounds of: use of fire-arms, subversive association and attempt against the Constitution). The State party further stated that Luis Estradet was sentenced by a tribunal of first instance to nine years and six months of imprisonment and in addition to six months to three years of precautionary detention (*medidas de seguridad eliminativas*). On 15 February 1977, on appeal, the Supreme Military Tribunal sentenced him to 12 years of imprisonment and in addition to one to three years of "security measures" basically for the same offences with aggravating circumstances. It further informed the Committee that Luis Estradet is presently detained at the Establecimiento Militar de Reclusión No. 1. In a further submission, dated 20 October 1982, the State party contests the author's description of the prison conditions and states that detainees in military prisons are not isolated from the outside world, that they enjoy periodical visits in accordance with the regulations for military prisons, that they can listen to radio programmes transmitted by loud speakers, that they may see films and read books which are either available in the prison library or are brought by their relatives and are handed to the prisoners after a normal inspection for security reasons. The State party further denies in general terms the author's allegations of mistreatment, psychological tension and arbitrary punishment at the Establecimiento de Reclusión No. 1. The State party also points out that some paragraphs of the author's submission of 5 June 1982 are identical to paragraphs of another communication before the Committee and that this proves that the author has merely signed her communication and that there is an organized campaign aimed at preparing complaints for submission to international organizations. The State party further states that Luis Estradet's sentence was increased due to the discovery of new facts which amount to aggravating circumstances. As far as Luis Estradet's health is concerned, the State party informs the Committee that he is given regular medical examinations and that there is no reason to be concerned about his physical state of health.

5. Commenting on the State party's submission, the author maintains, in her letter dated 3 September 1982, that her son is not a terrorist, that he was arrested for the first time in 1969 for having distributed some pamphlets to the workers of a tire factory (FUNSA) in Montevideo and that he was released five months later, in February 1970, without any charges of "terrorism" having been retained against him. She reiterates that he was re-arrested on 13 July 1972 and that he was sentenced on the basis of confessions extracted from him under torture. She also reiterates that her son suffers from a heart disease and that his state of health is extremely poor and is aggravated by inhuman conditions of imprisonment. The author, in her further comments postmarked 23 September 1982, alleges that the Supreme Military Tribunal which on appeal on 15 February 1977 increased the sentence imposed on her son by the military tribunal of first instance, has transgressed Uruguayan law and jurisprudence of several decades, because the offences were the same. She further alleges that the imposition of precautionary detention measures (*medidas de seguridad eliminativas*) is illegal and that such measures merely serve the purpose of preventing any proceedings aimed at obtaining a release on parole. She adds that military justice has often imposed such measures when dealing with political offences. The author reiterates that article 14 of the Covenant has been violated in particular because her son only received a final sentence four years and seven months after his arrest.

6. The author's assertion that the same matter was not being examined by another international body had not been contested by the State party. As to the question of exhaustion of domestic remedies, the Committee was unable to conclude that, in the circumstances of this case, there were effective remedies which Luis Estradet had failed to exhaust. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (*a*) and (*b*) of the Optional Protocol.

7. On 22 October 1982, the Human Rights Committee therefore decided:

(*a*) That the communication was admissible in so far as it relates to events said to have occurred on or after 23 March 1976, the date on which the Covenant and the Optional Protocol entered into force for Uruguay;

(*b*) That, in accordance with article 4 (2) of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(*c*) That the State party should be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to perform its responsibilities, it required specific responses to the allegations which had been made by the author of the communication, and the State party's explanations of the actions taken by it. The State party was requested, in this connection, (i) to enclose copies of any court orders or decisions of relevance to the matter under consideration, (ii) to submit its observations concerning the author's allegations that the judgement of the Supreme Military Tribunal on 15 February 1977, contained "grave technical defects" and that "because of this the defence lawyer submitted an appeal (*recurso de casación*)" and (iii) to inform the Committee on what legal grounds such appeal (*recurso de casación*) was dismissed;

(*d*) That the State party be requested to inform the Committee whether Luis Alberto Estradet suffered from a heart disease and, if so, whether he was being given appropriate medical treatment.

8.1. By a note dated 27 May 1983, the State party submitted further information on the state of health of Luis Alberto Estradet, as follows:

Record prior to his detention: in 1971 he was operated on for a stab wound in the right ventricle. Since being imprisoned in Military Detention Establishment No. 1, he has been given regular check-ups by a cardiologist. He occasionally suffers from atypical precordial pains. Electrocardiograms are made every month. Special examinations of the heart vessels, coronary arteries, etc., reveal the following: myocardial bridge in one third of the front descendens; moderate prolapse of the valve behind the mitral valve; moderate hypertrophy of the left ventricle; coronaries normal; fibrosis in parts of the front surface of the left ventricle. An ergometer examination produced negative results, with excellent tolerance of the test. He has been given the following medication as required: Difixil, Opranol, Adalat, Bromzepan, Nitrazepan, Acamipan and Nitrangor. He continues to undergo examinations at the medical and cardiological polyclinic for persistent precordialgia, but does not have dyspnea or palpitations and has good tolerance for sports. Periodic electrocardiagrams. No notable irregularities.

Present examination: good general condition, skin and mucosa normal colour, no notable lesions. Buccopharyngeal region: no special features; lymphatic vessels and lymph nodes: no special features; bones and joints: no special features. Auscultation: steady rhythm of 72 pulsations per minute, firm beats, no murmur, blood pressure 120/70, full peripheral pulses. Pleuropulmonary region: MAV in good overall condition, no wheezing. Abdomen: no special features. Genitals and perineum: no special features. Lower limbs: no edemas.

8.2. The time-limit for the State party's submission under article 4 (2) of the Optional Protocol expired on 22 May 1983. No submissions other than those of 25 June and 20 October 1982 and 27 May 1983 have been received. The Committee notes with appreciation the information furnished by the State party concerning the state of health of Luis Alberto Estradet. It regrets, however, the failure of the State party to respond to the specific requests for information, and copies of court orders or decisions, made in paragraph 3 of the Committee's decision of 22 October 1982.

9.1. The Committee decides to base its views on the following facts which have been either essentially confirmed by the State party or are uncontested except for denials of a general character offering no particular information or explanation.

9.2. *Events prior to the entry into force of the Covenant:* Luis Alberto Estradet Cabreira was arrested on 13 July 1972. During the first six months he was kept incommunicado and subjected to ill-treatment. On 24 January 1973 he was tried by the court of first instance and sentenced to nine years and six months of imprisonment and in addition to six months to three years of precautionary detention (*medidas de seguridad eliminativas*). In January 1973, he was transferred to Libertad prison.

9.3. *Events subsequent to the entry into force of the Covenant:* On 15 February 1977, the Supreme Military Tribunal increased the sentence imposed on Luis Alberto Estradet Cabreira to 12 years of imprisonment and in addition to one to three years of precautionary detention. The defence lawyer lodged an appeal (*recurso de casación*) for reasons of technical defects in the judgement of the Supreme Military Tribunal. This appeal was rejected.

10.1. In formulating its views, the Human Rights Committee takes into account the following considerations.

10.2. The Committee notes that the State party in its submission of 20 October 1982 has, apart from denials in general terms, replied only to certain of the author's allegations that her son has been ill-treated and held under inhuman prison conditions at Libertad and, in particular, the State party has not satisfied the Committee that living conditions and the treatment received by Luis Alberto Estradet at Libertad have met the requirements of article 10 (1) of the Covenant. In this connection, the Committee recalls its findings in other cases[1] that a practice of inhuman treatment existed at Libertad prison during the period to which the present communication relates and that it has come to this conclusion on the basis of specific accounts by former detainees themselves. The Committee concludes that, in the present case also, Luis Alberto Estradet has not been treated with humanity and with respect for the inherent dignity of the human person as required by article 10 (1) of the Covenant.

10.3. As to the alleged technical defects in the judgement at second instance, the Committee considers that due to the lack of specific information provided by the author it cannot make a finding on the question of the alleged violations of articles 2 (3) and 14 of the Covenant.

11. 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, as found by the Committee, in so far as they continued or occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay), disclose violations of the International Covenant on Civil and Political Rights, particularly of:

Article 10 (1) because Luis Alberto Estradet has not been treated in prison with humanity and with respect for the inherent dignity of the human person.

[1] For the views of the Committee, see communication No. 66/1980 (Cámpora Schweizer v. Uruguay) and communication No. 74/1980 (Miguel Angel Estrella v. Uruguay) in this volume, pp. 90 and 93.

12. The Committee, accordingly, is of the view that the State pary is under an obligation to take immediate steps to ensure strict observance of the provisions of the Covenant and, in particular, to extend to Luis Alberto Estradet treatment as laid down for detained persons in article 10 of the Covenant.

Communication No. 106/1981

Submitted by: Mabel Pereira Montero on 29 August 1981
Alleged victim: The author
State party: Uruguay
Date of adoption of views: 31 March 1983 (eighteenth session)

Subject matter: Denial of renewal of passport to Uruguayan citizen

Procedural issues: Competence of the HRC—Admissibility decision without rule 91 submission from State party—Jurisdiction of States

Substantive issues: Freedom of movement—Effective remedy—Passport

Articles of the Covenant: 2 (1) and (3) and 12 (2)
Article of the Optional Protocol: 1

1.1. The author of the communication dated 29 August 1981, is Mabel Pereira Montero, a Uruguayan citizen residing at present in Berlin (West). The author, a student in chemical engineering at the Technical University of Berlin, submitted the communication on her own behalf, alleging that she is a victim of a breach by Uruguay of article 12 (2) of the International Covenant on Civil and Political Rights.

1.2. The author claims that the Uruguayan authorities have refused, without further explanation, to renew her passport.

2.1. She describes the relevant facts as follows:

2.2. In 1972, owing to financial difficulties, she decided to leave Uruguay and to pursue her studies in Chile. In September of the same year, she left Montevideo by boat "through normal channels". After the *coup d'état* in Chile, in September 1973, she sought refuge at the Embassy of Mexico in Chile. Mabel Pereira Montero claims that she did not seek refuge for political reasons, but that she did so because, at the time, a feeling of insecurity prevailed in that country, particularly among foreigners.

2.3. In November 1973, the Uruguayan Consulate in Mexico issued the author with a new Uruguayan passport (No. 015374), with an expiration date of 22 November 1983, but subject to renewal in November 1978. In January 1974 she left Mexico for the Federal Republic of Germany. She obtained a scholarship and was admitted to the University in Berlin (West).

2.4. As her passport was due to expire on 22 November 1978 unless it was renewed, Mabel Pereira Montero applied in writing for its renewal at the Embassy of Uruguay in Bonn on 3 July 1978. She was told to contact the Consulate of Uruguay in Hamburg which she did by a letter dated 26 July 1978.

2.5. In December of that year, the author inquired at the Consulate of Hamburg about the position with regard to her passport renewal. She was told by telephone that the renewal of her passport had been refused. No reason was given by the consular officer. It followed from the author's telephone conversation and from inquiries undertaken on her behalf by her scholarship-sponsoring organization that the decision not to renew her passport was taken by the competent authorities in Montevideo, and that she had the possibility to request, either through the Uruguayan Consulate in Hamburg or directly at the Ministry for Foreign Affairs in Montevideo, to be informed of the reasons why the renewal of her passport had been refused.

2.6. Mabel Pereira Montero claims that in February 1979, she addressed herself to the Uruguayan Consulate in Berlin (German Democratic Republic) requesting the renewal of her passport and that this request was also refused, again without any explanation. The author states that, during the year 1979, she also tried, without success, to contact a lawyer in Montevideo who could take up her case with the Uruguayan authorities there.

2.7. Consequently, the author sent a letter dated 27 November 1979 to the Uruguayan Consulate in Hamburg requesting that the Uruguayan authorities reconsider their negative decision, or that she be informed by the Uruguayan authorities about the reasons for this decision. She did not receive any reply to this letter till May 1980. Mabel Pereira Montero then telephoned the Consulate in Hamburg to inquire about her case. A consular officer told her that the Uruguayan authorities had upheld their decision to refuse renewal of her passport. He suggested that she repeat in writing her request of 27 November 1979, indicating in addition in her request that she had no family members in Montevideo who could pursue her case there. The author did so.

2.8. The author states that she also contacted the Uruguayan Embassy and the Uruguayan Consulate in Bonn regarding her case, but that she received there the same reply as in Hamburg.

2.9. At one time it was indicated to her that there was a recourse by way of appeal against the Government decision, but that this had to be done in Uruguay. She replied that she had no relatives in Montevideo who could represent her.

2.10. In December 1980, the Uruguayan authorities offered her safe-conduct to travel to Uruguay in order to resolve her problem there. The author felt that she could not accept this offer, because she did not have the financial means to undertake the journey and because her studies would be unduly interrupted.

2.11. The author claims that, owing to the increasing instability of her situation caused by the refusal of the Uruguayan authorities to renew her passport, she approached the Ambassador of the Federal Republic of Germany in Uruguay, in August 1980, asking for his good offices in her case. The Embassy's efforts were also without success. There were, however, according to the Embassy of the Federal Republic of Germany, certain indications that the refusal to renew the author's passport stemmed, *inter alia*, from the belief that Mabel Pereira Montero was married to a "Tupamaro" who figured on the list of "wanted persons" in Uruguay. In a letter to the Foreign Ministry in Bonn, dated 9 March 1981, the author rejected his allegation as totally unfounded. She stated that she had never married, that the person in question was a friend from childhood because they both came from the same village, and that she never was active in politics or had had any contacts with the Tupamaros.

2.12. On 18 March 1981, the author was requested orally by the Uruguayan Consul in Hamburg to provide, for the use of the authorities in Montevideo, a written description of her life since she left Uruguay in 1972 and of the reasons why she left the country. She did so.

2.13. On 10 July 1981, the Uruguayan Consulate in Hamburg received by telegram final instructions from the authorities in Montevideo not to renew the author's passport. No reasons were given. The author states that a copy of this telegram is the only written notice she possesses with regard to the refusal of the Uruguayan authorities to renew her passport.

2.14. The author concludes that she has exhausted all domestic remedies available to her in the case.

3. There is no indication in the communication that the same matter has been submitted to another procedure of international investigation or settlement.

4. By its decision of 14 October 1981, 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 not later than two months from the date of the transmittal of the decision. This time-limit expired on 26 January 1982. No reply had been received from the State party at that time.

5. Before taking its decision on the admissibility of the communication, the Human Rights Committee examined, *ex officio*, whether the fact that Mabel Pereira Montero resides abroad affects the competence of the Committee to receive and consider the communication under article 1 of the Optional Protocol, taking into account the provisions of article 2 (1) of the Covenant. In that context, the Committee made the following observations: article 1 of the Optional Protocol applies to individuals subject to the jurisdiction of the State concerned who claim to be victims of a violation by that State of any of the Covenant rights. The issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is "subject to the jurisdiction" of Uruguay for that purpose. Moreover, a passport is a means of enabling him "to leave any country including his own", as required by article 12 (2) of the Covenant. Consequently, the Committee found that it followed from the very nature of that right that, in the case of a citizen resident abroad, it imposed obligations both on the State of residence and on the State of nationality and that, therefore, article 2 (1) of the Covenant could not be interpreted as limiting the obligations of Uruguay under article 12 (2) to citizens within its own territory.

6.1. The Committee found, on the basis of the information before it, that it was not precluded by article 5 (2) (*a*) of the Optional Protocol from considering the communication. The Committee was also unable to conclude that, in the circumstances of the case, there were effective domestic remedies available to the alleged victim which she failed to exhaust. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (*b*) of the Optional Protocol.

6.2. On 25 March 1982, the Human Rights Committee therefore decided:

(*a*) That the communication was admissible;

(*b*) That, in accordance with article 4 (2) of the Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(*c*) That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Protocol must primarily relate to the substance of the matter under consideration and, in particular, the specific violations of the Covenant alleged to have occurred.

7.1. In a note, dated 14 July 1982, which appears to be a late submission under rule 91, the State party rejects the competence of the Committee to consider the communication on the grounds that the requirements for submission of a communication to the Committee under article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights are not met. Article 1 of the Optional Protocol recognizes the competence of the Committee to receive and consider communications from individuals "subject to its jurisdiction". The State party argues that "at the time of the submission of her request (to have her passport renewed), Miss Mabel Pereira Montero was not subject to the jurisdiction of the Uruguayan State" and that ". . . it is consequently inappropriate for the Committee to deal with communications of this kind which are outside its terms of reference and violate international provisions". It is further submitted that "Miss Pereira Montero can return to her country at any time and in any circumstances", even without a valid passport, to clear up her situation personally. In conclusion, the State party asserts that "in Uruguay the right to freedom of residence and movement is protected, subject only to domestic legal provisions, and constitutionally recognized".

7.2. In a further note, dated 13 August 1982, the State party, in response to the request for a submission under article 4 (2), refers to the contents of its earlier note.

8.1. On 7 January 1983, the author of the communication forwarded her comments in reply to the State party's submissions of 14 July and 13 August 1982.

8.2. She rejects the State party's formal contention that in the present case she does not come within the jurisdiction of Uruguay. She claims that her sojourn in a foreign country is subject to her possessing a valid Uruguayan passport and that, consequently, she does come within the jurisdiction of the State of Uruguay in the matter under consideration.

8.3. The author of the communication further points out that it is the normal procedure for Uruguayan citizens residing abroad to have their passport renewed by Uruguayan consulates. She adds that she applied to all appropriate consular posts and that no reasons were given to her as to why the renewal of her passport was constantly refused.

8.4. Miss Pereira Montero also states that she regards it as abnormal that the Uruguayan authorities suggested that she travel to Uruguay in order to have her passport renewed when consular authorities usually deal with such matters.

9.1. The Human Rights Committee has considered the present communication in the light of all information made available to it, as provided in article 5 (1) of the Optional Protocol.

9.2. The Committee decides to base its views on the following facts which seem to be uncontested: Mabel Pereira Montero, a Uruguayan citizen residing at present in Berlin (West), and holder of a Uruguayan passport issued in 1973 in Mexico with a 10-year validity upon condition that it be renewed after 5 years, was refused such renewal by the Uruguayan authorities, without explanation, several times between 1978 and 1981. In December 1980, she was offered a safe-conduct which would have entitled her to travel to Uruguay. The author declined this offer, because she did not have the financial means to undertake the travel and because her studies would have been unduly interrupted.

9.3. The Committee does not accept the State party's contention that the Committee is not competent to deal with the communication because the author does not fulfil the requirements of article 1 of the Optional Protocol. It refers, in that respect, to the reasons stated in paragraph 5 above.

9.4. As to the alleged violation of article 12 (2) of the Covenant, the Committee has observed (see para. 5 above) that a passport is a means of enabling an individual "to leave any country, including his own" as required by that provision: consequently, it follows from the very nature of that right that, in the case of a citizen resident abroad, article 12 (2) imposes obligations on the State of nationality as well as on the State of residence and, therefore, article 2 (1) of the Covenant cannot be interpreted as limiting the obligations of Uruguay under article 12 (2) to citizens within its own territory. The right recognized by article 12 (2) may, in accordance with article 12 (3), be subject to such restrictions as are "provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the Covenant". There are, therefore, circumstances in which a State, if its law so provides, may refuse passport facilities to one of its citizens. However, in the present case, the State party has not, in its submissions to the Committee, put forward any such justification for refusing to renew the passport of Mabel Pereira Montero.

10. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is therefore of the view that the facts as found by it disclose a violation of article 12 (2) of the Covenant, because Mabel Pereira Montero was refused the renewal of her passport without any justification therefor thereby preventing her from leaving any country, including her own.

11. Accordingly, the Committee is of the view that the State party is under an obligation to provide Mabel Pereira Montero with effective remedies pursuant to article 2 (3) of the Covenant.

Communication No. 107/1981

Submitted by: María del Carmen Almeida de Quinteros on 17 September 1981
Alleged victims: The author and her daughter Elena Quinteros Almeida
State party: Uruguay
Date of adoption of views: 21 July 1983 (nineteenth session)[1]

Subject matter: Abduction and detention of civilian by military authorities

Procedural issues: Request to author and State party for additional information—Interim decision—Jurisdiction of State—Sufficiency of State party's reply under article 4 (2)—Failure of investigation of allegations by State party—Adoption of views without submission on merits by State party—Admissibility decision without rule 91 submission from State party—

[1] Following his appointment to the Court of Appeal of the Supreme Court of Ontario, Mr. Walter Surma Tarnopolsky did not participate in the adoption of views at the Committee's nineteenth session.

Withdrawal of communication from IACHR—Weight of evidence—Burden of proof

Substantive issues: Abduction—Disappeared persons—Diplomatic asylum—Detention incommunicado—Ill-treatment of detainees—Torture—Compensation

Articles of the Covenant: 7, 9 and 10 (1)
Articles of the Optional Protocol: 1, 4 (2) and 5 (2) (a)

1.1. The author of the communication (initial letter dated 17 September 1981 and further letters postmarked 30 September 1981 and dated 28 September 1982 and 2 May 1983) is María del Carmen Almeida de Quinteros, a Uruguayan national, residing at present in Sweden. She submitted the communication on behalf of her daughter, Elena Quinteros Almeida, and on her own behalf.

1.2. The author describes the relevant facts as follows:

My daughter (born on 9 September 1945) was arrested at her home in the city of Montevideo on 24 June 1976. Four days later, while she was being held completely incommunicado, she was taken by military personnel to a particular spot in the city near the Embassy of Venezuela. My daughter would appear to have told her captors that she had a rendezvous at that place with another person whom they wished to arrest. Once she was in front of a house adjoining the Embassy of Venezuela, my daughter succeeded in getting away from the persons accompanying her, jumped over a wall and landed inside the Embassy grounds. At the same time, she shouted out her name so as to alert passers-by to what was happening in case she was recaptured. The military personnel accompanying her then entered the diplomatic mission and, after striking the Secretary of the Embassy and other members of its staff, dragged my daughter off the premises.

1.3. The author alleges that, due to this event, Venezuela suspended its diplomatic relations with Uruguay.

1.4. The author claims that since that day (28 June 1976), she could never obtain from the authorities any official information about her daughter's whereabouts, nor was her detention officially admitted. She further claims that his denial of official information by the authorities of Uruguay was incompatible with the testimony of other persons (the author encloses two testimonies) and also numerous statements made privately by authorities and diplomatic representatives of Uruguay to the author herself and to others. The author, in addition, encloses an extract from a booklet entitled *Mujeres y niños Uruguayos desaparecidos* ("Missing Uruguayan Women and Children") concerning the case of her daughter, in which it is mentioned in particular that on 2 March 1979, the Ambassador and Representative of Uruguay to the United Nations Commission on Human Rights at Geneva, who was at that time Director of Foreign Policy of the Ministry of Foreign Affairs, told the author that her daughter was alive, that she had been taken from the Venezuelan Embassy by members of the Uruguayan police and army, that she was being kept a prisoner and that efforts were being made to clarify responsibilities.

1.5. The first testimony enclosed by the author, dated January 1981, is from Cristina Marquet Navarro, who states that she personally knew Elena Quinteros. Cristina Marquet Navarro states that she was arrested on 29 July 1976 in Montevideo, that on 8 August 1976 she was taken to a military unit, that there all detainees were kept blindfolded and with their hands tied and that they were systematically subjected to torture. She adds that all detainees received an identification number upon arrival, by which they were addressed, and that her number was 2572. Cristina Marquet further states that during her first night there, she heard "the despairing cries of a woman who kept saying 'why didn't they kill me, why didn't they kill me?' It was definitely the voice of Elena Quinteros. It was clear from the desperation of her cries that she was being brutally tortured". Cristina Marquet alleges that later she was able to establish that Elena Quinteros had been given number 2537. She further alleges that once, her eye-bandage being loose, she could see Elena Quinteros who was lying on a mattress. Elena Quinteros, state of health was extremely poor "as a result of the brutal torture to which she had been and was being subjected daily". Cristina Marquet mentions the names of two male officers and of two female soldiers who were dealing with Elena Quinteros. In October 1976, Cristina Marquet was transferred to another detention place and she was released on 7 December 1978. She adds that after October 1976, she never heard about Elena Quinteros again.

1.6. The second testimony is from Alberto Grille Motta.[2] He states that he and other Uruguayans, among them Enrique Baroni, who had taken refuge at the Embassy of Venezuela in Montevideo, saw a number of Embassy employees running out of the building on the morning of 28 June 1976; that Enrique Baroni, who had gone up to the first floor, saw a young woman being dragged away by a man whom he recognized as a policeman whom he had known, under a nickname which is given by the author, in Department No. 5 for Intelligence and Information of the Montevideo Police Headquarters when they were held there. Mr. Grille adds that the following day, on 29 June 1976, the parents-in-law of Elena Quinteros came to the Embassy with a picture of their daughter-in-law and her identity was confirmed, in particular, by the Secretary of the Embassy. He further claims that the Ambassador told him some months later that he was in possession of information pointing to a policeman known under the same nickname as the one mentioned by Enrique Baroni and whose real name was . . ., who, together with other police personnel, had taken part in the abduction of Elena Quinteros.

1.7. The author, María del Carmen Almeida de Quinteros, states that she has withdrawn her daughter's case from the Inter-American Commission on Human Rights. By a further letter, postmarked 30 September 1981, she enclosed a copy of her withdrawal letter, dated 17 November 1980, addressed to the Inter-American Commission, and the text of a request for confirmation of the withdrawal, dated 28 September 1981.

1.8. The author further states that there are no domestic remedies that could be invoked and have not been exhausted, since her daughter's arrest has always been denied by the Uruguayan authorities and the

[2] On 29 July 1980, the Committee adopted views in case No. 11/1977 concerning Alberto Grille Motta v. Uruguay; see *Selected Decisions . . .*, vol. 1, p. 54.

remedy of *habeas corpus* is only applicable in the case of detained persons.

1.9. The author claims that the following articles of the Covenant have been violated with respect to her daughter: 7, 9, 10, 12, 14, 17 and 19. She adds that she is herself a victim of violations of article 7 (psychological torture because she does not know where her daughter is) and of article 17 of the Covenant, because of interference with her private and family life.

2. The Human Rights Committee noted, in this connection, that the allegations of violations made by the author on her own behalf raised the question whether she was subject to the jurisdiction of Uruguay, within the meaning of article 1 of the Optional Protocol, at the time of the alleged violations in question. The Committee agreed that this issue would be reviewed, if necessary, in the light of any submission which the State party might make under article 4 (2) of the Optional Protocol.

3. By its decision of 14 October 1981, the Working Group of the Human Rights Committee, having decided that the author of the communication was justified in acting on behalf of the alleged victim, 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 and, the whereabouts of the alleged victim being unknown since 1976, further requesting the State party to confirm that Elena Quinteros was in detention and to make known the place of her detention. No reply was received from the State party to these requests.

4. On the basis of the information before it, the Committee found that it was not precluded by article 5 (2) (*a*) of the Optional Protocol from considering the communication. The Committee was also unable to conclude that, in the circumstances of this case, there were effective remedies available to the alleged victim which she had failed to exhaust. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (*b*) of the Optional Protocol.

5. On 25 March 1982, the Human Rights Committee therefore decided:

(*a*) That the communication was admissible;

(*b*) That, in accordance with article 4 (2) of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(*c*) That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to perform its responsibilities, it required specific responses to the allegations which had been made by the author of the communication and the State party's explanations of the actions taken by it. The State party was requested, in this connection, to enclose copies of any court orders or decisions or reports of inquiries of relevance to the matter under consideration.

6. In its submission under article 4 (2) of the Optional Protocol, dated 13 August 1982, the State party referred to the contents of an earlier note, dated 14 June 1982, which appeared to be a late submission under rule 91 of the provisional rules of procedure. The text of this earlier note read as follows:

> The Uruguayan Government wishes to inform that the person in question (Elena Quinteros) has been sought throughout Uruguay since 8 May 1975. The assertions contained in this communication are therefore rejected as unfounded since the Government had no part in the episode described.

7.1. In her comments, dated 28 September 1982, the author draws the attention of the Human Rights Committee to the fact that the Government of Uruguay has failed to provide any specific or detailed answers regarding the substance of her daughter's case, despite the express request by the Committee. The author states that:

> The Government simply rejected my assertions as "unfounded" in purely general terms and, indeed, on the sole ground that it had had no part in the episode which I described. I consider it to be of the utmost importance to point out, in this connection, that the Government does not specifically deny that my daughter was arrested in June 1976 by Government forces, that she was detained by the army in 1976, or that an incident took place at the Venezuelan Embassy on 28 June 1976, in the course of which my daughter was taken from the Embassy grounds. Above all, the Government of Uruguay does not deny that it is holding my daughter. In short, apart from the very general assertion referred to above, the Government has not denied, or even questioned the truth of a single one of the serious events described by me in my communication to the Committee. It is surprising that, despite the gravity of these events, the Government has quite clearly failed to order an investigation into the matter.

7.2 The author urges the Committee to call on the Government of Uruguay to order an investigation. She suggests that specific questions should be put to the State party and that it would be very helpful if the Committee could obtain further details from the Government of Venezuela regarding the incident which took place on 28 June 1976 in the grounds of their Embassy in Montevideo.

7.3. Addressing the question raised by the Committee whether she comes within the jurisdiction of Uruguay as to the violations alleged in her own behalf, the author states that she was in Uruguay at the time of her daughter's arrest in 1976.

> Consequently, both my daughter and I were at the time under Uruguayan jurisdiction. Quite clearly, my daughter remains under Uruguayan jurisdiction and her rights continue to be violated daily by the Government of Uruguay. Since the continued violation of my daughter's human rights constitutes the crucial factor of the violation of my own rights, the Government cannot, in my view, in any way evade its responsibility towards me. I continue to suffer day and night because of the lack of information concerning my dear daughter, and I therefore believe that, from the moment when my daughter was arrested, I was, and I continue to be, the victim of a violation of articles 7 and 17 of the Covenant.

8. On 15 October 1982, before formulating its views in the light of the information made available to it by the author of the communication and by the State party concerning the alleged arrest, detention and mistreatment of Elena Quinteros, the Human Rights Committee decided to adopt the following interim decision:

The Human Rights Committee,

Noting that the author of the communication has submitted detailed information, including eyewitness testimonies, concerning the detention of her daughter, Elena Quinteros,

Taking note also of the brief information submitted by the State party on 14 June and 13 August 1982, to the effect that Elena

Quinteros had been sought throughout Uruguay since 8 May 1975 and that the Government of Uruguay had no part in the events described by the author of the communication,

Concerned, however, that the State party has made no attempt to address in substance the serious and corroborated allegations made against it, but merely denies any knowledge thereof,

Concluding, that the information furnished by the State party, so far, is insufficient to comply with the requirements of article 4 (2) of the Optional Protocol,

1. *Urges* the State party, without further delay and with a view to clarifying the matters complained of, to conduct a thorough inquiry into the allegations made and to inform the Human Rights Committee of the outcome of such inquiry not later than by 1 February 1983.

9. In a note dated 12 January 1983, in response to the Human Rights Committee's interim decision, the State party stated the following:

The Government of Uruguay wishes to reiterate what it said to the Committee in its reply to the note of 4 December 1981 on this case (see para. 6 above).

10.1. In her comments of 2 May 1983, the author recalls that her daughter was officially arrested at her home in Montevideo, on 24 June 1976, because of her political opinions, by members of Department No. 5 of the National Directorate for Information and Intelligence of the Montevideo Police Headquarters. She states that her daughter was kept incommunicado on the premises of the police department for four days until the morning of 28 June, although under the Constitution and laws of Uruguay the maximum period during which a person may be held incommunicado is 48 hours.

10.2. The author claims that "there is no possible doubt regarding the central fact which prompted my communication, namely that my daughter Elena was abducted on 28 June 1976 from within the Embassy of the Republic of Venezuela at Montevideo and that this abduction (or arrest carried out in the form of an abduction) was the work and responsibility of Uruguayan official authorities, and since that day Elena has been in the custody of the Uruguayan official military authorities."

10.3. Concerning her daughter's arrest inside the Venezuelan Embassy grounds on 28 June 1976, the author gives the following details:

Believing that Elena was going to denounce someone, her captors brought her near to the Embassy, allowing her freedom of movement so that she could go to the supposed rendezvous. Elena, who had already given thought to the possibility, went into the house next to the Embassy. From there she managed to jump over the dividing wall, thus landing in Venezuelan territory. She shouted "Asylum!" and stated her name and occupation. When they realized what was happening, the policemen escorting her came through the gate giving access to the gardens of the Embassy, without being stopped by the four policemen on guard. When they heard Elena shouting, the Ambassador and his secretary, as well as other officials, ran towards her and were able to see her being beaten and dragged by the hair by the policemen who were trying to remove her by force from Venezuelan territory. The Counsellor of the Embassy, Mr. Frank Becerra, and the Secretary, Baptista Olivares, tried to prevent the woman seeking refuge from being removed from the Embassy garden before she could enter the residence itself. While Elena was being dragged outside, the two diplomats were grappling with the police, grabbing hold of Elena's legs. One of the policemen struck Mr. Becerra, who fell, thus enabling them to take Elena away and put her in a greenish Volkswagen whose registration number, as was seen by a large number of residents who had observed each stage of the police raid, ended in 714 and which a Police Headquarters communiqué identified on 2 July as the "car with unidentified suspects who abducted a woman". In their anger, the police even went to the inhuman lengths of slamming the car door hard against Elena's legs while she was being bundled into the car, certainly causing a fracture. The car then moved off at high speed, with its doors still open, against the oncoming vehicles and despite the heavy traffic to be found at that hour, about 10.30 a.m., in the Bulevar Artigas, where the Embassy is situated, at number 1257, in the "Pocitos" district, 5 km from the centre of Montevideo.

10.4. The author further states that, according to eyewitness accounts received by the Ambassador of Venezuela, her daughter was transferred from the green Volkswagen to an official Uruguayan army truck. She claims that another significant detail is that when her daughter entered the garden of the Embassy, she ran towards the residence crying "Asylum, asylum!", stated her name and occupation and managed to shout "this is '. . .' from the Department No. 5". The author further submits that "from refugees (five in all) who were in the Embassy awaiting a safe conduct in order to leave Uruguay, and from her (daughter's) statements, it was possible to ascertain that three of the plain-clothes police officers who entered the Embassy were . . ." (names are given).

10.5. Concerning the suspension of diplomatic relations between Venezuela and Uruguay, the author stresses that "as a result of these events of June 1976, Venezuela broke off diplomatic relations with the Government of Uruguay and they have not been restored until this day. The Government of Venezuela has made it absolutely clear that these relations will remain severed until such time as Elena Quinteros is set free and handed over to the Venezuelan authorities and it is given a full explanation of the facts". She adds that "it would not seem logical to think even for a moment that the authorities and various groups in Venezuela would have taken such a serious step as the breaking of diplomatic relations if they had not been convinced that Uruguayan public officials had directly participated in the violation of the Venezuelan Embassy in Uruguay and in the abduction of Elena Quinteros".

10.6. The author refers to the position the Committee has taken, in previous cases, that in the face of specific and detailed complaints, it was not sufficient for the State party to refute these allegations in general terms but that "it should have investigated the allegations". In case No. 30/1978 (Eduardo Bleier v. Uruguay),[3] for example, the Committee came to the conclusion that the person concerned had been "arrested and detained" by the Uruguayan authorities, although officially he had "disappeared", on the basis of statements by witnesses that they had seen him held prisoner in official detention centres.

10.7. To corroborate her allegations concerning the responsibility of the Uruguayan authorities in her daughter's case, the author recalls the testimonies referred to in paragraphs 1.5 and 1.6 above and adds substantial new evidence as follows:

(i) A letter sent to the author in January 1977 by the Secretary-General of the Office of the Presidency of the Republic of Venezuela, in which he stated that the Government "will continue to press for the release of your daughter, Elena Quinteros Almeida" and expressed the hope that "in the end justice will be done and this wrong will be redressed";

[3] See *Selected Decisions* . . ., vol. 1, p. 109.

(ii) A Declaration adopted by the Chamber of Deputies of Venezuela on 26 April 1978, in which it is stated "on 28 June 1976 last, the Uruguayan citizen, Elena Quinteros, was arrested by the Uruguayan police authorities when she was seeking diplomatic asylum in the Venezuelan Embassy at Montevideo", ". . . not only does this action constitute a flagrant violation of the right of asylum but, in addition, the Uruguayan police authorities assaulted two diplomatic representatives of our country, thus violating the most elementary rules of diplomatic immunity and international courtesy";

(iii) Statements made to the Working Group on Enforced or Involuntary Disappearances by the representative of Uruguay to the Commission on Human Rights on 1 December 1981. The representative then said: "The disappearance of Elena Quinteros has caused us considerable problems. It led to the severing of our relations with Venezuela. It gave rise to a controversy in the Uruguayan newspapers, some of which asked whether or not the Uruguayan authorities were implicated . . . Miss Quinteros went into the Embassy of Venezuela. Before she was able to go inside and before she could initiate the procedure for applying for asylum, two persons removed her forcibly from the entrance to the Embassy of Venezuela, put her in a car and took her away. . . ."[4]

10.8. The author reiterates that "there can be no doubt as to the applicability of the Covenant in my particular case . . .". She states that, when her daughter was arrested in June 1976, "she and I were living in Montevideo, that is to say, within the jurisdiction of the Uruguayan authorities. As stated in my original communication, I was and continue to be victim of the violation of articles 7 and 17 of the Covenant".

11. In accordance with its mandate under article 5 (1) of the Optional Protocol, the Committee has considered the communication in the light of the information made available to it by the author of the communication and by the State party concerned. In this connection, the Committee has adhered strictly to the principle *audiatur et altera pars* and has given the State party every opportunity to furnish information to refute the evidence presented by the author. The State party appears to have ignored the Committee's request for a thorough inquiry into the author's allegations. The Committee reiterates that it is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, especially when such allegations are corroborated by evidence submitted by the author of the communication, and to furnish to the Committee the information available to it. In cases where the author has submitted to the Committee allegations supported by substantial witness testimony, as in this case, and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party.

12.1. With regard to the identity of the alleged victim, the Committee, on the basis of (*a*) the detailed information submitted by the author, including an eyewitness testimony, and (*b*) the statement made to the Working Group on Enforced or Involuntary Disappearance by the representative of Uruguay to the Commission on Human Rights, on 1 December 1981, has no doubt that the woman who was able to go inside the Embassy of Venezuela at Montevideo, on 28 June 1976, requesting asylum and who was forcibly removed from the Embassy grounds, put in a car and taken away, was Elena Quinteros.

12.2. In addition, the Committee cannot but give appropriate weight to the following information:

(i) Mr. Grille Motta in his testimony states that, during the incident of 28 June 1976, Enrique Baroni could identify one of Elena Quinteros' captors as being a policeman, nicknamed . . .";[5]

(ii) Mrs. Marquet Navarro in her testimony asserts that she saw Elena Quinteros in August 1976 in the detention place where she herself was being held and that she could observe that Elena Quinteros had been subjected to severe ill-treatment. Mrs. Marquet also gives the names of two male officers and two female soldiers who were "dealing" with Elena Quinteros.

12.3. The Human Rights Committee, accordingly, finds that, on 28 June 1976, Elena Quinteros was arrested on the grounds of the Embassy of Venezuela at Montevideo by at least one member of the Uruguayan police force, and that in August 1976 she was held in a military detention centre in Uruguay where she was subjected to torture.

13. It is, therefore, the Committee's view that the information before it reveals breaches of articles 7, 9 and 10 (1) of the International Covenant on Civil and Political Rights.

14. With regard to the violations alleged by the author on her own behalf, the Committee notes that, the statement of the author that she was in Uruguay at the time of the incident regarding her daughter, was not contradicted by the State party. The Committee understands 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 has 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.

15. The Human Rights Committee reiterates that the Government of Uruguay has a duty to conduct a full investigation into the matter. There is no evidence that this has been done.

16. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, therefore con-

[4] See E/CN.4/1492, annex XVI.

[5] Same nickname and name as referred to in paras. 1.6 and 10.4 above.

cludes that responsibility for the disappearance of Elena Quinteros falls on the authorities of Uruguay and that, consequently, the Government of Uruguay should take immediate and effective steps: (*a*) to establish what has happened to Elena Quinteros since 28 June 1976, and secure her release; (*b*) to bring to justice any persons found to be responsible for her disappearance and ill-treatment; (*c*) to pay compensation for the wrongs suffered; and (*d*) to ensure that similar violations do not occur in the future.

Communication No. 108/1981

Submitted by: Carlos Varela Núñez on 27 October 1981
Alleged victim: The author
State party: Uruguay
Date of adoption of views: 22 July 1983 (nineteenth session)[1]

Subject matter: Revocation of passport—Journalist

Procedural issues: Competence of HRC—Jurisdiction of States—Adoption of views without submission on the merits by State party

Substantive issues: Freedom of movement—Freedom of expression—Passport—Effective remedy—Derogation from Covenant

Articles of the Covenant: 2 (1) and (3), 4, 12 (2) and 19
Article of the Optional Protocol: 1

1.1. The author of the communication, dated 27 October 1981, is Carlos Varela Núñez, a Uruguayan journalist, living at present in New York City, United States of America. (The communication is submitted by the author with the assistance of the International League for Human Rights.) Mr. Varela Núñez alleges that he is a victim of a breach by Uruguay of articles 12 (2) and 19 of the Covenant on Civil and Political Rights.

1.2. The author claims that his Uruguayan passport has been revoked by the Uruguayan authorities, without official notice or explanation, to punish him for the opinions which he holds and which he has expressed and still expresses in press articles critical of the policies of the Uruguayan Government, and to prevent him from continuing to exercise fully his freedom of expression as a journalist. He claims that for the purpose of his complaint, he comes within the jurisdiction of Uruguay.

2.1. The author states that he is a Uruguayan citizen born in Montevideo, Uruguay, on 25 May 1942. In the early 1960s, he was an active member of the Uruguayan Socialist Party, which was then a legally functioning party. At the same time, he was also working as a journalist for the Uruguayan newspapers *Epoca* and *Marcha.* (Both newspapers and the Socialist Party were proscribed after the author left Uruguay.) The author affirms that throughout his career as a journalist in Uruguay and abroad, he has written press articles which have critically discussed Uruguay's human rights policies and practices.

2.2. On 11 March 1966, the author left Uruguay legally, in possession of a valid Uruguayan passport. In July 1970, Mr. Varela started to work for the Italian news agency, ANSA, and has been ANSA's correspondent at United Nations Headquarters in New York since 1973. When his passport expired in 1971, the Uruguayan consulate in Rome, Italy, issued a new passport (No. 151-922) to him with the expiration date of November 1981, provided that the passport be renewed in November 1976.

2.3. The author states that when he applied for the renewal of his passport at the Uruguayan consulate in New York in 1976, he was informed by the consular officer that there would probably be a long delay in the processing of his application. The author claims that after 1973, it had become the practice of the Uruguayan authorities, under the pretext of long delays, to deny the renewal of passports to certain persons. The author submits that, based upon personal knowledge of several such cases where Uruguayans had been waiting for the renewal of their passport for many years, without positive result, he informed the Uruguayan Ambassador to the United Nations that he intended to publicize his case. Subsequently, he obtained the renewal of his passport, valid then until November 1981.

2.4. The author states that, since the time of the "passport renewal incident", he has been afraid to return to Uruguay, for fear of reprisals because of his opinions and writings which have been critical of the Uruguayan Government's human rights record and other matters. The author adds that he is convinced that returning to Uruguay would place him in grave physical danger.

2.5. Mr. Varela claims that, in July 1980, he learned through foreign diplomats that the Uruguayan Government had notified foreign Governments in June of 1980 that his passport had been revoked. He himself, however, did not receive any written notice of the revocation, nor any statement of the reasons for that decision from the Uruguayan Government. His written inquiry regarding his passport, sent by registered mail to the Uruguayan consulate in New York on 5 May 1981, remained unanswered.

2.6. In March 1981, he was issued with a travel document by the Italian Government, based on humanitarian grounds, which enables him for the time being to

[1] Following his appointment to the Court of Appeal of the Supreme Court of Ontario, Mr. Walter Surma Tarnopolsky did not participate in the adoption of views at the Committee's nineteenth session.

continue his work as ANSA correspondent at the United Nations in New York. The author states, however, that this travel document cannot be regarded as an adequate substitute for a Uruguayan passport, as it is issued to him at the discretion of the Italian Government, on an *ad hoc* basis, subject to revocation at any time and valid for travel only in a limited number of countries. He maintains, therefore, that his rights under article 12 (2), which allegedly have been and still are violated by the Uruguayan Government by revoking his passport, are not fully and permanently restored by the Italian travel document and continue to be severely curtailed.

2.7. The author also maintains that he continues to be a victim of a breach by Uruguay of article 19 of the Covenant, on the following grounds: his passport was revoked by the Uruguayan authorities allegedly in retaliation for his public criticism of the Government. The revocation of his passport by Uruguay entails serious consequences for his future work as a journalist, restricting his ability to cross frontiers freely in order to seek, receive and impart information.

2.8. The author indicates that no further domestic remedies are available in his case. He also states that the same matter has not been submitted to another procedure of international investigation and settlement.

2.9. The author points out that no derogation from the obligations under articles 12 and 19 can possibly be claimed by Uruguay in the circumstances of his case, because the specific conditions for derogation set out in article 4 (1) and (3) of the Covenant do not apply.

3. By its decision of 16 March 1982, 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.

4.1. By a note dated 14 July 1982, the State party objected to the competence of the Human Rights Committee on the ground that the communication did not meet the requirements for admissibility laid down in article 1 of the Optional Protocol, ". . . in other words, Mr. Varela, on the date of submission of his petition, is outside the jurisdiction of the Uruguayan State . . .".

4.2. The State party concludes that "it is therefore inappropriate for the Committee to deal with communications of this type, which divert it from its tasks and breach provisions of international norms".

4.3. The State party emphasizes that it has replied to the communication "simply out of its desire to carry on its unfailing co-operation with the Committee in promoting and protecting human rights".

4.4. As regards the contents of the communication, the State party in its submission dismisses the allegations of violations of articles 12 (2) and 19 of the Covenant by Uruguay as unfounded.

4.5 In substantiation of its rebuttal, the State party draws the Committee's attention to Mr. Varela's activities abroad, as journalist for the Italian news agency, ANSA, and to his actual enjoyment of the right to move demonstrated by his "free" departure from Uruguay and his visits to Czechoslovakia and Cuba in 1967-1968. The State party further points out that Mr. Varela, like all Uruguayan citizens, has the constitutional right to return to his country at any time, even if his passport has expired. The State party further asserts that it never prevented or tried to prevent the author of the communication from freely expressing his opinions, citing Mr. Varela's activities in Uruguay as a member of and a spokesman for the Movimiento Popular Unitario.

5.1. On 21 September 1982, the author of the communication forwarded his comments in reply to the State party's submission of 14 July 1982.

5.2. He rejects the State party's contention that the communication is inadmissible under the provisions of article 1 of the Optional Protocol because he does not come within its jurisdiction in the matter concerned. Mr. Varela maintains that he is a Uruguayan citizen who is subject to the jurisdiction of the State party with respect to the granting of a passport. Should Uruguay's statement that it has no jurisdiction in the case imply that his citizenship has been revoked, Mr. Varela contends that he has never received a notice of withdrawal of citizenship, an act which would be arbitrary and in violation of international norms.

5.3. The author refers, in this connection, to the case of Guillermo Waksman (No. 31/1978),[2] which, similar to his own, concerned the denial of a passport, in violation of articles 12 (2) and 19 of the Covenant, by Uruguay to a Uruguayan citizen living abroad, and which, after being declared admissible by the Human Rights Committee, led to the issuance of a new passport to Mr. Waksman by the appropriate Uruguayan consular authorities.

5.4. The author also rejects the State party's contention that his rights under article 12 have not been violated. Mr. Varela points out that article 12 does not merely protect the right to leave one's country and to return to it for the purpose of a single journey, but that it protects a more far-reaching right to travel, namely to be free to leave any country, including one's own. As to the State party's further contention that he travelled to Czechoslovakia and Cuba in 1967-1968, the author stresses the fact that at that time he was still in possession of a valid Uruguayan passport. He further maintains that the Italian travel document which he has been able to acquire permits only limited travel and is valid only until July 1983. The author reaffirms that he is a victim of a breach by Uruguay of article 19, first, because he must assume, in the absence of clarifications to this point from the State party, that reporting critically on human rights developments in Uruguay, as part of his work as a United Nations journalist, led to the difficulties concerning his passport, and secondly, because, by the lack of a passport, he is restricted in his work as a journalist which would require him to cross frontiers freely to seek information.

5.5. He finally dismisses as inaccurate the State party's reference to his political activities in Uruguay as member and spokesman of the Movimiento Popular Unitario, declaring that he never was a member or spokesman for that political group or any other group or political party affiliated to the Frente Izquierdo de Liberación.

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[2] The Human Rights Committee decided to discontinue case No. 31/1978 on 28 March 1980; see *Selected Decisions . . .*, vol. 1, p. 36.

6.1. When considering the admissibility of the communication, the Human Rights Committee did not accept the State party's contention that it was not competent to deal with the communication because the author did not fulfil the requirements of article 1 of the Optional Protocol. In that connection, the Committee made the following observations: article 1 applies to individuals subject to the jurisdiction of the State concerned who claim to be victims of a violation by that State of any of the Covenant rights. The issuance of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is "subject to the jurisdiction" of Uruguay for that purpose. Moreover, a passport is a means of enabling him "to leave any country, including his own", as required by article 12 (2) of the Covenant. Consequently, the Committee found that it followed from the very nature of that right that, in the case of a citizen resident abroad, article 12 (2) imposed obligations both on the State of residence and on the State of nationality, and that therefore article 2 (1) of the Covenant could not be interpreted as limiting the obligations of Uruguay under article 12 (2) to citizens within its own territory.

6.2. The Committee found, on the basis of the information before it, that it was not precluded by article 5 (2) (*a*) of the Optional Protocol from considering the communication. The Committee was also unable to conclude that, in the circumstances of this case, there were effective domestic remedies available to the alleged victim which he had failed to exhaust. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (*b*) of the Optional Protocol.

6.3. On 27 October 1982, the Human Rights Committee therefore decided:

(*a*) That the communication was admissible;

(*b*) That, in accordance with article 4 (2) of the Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(*c*) That the State party should be informed that the written explanations or statements submitted by it under article 4 (2) of the Protocol must primarily relate to the substance of the matter under consideration and, in particular, the specific violations of the Covenant alleged to have occurred.

7. By a note dated 20 April 1983, the State party reiterated the opinion put forward in its earlier submission of 14 July 1982 on the question of the admissibility of the communication, namely "that the Committee has no competence to deal with this case".

8. On 30 May 1983, in reply to the State party's submission of 20 April 1983, the author informed the Committee that his passport continued to be withheld by the Government of Uruguay, in violation of his rights under articles 12 and 19 of the Covenant. Referring to the State party's failure to respond to the merits of his case, the author concluded that the State party thereby "appears to acknowledge the indefensibility of its actions against Mr. Varela".

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 decides to base its views on the following facts which appear to be uncontested: Carlos Varela Núñez is a Uruguayan citizen living in New York City since 1973, where he is working as a correspondent for the Italian news agency, "ANSA". In 1980, his passport (valid then until November 1981) was revoked by the Uruguayan Government which so notified foreign Governments in June 1980. Mr. Varela himself never received any written notice of the revocation, nor any statement of the reason for that decision, from the Uruguayan Government. His written inquiry regarding his passport sent by registered mail to the Uruguayan consulate in New York, remained unanswered. In March 1981, the Italian Government issued a travel document to him; such document, however, could not be regarded as an adequate substitute for a Uruguayan passport (see para. 2.6 above).

9.3. As to the alleged violation of article 12 (2) of the Covenant, the Committee reiterates that article 2 (1) of the Covenant cannot be interpreted as limiting the obligations of Uruguay under article 12 (2) to citizens within its own territory. On the other hand, article 12 does not guarantee an unrestricted right to travel from one country to another. In particular, it confers no right for a person to enter a country other than his own. Moreover, the right recognized by article 12 (2) may, in accordance with article 12 (3), be subject to such restrictions as "are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the Covenant". There are, therefore, circumstances in which a State, if its law so provides, may refuse passport facilities to one of its citizens. However, in the present case, the State party has not put forward any such justification for revoking Mr. Varela's passport. The facilities afforded by Italy do not, in the opinion of the Committee, relieve Uruguay of its obligations in this regard.

9.4. As to the allegations made by the author with regard to a breach of article 19 of the Covenant, which were refuted by the State party, the Committee observes that these allegations are in such general terms that it makes no findings in regard to them.

10. 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 found by it disclose a violation of article 12 of the Covenant, because the passport of Carlos Varela Núñez was revoked without any justification, thus preventing him from fully enjoying the rights under article 12 of the Covenant.

11. Accordingly, the Committee is of the view that the State party is under an obligation to provide Carlos Varela Núñez with effective remedies pursuant to article 2 (3) of the Covenant.

Communication No. 109/1981

Submitted by: María Dolores Pérez de Gómez on 17 August 1981
Alleged victim: Teresa Gómez de Voituret (author's daughter)
State party: Uruguay
Date of adoption of views: 10 April 1984 (twenty-first session)

Subject matter: Arrest and detention of Uruguayan citizen by military authorities—Tupamaros

Procedural issues: Request to State party for additional information—Sufficiency of State party's reply under article 4 (2)—Burden of proof—Exhaustion of domestic remedies

Substantive issues: Ill-treatment of detainees—Solitary confinement—Release from imprisonment of victim

Article of the Covenant: 10 (1)
Article of the Optional Protocol: 4 (2)

1. The author of the communication (initial letter dated 17 August 1981, further letters dated 20 November 1981 and 18 September 1982) is María Dolores Pérez de Gómez, a Uruguayan national living in Montevideo, Uruguay, writing on behalf of her daughter, Teresa Gómez de Voituret, who is allegedly detained in Uruguay and is not in a position to present her case herself to the Human Rights Committee. Mrs. Pérez de Gómez claims that her daughter is a victim of a breach by Uruguay of article 10 (1) of the International Covenant on Civil and Political Rights.

2.1. The author states that Teresa Gómez de Voituret, a medical doctor, was arrested on 27 November 1980 at the airport of Carrasco, Uruguay, upon her return from a medical seminar held in Buenos Aires, Argentina from 24 to 27 November 1980.

2.2. The author submits that her daughter was arrested by plainclothes men without any warrant and taken to Military Unit No. 1 of the Artillery in the area of Cerro where she allegedly was held in solitary confinement in a cell almost without natural light and which she was not allowed to leave until she was brought to trial in June 1981. From then on she was allowed periods of recreation outside her cell, hooded and forced to walk without interruption during this time.

2.3. The author was allowed to visit her daughter in the Military Unit 30 days after the arrest occurred. The visit took place in the presence of three guards who listened to every word of the discussion between mother and daughter. The author states that this type of visit continued, once every two weeks, until Teresa Gómez de Voituret was transferred to the Punta de Rieles prison where she is still detained. In Punta de Rieles prison she is allowed one half-hour visit by close family members every two weeks.

2.4. Mrs. Pérez de Gómez states that at her first visit in the Military Unit she could observe that her daughter's state of health had visibly deteriorated since the time before her arrest. She claims, based upon information she received from a person who had been detained for some time in the same place as Teresa Gómez de Voituret and who had later been released, that her daughter was subjected to torture during interrogation in order to extract confessions from her.

2.5. Thus, Teresa Gómez de Voituret falsely confessed that she was a member of a political group which kept close links with persons in and outside Libertad prison where her husband has been detained since 27 December 1974. Teresa Gómez de Voituret later revoked this statement in her written declarations before the court. She further admitted during interrogation that she had tried to mobilize international human rights bodies and related religious institutions, inside and outside Uruguay, drawing their attention to the critical situation of her husband and other prisoners in Libertad prison, claiming thereby that her husband's life was in grave danger because of death threats he allegedly had received from prison personnel.

2.6. The author claims that the Uruguayan authorities perceived her daughter's efforts before these human rights bodies as a threat to the country's image abroad.

2.7. In June 1981, Teresa Gómez de Voituret was charged with "subversive association and attempt against the Constitution followed by preparatory acts".

2.8. The author alleges that the proceedings in her daughter's case before the military court of first instance do not provide the necessary guarantees for a fair judicial process as they do not permit her daughter to be brought before the judge in person, but provide only for written statements by her daughter which are taken by a court clerk. The author further alleges in this connection that, although her daughter had been given the possibility to appoint a defence lawyer of her own choice, in reality she can expect only very little assistance from him because she is prevented from consulting him freely. The conversations have to take place by telephone, while the defence lawyer and her daughter are separated by a glass wall and continuously watched by guards standing at their sides.

2.9. The author maintains that there are no domestic remedies which could be effectively pursued in her daughter's case. The author also submits that to her knowledge the same matter has not been submitted to the Inter-American Commission for Human Rights.

2.10. Finally, the author states that she submits the case of her daughter to the Human Rights Committee with the request that the Committee take appropriate action to secure a fair trial for her daughter and her subsequent release.

3. By its decision of 16 March 1982 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. The State party was also requested (*a*) to provide the Committee with copies of any court orders or decisions relevant to this

case; and (*b*) to inform the Committee whether the alleged victim was brought before the military judge of first instance in person and what were the relevant laws and practices in this respect.

4.1. By a note dated 24 June 1982 the State party informed the Committee that Teresa Gómez de Voituret was tried on 23 March 1982, charged with the offence of "subversive association" under article 60 (*v*) of the Military Penal Code. The State party adds that Teresa Gómez de Voituret had been accused of this offence "on the basis of evidence confirming her active participation in the subversive movement known as 'Seispuntismo', which sought to reactivate MLN and about which the Committee has already been informed". The State party stresses that "Teresa Gómez de Voituret was a member of the most active centre of agitation and propaganda and [that] her primary task was to try to recruit new members for this seditious organization".

4.2. The State party did not however submit copies of any court orders or decisions of relevance to the case or reply to the specific questions set out in paragraph 3 above.

5.1. On 18 September 1982, the author of the communication forwarded her comments in reply to the State party's submission of 24 June 1982. She rejects the State party's contention that her daughter ever was an active member of MLN. She claims, in this connection, that "the Military Government of Uruguay simply invented the subversive movement known as 'Seispuntismo' in order to bring to trial once again a group of prisoners who had completed or almost completed their sentences in Libertad prison".

5.2. Mrs. Pérez de Gómez asserts that her daughter merely reported to the Red Cross and to the organization "Justicia y Paz" in Buenos Aires the physical, psychological and moral pressure that was being exerted at that time in Libertad prison against her husband Jorge Voituret Pazos and other political prisoners. She maintains that acting thus in defence of her husband was the only offence her daughter committed.

6. In reply to the author's comments and observations on its submission of 24 June 1982, the State party, in a further note dated 28 December 1982, reaffirms its statement on the case as contained in its note of 24 June 1982.

7. On 3 May 1983 the State party was again requested to furnish additional information, *inter alia*, as to whether judgement of first instance had already been rendered in the case. The time-limit for the State party's response expired on 20 June 1983. No such additional information had been received from the State party when the Committee decided on the admissibility of the communication in July 1983.

8. With regard to article 5 (2) (*a*), the author's assertion that the same matter had not been submitted to any other procedure of international investigation or settlement was not contested by the State party. As to the question of exhaustion of domestic remedies, the State party did not contest the author's statement concerning the absence of effective remedies in her daughter's case. The Committee noted in this regard that it would appear that the trial of Teresa Gómez de Voituret, although begun on 23 March 1982, might not yet have been concluded, since the Committee had no information that judgement had been given. However, the allegations of violations of the Covenant related to ill-treatment in prison and the lack of guarantees of a fair trial, as required by the Covenant, in respect of which the State party did not claim that there was an effective domestic remedy which the alleged victim had failed to exhaust. The Committee therefore was unable to conclude that in the circumstances of this case there were domestic remedies which could have been effectively pursued. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (*a*) and (*b*) of the Optional Protocol.

9. On 22 July 1983 the Human Rights Committee therefore decided:

1. That the communication was admissible;

2. That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of transmittal to it of the decision, written explanations or statements clarifying the matter and the remedy, if any, that might have been taken by it;

3. That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to perform its responsibilities, it required specific responses to the allegations which had been made by the author of the communication and the State party's explanations of the actions taken by it. The State party was again requested (*a*) to enclose copies of any court orders or decisions of relevance to the matter under consideration, (*b*) to inform the Committee whether the alleged victim was brought before the military judge of first instance in person and what were the relevant laws and practices in that respect, and (*c*) to inform the Committee as to the outcome of the trial at first instance of Teresa Gómez de Voituret and whether the judgement of the court of first instance was subject to appeal.

10. By a note of 22 August 1983 in response to the Committee's request of 3 May 1983, the State party submitted the following additional information:

> In the proceedings against Teresa Gómez de Voituret, the accused was sentenced at first instance on 28 September 1982 to five years' rigorous imprisonment on conviction of the offences of "subversive association" and "conspiracy to undermine the Constitution followed by criminal acts".
>
> On 15 June 1983 judgement was given at second instance confirming the sentence. The proceedings were conducted with all the guarantees provided for under the Uruguayan legal system, including that relating to the right of the accused to appropriate legal assistance.

11.1. In its submission under article 4 (2) of the Optional Protocol, dated 14 December 1983, the State party added:

> In all cases the legally established trial procedures are observed, which includes appearance before the competent judge. With respect to the judgements of first and second instance there are remedies to which recourse may be had within the prescribed periods. Finally, it must be pointed out that in Uruguay maltreatment and threats are not methods employed, and the physical integrity of prisoners is fully protected.

The Committee notes with concern that, in spite of its repeated requests, it has not been furnished with any

copies of court orders or decisions of relevance to the matter under consideration.

11.2. No further submission has been received from the author.

12.1. The Human Rights Committee, having examined the present communication in the light of all the information made available to it by the parties as provided in article 5 (1) of the Optional Protocol, hereby decides to base its views on the following facts, which appear uncontested.

12.2. Teresa Gómez de Voituret was arrested on 27 November 1980 by plainclothes men without any warrant and taken to Military Unit No. 1, where she was held in solitary confinement in a cell almost without natural light and which she was not allowed to leave until she was brought to trial in June 1981. She was subsequently transferred to Punta de Rieles prison, where she is still detained. In June 1981 she was charged with "subversive association and attempt against the Constitution followed by preparatory acts". Her trial at first instance began on 23 March 1982 and she was sentenced on 28 September 1982 to five years' rigorous imprisonment. On 15 June 1983 judgement was given at second instance confirming the sentence.

13. 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 as found by the Committee disclose a violation of article 10 (1) of the International Covenant on Civil and Political Rights, because Teresa Gómez de Voituret was kept in solitary confinement for several months in conditions which failed to respect the inherent dignity of the human person.

14. The Committee, accordingly, is of the view that the State party is under an obligation to ensure that Teresa Gómez de Voituret is treated with humanity and to transmit a copy of these views to her.[1]

[1] On 10 March 1984, shortly before the adoption of views by the Committee, Teresa Gómez de Voituret was released from imprisonment.

Communication No. 110/1981

Submitted by: Antonio Viana Acosta on 12 August 1981
Alleged victim: The author
State party: Uruguay
Date of adoption of views: 29 March 1984 (twenty-first session)

Subject matter: Trial of Uruguayan civilian by military court—Tupamaros

Procedural issues: Events prior to entry into force of the Covenant—Jurisdiction of States—Competence of HRC—Unsubstantiated allegations—Sufficiency of State party's reply under article 4 (2)

Substantive issues: Detention incommunicado—Abduction—Ill-treatment of detainees—Torture—Right to choose own counsel—Ex-officio counsel—Delays in proceedings—Effective remedy—Release of victim from imprisonment

Articles of the Covenant: 2 (1), 7, 10 (1) and 14 (3) (b), (c) *and* (d)
Article of the Optional Protocol: 1

1. The author of the communication (initial letter dated 12 August 1981 and further submissions dated 26 October 1981, 27 September 1982 and 11 June and 22 November 1983) is a Uruguayan national, residing at present in Sweden. He submits the communication on his own behalf.

2.1. The author (born on 30 October 1949) describes the background to the case as follows. Between 1969 and 1971 when he worked for Senator Zelmar Michelini of the Uruguayan opposition party Frente Amplio he was arrested several times on the suspicion of association with subversive movements but no charges were ever retained against him. After the defeat of Senator Michelini's party in the elections of November 1971, he left Uruguay with his family for Buenos Aires, Argentina. He continued to work for Zelmar Michelini, mostly as a journalist.

2.2. The author alleges that on 24 February 1974 he was kidnapped by a joint Uruguayan-Argentinian commando at his home in Buenos Aires, Argentina. After having been subjected to severe torture at several places of detention and interrogated with a view to making him admit that he had been involved in the activities of the Argentinian ERP (Ejército Revolucionario del Pueblo) and the Uruguayan MLN (Movimiento de Liberación Nacional, Tupamaros) he was brought on 4 April 1974 to the Metropolitan Airport of Buenos Aires, where he met his family. They were put on a regular flight to Montevideo, Uruguay. Mambers of the Uruguayan police were waiting for them at Carrasco Airport and they were taken to police headquarters.

2.3. The author claims to have been held at the following detention places in Uruguay: Batallón de Infantería No. 12, where he allegedly was torture for two months in 1974, and Batallón de Infantería No. 11, where he was also subjected to torture of which he gives a detailed description. On 23 December 1974 he was taken to Libertad prison, where he remained until his "advanced release" on 13 February 1981. On 24 October 1974 he was brought before a judge to be indicted. Subsequently his wife was released. The background to the case, as described above, relates to events said to have taken place prior to the entry into force of the In-

ternational Covenant on Civil and Political Rights for Uruguay on 23 March 1976.

2.4. On 26 April 1976 the author was taken before a military tribunal of first instance (Juzgado Militar de Primera Instancia, 5 Turno). There he replied to a questionnaire prepared by his defence lawyer, Dra. María Elena Martínez Salgueiro. The military judge, Colonel Eduardo Silva, listened to his replies but no witnesses were heard. The author then was taken back to Libertad prison and held there incommunicado. His defence lawyer was informed two weeks later that he indeed was at Libertad prison but that no visits were allowed. Before the tribunal of first instance the author was charged with subversive association and sentenced to seven years' imprisonment.

2.5. On 18 April 1977 the author was taken before the Supreme Military Tribunal and new charges were brought against him, such as attempting to subvert the Constitution at the level of conspiracy followed by preparatory acts, possession of arms and explosives and use of false identity papers. On that date the author was sentenced to 14 years' imprisonment.

2.6. The author states that both his first and second defence lawyers, Dra. Martinez Salgueiro and Dra. Susana Andreasen, had to renounce his defence in 1976 and later to leave the country. Before the Supreme Military Tribunal the author had to accept a military *ex officio* counsel, Colonel Otto Gilomen, although a civilian defence lawyer, José Korsenak Füks, was ready to take up his defence.

2.7. The author alleges that in 1976 he was subjected to psychiatric experiments (giving the name of the doctor) and that for three years, against his will, he was injected with tranquillizers every two weeks. He alleges in this connection that in May 1976 when he put up resistance to the injections, Captain X (name is given) ordered a group of soldiers to subdue him forcibly in order to inject the drug and that he was subsequently held incommunicado in a punishment cell for 45 days. He further claims, without providing any detail, that on 14 and 15 April 1977 he was interrogated and subject to torture at Libertad prison, that on 22 November 1978 he was again subjected to torture (giving the names of his torturers in both instances), that he started a hunger strike protesting against this ill-treatment and that in retaliation he was held incommunicado in a punishment cell for 45 days without any medical attention. He claims that in April 1980 he was again held incommunicado because he had spoken with members of the International Red Cross visiting Libertad prison. The author lists the names of several Uruguayan officials who allegedly practised torture.

2.8. The author states that he was released on 13 February 1981 under the régime of "advanced release", that he had to report every day to a particular unit and that he did so from 13 February up to 14 April 1981 when he went to Brazil. He states that his family continues to be subjected to harassment in Uruguay.

2.9. With regard to the question of admissibility, the author states that he has not submitted his case to another procedure of international investigation or settlement. He further alleges that, because of the state of lawlessness prevailing in Uruguay with regard to cases submitted to military jurisdiction, there are no further domestic remedies which could be invoked.

2.10. The author claims that he is a victim of violations of articles 7, 8, 9, 10 (paras. 1, 2 and 3), 12, 14, 16, 17, 18, 19 (paras. 1 and 2), 21, 22, 25 and 26 of the International Covenant on Civil and Political Rights.

3. By its decision of 16 March 1982 the Working Group of the Human Rights Committee decided to transmit the communication under rule 91 of the Committee's 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 18 August 1982 the State party informed the Committee that the Government of Uruguay wished to state that, in view of article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights, which provides that a State party to the Covenant recognizes the competence of the Committee to receive and consider communications "from individuals subject to its jurisdiction", it considered the communication in question to be inadmissible. Mr. Viana Acosta was not entitled to request the implementation of the machinery provided for in the Covenant because, once he was unconditionally released on 5 April 1981, he left the country to live abroad and he was therefore not subject to the jurisdiction of the Uruguayan State. The Government of Uruguay nevertheless wished to explain that the author of the communication was not a "political prisoner" but, rather a common criminal who was connected with the seditious "Tupamaros" movement and was tried for the offence of "aiding and abetting a conspiracy to subvert".

5. Commenting on the State party's submission, the author argued, in his letter of 27 September 1982, that it was impossible for him to submit the communication from his own country, since no individual guarantees existed there.

6. When discussing the admissibility of the communication the Human Rights Committee observed that the events complained of allegedly occurred in Uruguay while the author was subject to the jurisdiction of Uruguay. The Committee recalled that, by virtue of article 2, paragraph 1, of the Covenant, each State party undertakes to respect and to ensure to "all individuals within its territory and subject to its jurisdiction" the rights recognized in the Covenant. Article 1 of the Optional Protocol was clearly intended to apply to individuals subject to the jurisdiction of the State party concerned at the time of the alleged violation of the Covenant. This was manifestly the object and purpose of article 1.

7. On the basis of the information before it, the Committee found that it was not precluded by article 5, paragraph 2 (*a*), of the Optional Protocol from considering the communication, as there was no indication that the same matter had been submitted to another procedure of international investigation or settlement. The Committee was also unable to conclude that in the circumstances of this case there were effective remedies available to the alleged victim which he had failed to exhaust. Accordingly, the Committee found that the com-

munication was not inadmissible under article 5, paragraph 2 (*b*), of the Optional Protocol.

8. On 31 March 1983, the Human Rights Committee therefore decided:

1. That the communication was admissible in so far as it related to events which allegedly continued or took place after 23 March 1976, the date on which the Covenant and the Optional Protocol entered into force for Uruguay;

2. That the author be requested to submit to the Committee, within six weeks of the date of transmittal of this decision, further, more precise information (together with any relevant medical reports) concerning the psychiatric experiments to which he alleged that he was subjected (see para. 2.7 above);

3. That any information received from the author be transmitted as soon as possible to the State party to enable it to take such information into account in the preparation of its submission under article 4, paragraph 2, of the Optional Protocol;

4. That, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

5. That the State party be informed that the written explanations or statements submitted by it under article 4, paragraph 2, of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to perform its responsibilities, it required specific responses to the allegations which had been made by the author of the communication, and the State party's explanations of the actions taken by it. The State party was requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration.

9. By a note dated 5 April 1983, the Government of Uruguay repeated "what it stated in the reply given to the Committee in its note dated 18 August 1982 concerning the same case" (see para. 4 above).

10. In a letter dated 11 June 1983 the author regrets not being able to provide the Committee with the requested precise information concerning the psychiatric experiments he allegedly had been subjected to during his detention. He explains that all information of this kind remained in the hands of the doctors, some of whom he identifies by name, who belonged to the military health establishment in Uruguay. He repeats his earlier allegations that every fortnight for more than three years he was injected against his will with a psychotropic drug. He claims that the doctors stopped administering the drug after he had informed the Chief of the Red Cross mission which visited Libertad prison in April 1980. The author alleges that no competent medical supervision was exercised when the drug was administered to him and he lists in this connection several members of the Armed Forces Health Corps, who allegedly collaborated in the psychological and physical destruction of detainees. He further completes his earlier list of names of Uruguayan officials having allegedly practised torture (see para. 2.7 above), mentioning a total of 62 names. He also encloses two medical reports, one from a Brazilian doctor dated 16 June 1981 and one from a Swedish hospital covering the period 29 September to 18 December 1981. In the first medical report it is stated, *inter alia*, that ". . . examination reveals . . . a number of scars on the fists, ankles, penis and gluteal region, caused by electric shocks".

11. In its submissions under article 4 (2) of the Optional Protocol dated 27 September and 4 October 1983, the State party reiterates its views previously expressed to the Committee (see para. 4 above).

12. Commenting on the State party's submissions, the author in a letter dated 22 November 1983 points out that the Government of Uruguay, despite the Committee's requests, has failed to respond in substance and to provide the Committee with copies of court orders or decisions of relevance to his case. He further disputes the State party's contention that he was "unconditionally" released.

13.1. The Committee decides to base its views on the following facts which have been either essentially confirmed by the State party or are uncontested except for denials of a general character offering no particular information or explanation. However, it follows from the Committee's decision on the admissibility of the communication that the claims relating to events said to have taken place before 23 March 1976 (see paras. 2.1, 2.2 and 2.3 above) are inadmissible for the purpose of any finding by the Committee.

13.2. Antonio Viana Acosta was seized by a joint Uruguayan-Argentinian commando on 24 February 1974 at his home in Buenos Aires, Argentina, and was flown on 4 April 1974 to Uruguay, where he was detained in custody. He was subsequently held at various places of detention in Uruguay until 23 December 1974 when he was taken to Libertad prison where he remained until his release from prison on 13 February 1981. On 26 April 1976 he was taken before a military tribunal of first instance where he replied to a questionnaire prepared by his defence lawyer in the presence of a judge. He was thereafter taken back to Libertad prison and held incommunicado for several weeks. He was charged with subversive association and sentenced by the military tribunal of first instance to seven years' imprisonment. On 18 April 1977, Antonio Viana Acosta was brought before the Supreme Military Tribunal where new charges were brought against him. He was forced to accept a military *ex officio* counsel, Colonel Otto Gilomen, although a civilian defence lawyer, José Korsenak Füks, was ready to take up his defence. He was sentenced to 14 years' imprisonment. On three occasions, one starting in May 1976, one in November 1978 and one in April 1980, he was held incommunicado in a punishment cell. He was released from detention on 13 February 1981. On 14 April 1981 he left Uruguay.

14. Concerning the author's allegations of torture, the Committee notes that the periods of torture, except for 14 and 15 April 1977 and 22 November 1978 (see para. 2.7 above), occurred before the entry into force of the Covenant and the Optional Protocol thereto for Uruguay, and that regarding torture alleged to have occurred after 23 March 1976 no details have been provided by the author. These allegations are therefore, in

the opinion of the Committee, unsubstantiated. Nevertheless, the information before the Committee evidences that Antonio Viana Acosta was subjected to inhuman treatment.

15. 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 as found by the Committee, in so far as they continued or occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay), disclose violations of the International Covenant on Civil and Political Rights, with respect to:

Articles 7 and 10 (1), because Antonio Viana Acosta was subjected to inhuman treatment;

Article 14 (3) (*b*) and (*d*), because before the Supreme Military Tribunal he did not have counsel of his own choosing;

Article 14 (3) (*c*), because he was not tried without undue delay.

16. The Committee, accordingly, is of the view that the State party is under an obligation to provide Antonio Viana Acosta with effective remedies and, in particular, with compensation for physical and mental injury and suffering caused to him by the inhuman treatment to which he was subjected.

Communication No. 115/1982

Submitted by: John Wight on 5 January 1982
Alleged victim: The author
State party: Madagascar
Date of adoption of views: 1 April 1985 (twenty-fourth session)

Subject matter: Emergency landing—Overflight of Malagasy territory—Detention of South African citizen in Malagasy prison

Procedural issue: Confirmation of allegations by victim after release from prison.

Substantive issues: Right to overflight—Chicago Convention articles 5, 9 (b)*—State of emergency—Derogation from Covenant—Arbitrary arrest—Detention incommunicado—Ill-treatment of detainees—Prison conditions—Solitary confinement—Access to counsel—Arrest and harassment of counsel—Correspondence of prisoner—Appeal for clemency—Extraordinary remedy—Extradition of prisoner—Discrimination based on nationality—Review of conviction and sentence*

Articles of the Covenant: 7, 10 (1) and 14 (3) (b)
Article of the Optional Protocol: 4 (2)

1. The author of the communication (initial letter dated 5 January 1982 and further letters dated 14 February and 22 May 1982 and 31 May 1983, 30 January and 3 July 1984 and a final letter (undated) received on 21 September 1984) is John Wight, a South African national who was imprisoned in Madagascar from January 1977 to February 1984. He is represented by Maître Eric Hammel, who was a lawyer in Madagascar until his expulsion on 11 February 1982 and who is at present in France. The facts of this case are similar to those of Communication No. 49/1979 concerning Dave Marais, Jr., another South African national who was also imprisoned in Madagascar. The Human Rights Committee adopted views under article 5, paragraph 4, of the Optional Protocol concerning Communication No. 49/1979 on 24 March 1983.[1]

2.1. Maître Hammel (who was also the lawyer of Dave Marais, Jr.) alleged at the time of submission that, as in the Marais case, his client Wight was unable to submit a communication himself, as he was not permitted to engage in correspondence from his place of detention in Madagascar.

2.2. Maître Hammel states that John Wight was a pilot for South African Airways; that on 18 January 1977, on a private flight, he had to make an emergency landing at Mananjary, Madagascar, for technical reasons; that on 22 March 1978 the Military Tribunal of Antananarivo sentenced him, together with Dave Marais, to five years' imprisonment and fined him FMG 500,000 for the offence of unlawfully overflying Malagasy territory; that on 15 May 1981, the Correctional Tribunal of Antananarivo sentenced him to an additional two years' imprisonment and fined him FMG 1 million for the offence of escaping from prison; that he was detained at the prison in Manjakandriana until 27 November 1981 when, by written order of M. Honoré Rakotomana, Secretary-General of the Ministry of Justice, he was transferred to the DGID (political police) prison at Ambohibao, purportedly for the protection of his physical integrity.

2.3. It is alleged that the pretext used to justify the transfer to Ambohibao was false, and that John Wight was held there under the same inhuman conditions as Dave Marais, Jr., in a cell measuring 2 m by 1.5 m, that he could not receive any visitors or communicate with his attorney and that he could not send or receive letters.[2]

2.4. Maître Hammel explains that, pursuant to articles 550 and 551 of the Malagasy Code of Penal Procedure, convicted persons must be detained in the penal establishments under the Ministry of Justice and that

[1] See above, pp. 82-86.

[2] See para. 14, further clarifications concerning his conditions of imprisonment, received from John Wight after his release.

detention of a convicted person at a police establishment is illegal.

2.5. Maître Hammel claims that Mr. Wight is a victim of violations of article 10, paragraph 1, and article 14, paragraph 3, of the International Covenant on Civil and Political Rights.

3. By its decision of 16 March 1982, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party, requesting information and observations relevant to the question of admissibility of the communication. The Working Group also requested the State party to provide the Committee with copies of any court orders or decisions relevant to the case.

4.1. By a note dated 11 August 1982, the State party transmitted to the Committee a photocopy of a letter dated 14 July 1982, signed by Mr. John Wight and Mr. Dave Marais and addressed to the Director of the Directorate-General of Investigations and Documentation of the Malagasy Republic. The text of the letter reads as follows:

> We would like to thank you very much for the letters from our families, which were safely received yesterday. It is absolutely wonderful to have news of our wives after so many months.
>
> In writing, I take the opportunity also to thank you for all the money which you have provided to buy cigarettes, soap and medicine. Also for the food, the room and particularly for the kindness shown to us. We remain in good spirits and, in view of the circumstances, want for almost nothing—except, of course, our freedom.
>
> I would like to request your permission to write to President Ratsiraka to ask him if he might be so good as to consider a remission of sentence or an amnesty for us. I am extremely eager to return home so as to be able to participate in the struggle against *apartheid* . . .

4.2. The State party further informed the Committee that the relevant Malagasy high authorities were studying the action to be taken on the requests made in the letter referred to above.

5.1. The Human Rights Committee further examined the communication of John Wight at its seventeenth session. In view of the information furnished by the State party, which the Committee welcomed, and in order to give time to the President of Madagascar to respond to the appeal for clemency made to him by Mr. Wight and Mr. Marais, the Committee decided to defer further consideration of their cases until its eighteenth session. The State party was so informed on 25 November 1982 and requested to inform the Committee not later than 31 January 1983 whether the appeal for clemency made by Mr. Wight and Mr. Marais had been granted.

5.2. No further information was received from the State party prior to the Committee's eighteenth session.

6.1. With regard to article 5, paragraph 2 (*a*), of the Optional Protocol, the Committee noted that it had not received any information that the subject-matter had been submitted to another procedure of international investigation or settlement.

6.2. With regard to article 5, paragraph 2 (*b*), of the Optional Protocol, the Committee noted that the State party had not contended that there were domestic remedies which had not been exhausted. On the basis of the information before it, the Committee was unable to conclude that there were remedies available to the alleged victim which he could pursue or should have pursued.

6.3. Accordingly, the Committee found that the communication was not inadmissible under article 5, paragraph 2 (*a*) or (*b*), of the Optional Protocol.

7. On 24 March 1983, the Human Rights Committee decided:

1. That the communication was admissible;

2. That, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

3. That the State party be informed that the written explanations or statements submitted by it under article 4, paragraph 2, of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to fulfil its responsibilities, it required specific responses to the allegations which had been made and the State party's explanations of the actions taken by it. The State party was again requested to enclose copies of any court orders or decisions of relevance to the matter under consideration.

8. In a note dated 10 May 1983, the State party informed the Committee that

> the authorities of the Democratic Republic of Madagascar have not deemed it appropriate to respond to the appeal for clemency made by Mr. Dave Marais and Mr. John Wight on 14 July 1982 and will be unable to do so until Nelson Mandela has been finally released in exchange.

9.1. On 31 May 1983, Maître Hammel submitted a legal memorandum on behalf of John Wight, alleging that since 27 November 1981, John Wight had been detained in a dark cell in the basement of the Malagasy political police prison at Ambohibao under the same conditions as Dave Marais, Jr., completely incommunicado, and that since that date the detainee had been unable to communicate with his lawyer. Maître Hammel pointed out that three successive lawyers of the two South Africans had all been arrested and detained and then expelled or else had escaped the country; the purpose of the alleged persecution was to prevent political prisoners from being properly defended. In particular he alleges:

> (*a*) That Maître J. J. Natbai, their first lawyer, who was temporarily in France in early 1978 (on the eve of their trial), was prohibited from returning to Madagascar (his return visa was cancelled) . . .;
>
> (*b*) That Maître Boitard, their second lawyer, was arrested by the political police in May 1979 charged with conspiracy and with aiding and abetting the escape of his two clients detained in prison and that he escaped on 3 January 1980 . . .;
>
> (*c*) That the present defence counsel was arrested first on 3 March 1980 by DGID, interrogated on that day and then released and that he was again arrested by DGID in November 1980, interrogated on that day and then released, that his chambers were searched by the Malagasy political police in early February 1982, that he was arrested by the political police, detained in a basement cell of the Malagasy political police prison and then expelled from Madagascar on 11 February 1982. . . [and] that one of the principal charges levelled against this counsel during his detention and interrogation was that he had defended political prisoners, including the two South Africans.

9.2. With regard to the facts of the case, Maître Hammel elaborates on the initial communication and explains that

the South African aircraft piloted by the detainee made an emergency landing at Mananjary for technical reasons and in order to refuel because of atmospheric disturbances and bad weather between Madagascar and La Réunion and Mauritius (the month of January, which is mid-summer in the southern hemisphere, is generally a period of bad weather and cyclones). That since then, many aircraft have made emergency landings for technical reasons at Madagascar (aircraft from Botswana, Zambia, French aircraft from La Réunion, etc.) and that none of the pilots or passengers of those aircraft has been arrested or harassed, that in general such aircraft remain on the field guarded by the army or the gendarmerie, the passengers are confined to the aircraft but are given food, and that after the necessary repairs or refuelling, the aircraft are authorized to take off for their scheduled destination.

9.3. Maître Hammel therefore concludes that John Wight and Dave Marais were arrested and charged primarily because of their South African nationality and because of the South African nationality of their aircraft.

10.1. In its submission under article 4, paragraph 2, of the Optional Protocol dated 12 January 1984, the State party explains with respect to the nature of Mr. Wight's imprisonment that

under article 550 of the Code of Penal Procedure, to which the communication submitted on behalf of John Wight refers, imprisonment may be effected in two types of place: a prison or separate quarters of a penal establishment. This provision of the Code of Penal Procedure points to the concept of quarters and signifies that a penal establishment (forming a whole at the administrative level) may have quarters in a number of different places: so much so that in the case of Antananarivo Central Prison, the quarters reserved for adults and for juveniles are in two different places more than 15 kilometres apart. Nevertheless, these premises are under the administration of the Head Warden of the Central Prison . . . The Central Prison of Antananarivo, to which Mr. John Wight was committed, has never ceased to be responsible for him.

10.2. With respect to the charge of unlawful detention, the State party notes

that the definition of unlawful detention depends not on the place of detention but on the existence of a proper detention order issued by the competent judicial authority. Following his arrest, the author of the communication was the subject of the following detention orders in due form: warrant of commitment issued by the examining magistrate in charge of the case following examination; warrant of commitment issued by the indictment division which is valid until the time the prisoner is tried by the competent court; decision of the military court which convicted him and authorized his imprisonment until completion of his sentence.

10.3. With respect to the question of any irregularity in the imprisonment of Mr. Wight, the State party declares that the provisions of article 557 of the Malagasy Code of Penal Procedure have been respected and points out that extracts from the Prison Calendar (which the State party submits to the Committee) bears witness to the fact that the provisions of the law were complied with.

It is clear from those documents that Mr. John Wight has never ceased to be under the authority of Antananarivo Central Prison. If Mr. John Wight was transferred to another place of detention, it was in order to strengthen surveillance and prevent any recurrence of his escape. His present whereabouts are more appropriate for such surveillance and can guarantee the security of his prison.

11.1. The State party also forwarded a copy of the sentence of the military court of Antananarivo dated 22 March 1978, and a copy of the decision of 20 March 1979 of the Supreme Court of Madagascar, dismissing the appeal filed by Messrs. Marais, Lappeman and Wight.

11.2. On the question of the legitimacy of the overflight of Malagasy territory by the aircraft of which Mr. Wight was the pilot, the Supreme Court of Madagascar held:

WITH REGARD TO THE SECOND GROUND FOR CASSATION proposed by Me. BOITARD, counsel, referring to the violation of article 5 of the Chicago Convention, in that that article explicitly provides that each contracting State authorizes the overflight of its territory and landing in that territory for reasons of safety, and that it cannot be denied that both the Democratic Republic of Madagascar and the Republic of South Africa are signatories to that Convention;

Whereas article 5 of the Chicago Convention of 7 December 1944 does indeed stipulate that each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services, shall have the right to make flights into or transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, under article 9 (*b*) of the Convention each contracting State reserves the right, in exceptional circumstances or during a period of emergency, or in the interest of public safety, and with immediate effect, temporarily to restrict or prohibit flying over the whole or any part of its territory;

Whereas, by prohibiting flying over its territory during a period of emergency, and in the interest of public safety, the State of Madagascar was merely availing itself of the possibility afforded by article 9 (*b*) of the Chicago Convention;

Whence it follows that the appeal is unfounded.

12.1. On 30 January 1984, Maître Hammel submitted a memorandum concerning the State party's submission under article 4, paragraph 2, of the Optional Protocol. He points out, *inter alia*, that the State party has failed to submit to the Committee the judgement by the Correctional Tribunal of Antananarivo of 14 May 1981,[3] which sentenced John Wight for escaping from prison and overflying the territory. He reiterates that the place of imprisonment of John Wight is irregular, explaining that from the legal point of view, the Malagasy political police (DGID) is a police and intelligence service responsible for preliminary investigations, and that the political police prison is not part of the prison service, but is administered directly by the political police. Prisoners are guarded not by prison service officials, but by political police staff and military personnel from various units. Moreover, the political police prison has no commitment register because prisoners held there are listed in the commitment registers of the ordinary prisons. Within the legal meaning of the term, the political police prison is not a prison.

12.2. With respect to the conditions of detention, Maître Hammel reiterates that his client was held in the basement of the political police prison, where he was even chained at times. He was kept in the strictest solitary confinement, could not see anyone, could not receive or send letters and could not communicate with his lawyer. "No one from outside DGID, including chaplains, is allowed to enter the prison. Prisoners are also prohibited from talking to one another, as the undersigned counsel is in a particularly good position to know, since he was detained in that prison in the same conditions."[4]

12.3. Maître Hammel also submitted a copy of the order for release "from the lock-up" and the text of Ordinance No. 021/77 of 10 June 1977 amending the Code of Penal Procedure to read, *inter alia*, "Article 54 (new): A prisoner awaiting trial may, after his first

[3] In an earlier submission (see para. 2.2 above) Maître Hammel gives the date of this judgement as being 15 May 1981.

[4] See footnote 2 above.

hearing, communicate freely with his defence counsel. In no case shall the prohibition on communication apply to him. However, any person who is being held in custody in connection with an investigation of a crime or offence against State security and who is also charged with other offences may be prohibited by the competent judicial officer from communicating with his defence counsel except during hearings at which his presence is required and during sentencing."

13. By telegram dated 26 March 1984, the State party informed the Committee that Messrs. John Wight and Dave Marais, Jr., had been released from prison upon completion of their terms of imprisonment and that they had left Malagasy territory on 16 February 1984.

14. In a letter dated 3 July 1984, requesting the Committee to continue consideration of his communication for the purpose of adopting views thereon, Mr. Wight confirmed that the facts as described by Maître Hammel are basically correct, but added the following clarifications concerning the conditions of his detention:

(i) After our escape from prison and subsequent recapture in September 1978, I was kept in a solitary room at the DGID chained to a bed spring on the floor, with minimal clothing and a severe rationing of food (I lost 25 kg of weight) for a period of 3 1/2 months. I was then fortunate in contracting hepatitis and was transferred to the hospital. During the period of being chained to the floor, I was seldom allowed to wash (perhaps once a fortmight). During this period and in fact until July 1979 (10 months), I was held totally incommunicado.

(ii) From July 1979 until November 1981 I was held in a prison at Manjakandriana where conditions were at least human.

(iii) I was then transferred to the DGID where I was kept in a basement cell 2 m by 1 1/2 m in inhuman conditions for a period of one month. Incommunicado.

(iv) In January 1982, I was transferred from the basement cell to a room 3 m by 3 m, which I shared with Dave Marais until our release. The conditions were satisfactory and the treatment good, except that for the first 18 months of these last two years we were *never* allowed out of the room. We were now for the first time *officially* permitted to correspond with our families.

The above are the basic facts of my detention which are far less severe than the conditions under which Dave Marais was detained. He was held incommunicado in the 2 m by 1 1/2 m basement cells for a period of more than two years.

15.1. The Human Rights Committee has the obligation under article 5, paragraph 1, of the Optional Protocol to consider this communication in the light of all written information made available to it by or on behalf of John Wight, and by the State party. It therefore decides to base its views on the following facts, which have not been contradicted by the State party.

15.2. John Wight, a South African national, was the pilot of a private South-African aircraft which, *en route* to Mauritius, made an emergency landing in Madagascar on 18 January 1977. A passenger on the plane, Dave Marais, Jr., a South African national, another passenger, Ed Lappeman, a national of the United States of America, and John Wight were tried and sentenced to five years' imprisonment and a fine for overflying the country without authority and thereby endangering the external security of Madagascar. On 19 August 1978, while serving his sentence, John Wight escaped from the Antananarivo Central Prison, was subsequently apprehended, tried on charges of prison-breaking and, on 15 May 1981, sentenced to an additional two years' imprisonment. After his recapture in September 1978, John Wight was kept in a solitary room at the political police prison at Ambohibao (DGID), chained to a bed spring on the floor, with minimal clothing and severe rationing of food, for a period of 3 1/2 months. During this period and until July 1979 (10 months), he was held incommunicado. He was then held from July 1979 to November 1981 in a prison at Manjakandriana where conditions were better. In November 1981, he was again transferred to the DGID prison where he was kept incommunicado in a basement cell measuring 2 m by 1 1/2 m in inhuman conditions for a period of one month. In January 1982, he was moved from the basement cell to a room measuring 3 m by 3 m, which he shared with Dave Marais until their release. Although they were not allowed out of the room for the first 18 months of this period Wight acknowledges that the conditions were otherwise satisfactory and the treatment good. They were now allowed for the first time since their arrest to correspond with their families. John Wight and Dave Marais were released in February 1984 upon completion of their prison sentences.

16. The Human Rights Committee observes that the information available to it is insufficient to show that Mr. Wight was arrested and charged primarily because of his South African nationality and the South African nationality of his aircraft.

17. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee disclose violations of the International Covenant on Civil and Political Rights, with respect to:

Article 7 and article 10, paragraph 1, because of the inhuman conditions in which John Wight was at times held in prison in Madagascar;

Article 14, paragraph 3 (*b*), because during a 10-month period (from September 1978 to July 1979), while criminal charges against him were being investigated and determined, he was kept incommunicado without access to legal counsel.

18. The Committee, accordingly, is of the view that the State party is under an obligation to take effective measures to remedy the violations which John Wight has suffered and to take steps to ensure that similar violations do not occur in the future.

Communication No. 123/1982

Submitted by: Gabriel Manera Johnson on 10 June 1982
Alleged victim: Jorge Manera Lluberas (author's father)
State party: Uruguay
Date of adoption of views: 6 April 1984 (twenty-first session)

Subject matter: Trial of Uruguayan civilian by military court—Leading member of Tupamaros movement

Procedural issues: Withdrawal of communication from IACHR—Sufficiency of State party's reply under article 4 (2)—Failure of investigation of allegations by State party

Substantive issues: Access to counsel—Delays in proceedings—Ill-treatment of detainees—Prison conditions—Solitary confinement—State of health of victim

Articles of the Covenant: 10 (1) and 14 (3) (b) *and* (c)
Article of the Optional Protocol: 5 (2) (a))

1. The author of the communication (initial letter dated 10 June 1982 and further letter dated 11 February 1983) is Gabriel Manera Johnson, a Uruguayan national, residing at present in France. He submitted the communication on behalf of his father, Jorge Manera Lluberas, alleging that he is imprisoned in Uruguay and that he is a victim of a breach by Uruguay of several articles (specified by the author) of the International Covenant on Civil and Political Rights.

2.1. The author describes the background to the case as follows: Jorge Manera Lluberas (born on 18 November 1929), a civil engineer, was a principal founder of the Movimiento de Liberación Nacional-Tupamaros (MLN-T).

2.2. Jorge Manera Lluberas was arrested in Uruguay for the third time in July 1972. He was kept incommunicado during the first 195 days of his detention and allegedly subjected to severe torture. The author further states that in September 1973 his father was transferred as "hostage" from Libertad prison to the Batallón de Ingenieros No. 3 in Paso de los Toros and he alleges that up to the present his father continues to he held as "hostage". This status has caused him to be transferred 17 times from one prison to another, to be detained under extremely harsh prison conditions and to live under the continuous fear of being executed if MLN-T takes any action. In this connection the author encloses a statement from Elena Curbelo, a former hostage.

2.3. *Concerning the events that took place after 1976,* the author states that from January to September 1976 his father was held at the Pavilion of Cells at the Batallón de Infantería No. 4 "Colonia". He states that the cells measured 1.60 m by 2 m, that the electric light was continuously on, that the only piece of furniture was a mattress provided at night and that detainees had to remain in the cells 24 hours per day in solitary confinement.

2.4. From September 1976 to August 1977, Mr. Manera was held at Trinidad prison. Concerning this period of imprisonment, two statements are enclosed: (*a*) from David Cámpora who alleges that he was held at Trinidad from March 1975 to August 1977 and (*b*) from Waldemir Prieto, allegedly held there from June 1976 to March 1977. They both state that prison conditions were inhuman (dirty cells, without light, without furniture, extreme temperatures, very hot in the summer, very cold in the winter, lack of food, no medical attention). In particular, they state that Jorge Manera was in poor health (glaucoma, infected tooth) and that he did not receive adequate medical treatment. They point out that Manera, even more than other detainees, was continuously subjected to harassment by the guards and they give the names of several prison officials. For instance, they mention that Manera's cell was searched almost every night by the prison guards. W. Prieto adds that detainees were often beaten by the guards without any reason or subjected to "plantones" for 10 to 12 hours.

2.5. From August 1977 to April 1978, Jorge Manera was kept at the Regimiento de Infantería No. 2 Durazno. The author mentions that he has no first-hand information (by former detainees) on his father's conditions of imprisonment for the last five years. In April 1978, Jorge Manera was transferred to Colonia where he remained until March 1980. The author alleges that at Colonia his father was again subjected to torture, that he was kept for six months in complete isolation and that between May and November 1980 he was not allowed to sleep more than two hours at a time. In May 1980, Jorge Manera was transferred to the Batallón de Ingenieros No. 3 in Paso de los Toros where he is detained at present. The author states that his father is kept 24 hours a day in a cell with electric light only, without any daylight, and that his state of health is extremely poor. (He lists his father's illnesses.)

2.6. With respect to the judicial proceedings against his father, the author states that on 12 January 1973 his father was brought before a military judge and charged with the following offences: attempt to subvert the Constitution; production, trading in and storage of explosive substances; manslaughter; association to break the law and escape from prison. He further states that six years later, in 1979, his father was sentenced to the maximum penalty of 30 years of imprisonment and 15 additional years of precautionary detention (*medidas de seguridad eliminativas*) by a military tribunal of first instance. The author claims that his father's trial was not public and that he was not given the opportunity to call his own witnesses. In his further submission of 11 February 1983, the author mentions that his father has been sentenced by the court of second instance, without giving further details.

2.7. Concerning his father's defence, the author alleges that from 1969 to 1971 Alejandro Artucio defended Manera; Dr. Arturo Dubra was his second defence lawyer; and then in March 1975, Dr. José Corbo became Manera's third defence lawyer. In

mid-1977 Dr. Corbo had to leave Uruguay. He had never been allowed to see his client. The author encloses a statement from Dr. Corbo. The author maintains that the present official lawyer assigned to his father has never done anything on his behalf.

2.8. The author claims that his father is a victim of violations of the following articles of the International Covenant on Civil and Political Rights: of articles 2 and 26, because he was discriminated against and treated worse than a common criminal because of his political ideas; of article 6, because he is held as a "hostage" and his life is in danger; of articles 7 and 10, because he has been subjected to torture, he has been detained under inhuman prison conditions and he is denied proper medical attention; and of article 14, because he did not have a fair and public hearing by a competent, independent and impartial tribunal since a military tribunal does not fulfil these criteria; he was not presumed innocent; he could never communicate with counsel of his own choosing and he had no facilities for the preparation of his defence; he was not tried without undue delay and he was denied the opportunity to obtain the attendance and examination of witnesses on his own behalf or to dispute the evidence against him, often obtained under torture.

2.9. The author claims that domestic remedies have been exhausted. He maintains that the domestic remedies which are provided for in the Uruguayan legislation cannot protect his father, because none of them is allegedly applicable in practice, if the human rights violation has been committed by military personnel or by members of the police in connection with State security as interpreted by the military forces.

2.10. The author states that the same matter is not being examined under another procedure of international investigation or settlement. He encloses a copy of a letter dated 9 February 1982 addressed by Olga Johnson de Manera to the Executive Secretary of the Inter-American Commission on Human Rights (IACHR), requesting that consideration of case No. 1872 concerning Jorge Manera Lluberas should be discontinued before that body.

3. By its decision of 7 July 1982 the Working Group of the Human Rights Committee decided that the author was justified in acting on behalf of the alleged victim and 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. The Working Group also requested the State party to transmit to the Committee any copies of court decisions against Jorge Manera Lluberas, to give the Committee information on his state of health and to ensure that he receives adequate medical care.

4. By a note dated 11 October 1982 the State party informed the Committee that, notwithstanding the fact that it remained to be determined whether the communication was admissible, the Government of Uruguay wished to make the following comments with respect to Mr. Manera Lluberas:

This communication is further proof that, even today, instead of the truth about the situation in Uruguay gaining ground, the real situation remains unknown, with a distorted picture prevailing in the international sphere, where there has been exploitation of manifestly untrue and ill-intentioned information, such as the information which has been used to depict Mr. Manera Lluberas as a "victim of political repression". Political opinions have not been suppressed in Uruguay; rather, steps have been taken to punish criminal acts which are duly defined in Uruguayan law and which have been committed by those who would replace the traditional means of expressing the views and wishes of the people through direct and secret balloting in free elections by organized violence which serves the interests of groups that are by no means representative of the people on whose behalf they claim to be acting and for whose supposed happiness they do not shrink from committing outrages and heinous crimes, which are universally repudiated in the country. The declared "devotion" of such groups to the people's causes had not kept them from attempting to create the conditions for an insurrection by means of assault, robbery, kidnapping, murder, etc., crimes for which much of the blame belongs to Mr. Manera Lluberas in his capacity as a leader of MLN Tuparamos.

Mr. Manera Lluberas is described in the communication as a "hostage". The Government of Uruguay rejects the use of that term to describe someone who has treacherously indulged in the kidnapping of foreign diplomats and in depriving them of their liberty in an attempt to put pressure on the legitimate Government of the Republic in order to attain his objectives, and has thereby jeopardized the lives of the human beings taken as hostages and undermined the relations of sincere friendship and co-operation with countries which are traditionally friends of Uruguay. Mr. Manera Lluberas is not in any sense of the term a hostage, since he enjoys the same rights as any other prisoner. The only circumstance which distinguishes his situation from that of others imprisoned for crimes of subversion is that he is being held in a different place of detention, a matter with regard to which the Government of Uruguay reserves the right of decision since it falls exclusively within its domestic jurisdiction.

. . .

The Government of Uruguay rejects the whole series of accusations contained in the communication, such as the allegations of torture and ill-treatment, failure to provide medical care, inadequate food, lack of medicines and so on. It should be emphasized in this connection that Mr. Manera Lluberas, like all prisoners, is subjected to periodic medical examinations and that, in the specific case of the urinary infection and bilateral lumbar myalgia from which he has recently suffered, he was given adequate medical care and the necessary medicines by the official health services; he is at present in good health.

The author of the communication has resorted to false evidence to assemble a set of truthless accusations with the aim of compiling a document that, by its excessive length, would impress the Committee and lead it astray in its decisions. Moreover, the similarities between paragraphs contained in the communication to which this reply relates and expressions used in other communications provide clear proof of the existence of an apparatus which has been established for the sole purpose of drawing up complaints to be submitted for the consideration of relevant international organizations.

5. Commenting on the State party's submission, the author reiterates, in his letter of 11 February 1983, that his father has been subjected to torture and inhuman treatment for the last 10 years, that his trials at first and second instance were a travesty of justice and that his father received the inhuman sentence of 45 years' imprisonment. The author further alleges that because of his father's status as "hostage" he has been kept incommunicado from time to time and this has amounted to approximately 21 months during which his relatives could not visit him. The author also argues that the State party "confirmed" in fact that his father is held in solitary confinement since it has admitted that he was being held "in a different place of detention". The author informed the Committee that since June 1982 (the date of his initial letter) his father's state of health has deteriorated. In particular he states that owing to inadequate medical attention and lack of medicines his father was urgently taken to the Central Hospital of the Armed Forces in December 1982 to be operated on again. The author, who has often referred in his submission to the views adopted by the Human Rights

Committee in the case of Raúl Sendic (No. 63/1979),[1] explains that he does so mainly because both of them are considered as "hostages" and because he wishes to rely on the jurisprudence of the Human Rights Committee.

6.1. The Committee has noted that the observations submitted by the State party on 11 October 1982 did not affect the question of the admissibility of the communication under the terms of the Optional Protocol.

6.2. On the basis of the information before it, the Committee found that it was not precluded by article 5 (2) (*a*) of the Optional Protocol from considering the communication, as the case submitted to IACHR on behalf of Jorge Manera had been withdrawn and the same matter was not being examined under any other procedure of international investigation or settlement. The Committee was also unable to conclude that in the circumstances of this case there were effective remedies available to the alleged victim which he had failed to exhaust. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (*b*) of the Optional Protocol.

7. On 25 March 1983, the Human Rights Committee therefore decided:

1. That the communication was admissible in so far as it related to events which allegedly continued or took place after 23 March 1976, the date on which the Covenant and the Optional Protocol entered into force for Uruguay;

2. That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

3. That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that in order to perform its responsibilities, it required specific responses to the allegations which had been made by the author of the communication, and the State party's explanations of the actions taken by it. The observations contained in the State party's note of 11 October 1982, to the extent that it contained only refutations of these allegations in general terms, were deemed insufficient for this purpose;

4. That the State party again be requested to furnish the Committee with (*a*) information on the present state of health of Jorge Manera and (*b*) copies of any court decisions taken against Jorge Manera, including the decision of the military court of first and second instance.

8.1. By a note dated 9 June 1983, the Government of Uruguay reiterates what it had stated in its submission of 11 October 1982. Regarding the state of health of Mr. Manera, the State party adds that

> on 27 December 1982 an internal urethrotomy was performed on him, with satisfactory results. It is intended to check his condition by means of a urethrocystoscopy to be carried out by the urological service of the Armed Forces Central Hospital. He is also being treated for lumbalgia, which has responded to oral medication.

8.2. The time-limit for the State party's submission under article 4 (2) of the Optional Protocol expired on 28 October 1983. The Committee has not received any further explanations or specific responses to the author's allegations, as requested in operative paragraph 3 of the Committee's decision on admissibility. Moreover, the State party has not furnished the Committee with copies of any relevant court decisions, as requested in operative paragraph 4 of the decision on admissibility.

8.3. No further submissions have been received from the author.

9.1. The Human Rights Committee, having examined the present communication in the light of all the information made available to it by the parties as provided in article 5 (1) of the Optional Protocol, hereby decides to base its views on the following facts, which appear uncontested, except for denials of a general character offering no particular information or explanations.

9.2. Jorge Manera Lluberas was a civil engineer and a principal founder of the Movimiento de Liberación Nacional-Tupamaros (MLN-T). He was arrested in July 1972; from January to September 1976 he was held at the Pavilion of Cells at the Batallón de Infantería No. 4 "Colonia", where cells measure 1.60 m by 2 m, electric lights were kept continuously on, the only piece of furniture was a mattress provided at nights and where detainees had to remain in the cells 24 hours per day in solitary confinement. From September 1976 to August 1977 he was held at Trinidad prison, where prison conditions were described by two witnesses as being characterized by dirty cells without light, without furniture, very hot in the summer and very cold in the winter. In April 1978, he was transferred to Colonia, where he was kept in complete isolation for six months; in May 1980 he was transferred to the Batallón de Ingenieros No. 3, were he is detained at present.

9.3. Mr. Manera was indicted on 12 January 1973. Six years later, in 1979, he was sentenced to the maximum penalty of 30 years' imprisonment and 15 additional years of precautionary detention (*medidas de seguridad eliminativas*) by a military tribunal of first instance; he was subsequently sentenced by the court of second instance. From March 1975 to mid-1977 Mr. Manera was not allowed to see his defence lawyer.

10. 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 as found by the Committee, in so far as they continued or occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay), disclose violations of the International Covenant on Civil and Political Rights, particularly of:

Article 10 (1), because Jorge Manera Lluberas has not been treated with humanity and with respect for the inherent dignity of the human person;

[1] See *Selected Decisions* . . ., vol. 1, p. 101.

Article 14 (3) (*b*), because he was not allowed adequate facilities to communicate with his counsel;

Article 14 (3) (*c*), because he was not tried without undue delay.

11. The Committee, accordingly, is of the view that the State party is under an obligation to provide Jorge Manera Lluberas with effective remedies and, in particular, to ensure that he is treated with humanity, and to transmit a copy of these views to him.

Communication No. 124/1982

Submitted by: Nina Muteba, later joined by her husband Tshitenge Muteba, on 30 January 1982
Alleged victim: Tshitenge Muteba
State party: Zaire
Date of adoption of views: 24 July 1984 (twenty-second session)*

Subject matter: Detention of Zairian citizen by military security

Procedural issues: Confirmation of allegations by victim after release—Failure of investigation of allegations by State party—Adoption of views without submission on merits by State party—Sufficiency of State party's reply under article 4 (2)—Burden of proof—Individual opinion

Substantive issues: Detention incommunicado—Delays in proceedings—Access to counsel—Fair trial—Ill-treatment of detainees—Torture—State of health of victim—Release of victim from imprisonment—Confession under duress—Amnesty—Freedom of expression—Political rights

Articles of the Covenant: 7, 9 (3) and (4), 10 (1), 14 (3) (b), (c) *and* (d) *and 19*
Article of the Optional Protocol: 4 (2)
Rule of Procedure: 94 (3)

1. The initial author of the communication (initial letter dated 30 June 1982; further submission posted 21 September 1982 by the author's legal representative John N. Humphrey) is Nina Muteba, a national of Zaire, at present living in France, writing on behalf of her husband, Tshitenge Muteba, a Zairian national born in 1950, who at the time of the submission of the communication was detained in Zaire.

2.1. Nina Muteba enclosed a copy of a brief note from her husband, addressed to the International Red Cross and received by her in February 1982. In this note her husband stated that he had been living in France since 1979 as a political refugee from Zaire, that he was arrested on 31 October 1981 by members of the Military Security of Zaire (G 2) when arriving from Paris via Brazzaville (Congo), that he was at that time detained at the prison of "OUA II" in Kinshasa, Zaire. He further stated that he had no contact with the outside world, that he did not receive visits and that food was insufficient. He claimed to be a political detainee.

2.2. Nina Muteba, in her statement, repeated the information given by her husband, adding that he was arrested at Ngobila Beach in Zaire. She also stated that her husband had been granted political asylum in France in June 1980.

2.3. She further added that she had been informed by one of her brothers and by a former detainee that her husband had been subjected to such severe torture that he became unrecognizable and that he continued to be held under inhuman prison conditions. She stated that the authorities of Zaire allege that documents and pamphlets considered subversive were found in her husband's luggage. She claimed, however, that her husband had not been charged or brought before a judge.

2.4. Concerning the exhaustion of domestic remedies, Nina Muteba stated that no such steps could be taken because her husband had never been allowed to establish contact with a lawyer or a judge, and that no member of his family dared to do anything on his behalf because they were afraid of retaliation. She mentions that all the members of her family, still living in Zaire, were under house arrest and that their mail was interfered with. She also mentions that one of her brothers had been arrested and subjected to torture on grounds of his relationship with the alleged victim.

2.5. Nina Muteba stated that the same matter was not being examined under another procedure of international investigation or settlement.

2.6. She claimed that her husband was a victim of violations of articles 9, 10, 14 and 19 of the International Covenant on Civil and Political Rights.

3.1. By its decision of 7 July 1982 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.

3.2. The State party was further requested in the decision to inform the Committee whether Tshitenge Muteba had been able to contact a lawyer and whether he had been brought before a court, and to transmit to the Committee any copies of court decisions taken against Mr. Muteba.

* The text of an individual opinion submitted by five Committee members is appended to the present decision.

3.3. In view of the observations made by Mrs. Muteba on the health of her husband, information on the state of health of Mr. Muteba was also sought from the State party and the latter requested to ensure that Tshitenge Muteba received adequate medical care.

3.4. The time-limit for the observations requested from the State party under rule 91 of the provisional rules of procedure expired on 13 October 1982. No submissions were received from the State party.

4.1. In a further submission on behalf of Mr. Muteba of 21 September 1982, Mr. John N. Humphrey, a British attorney appointed by Mrs. Muteba to represent her husband before the Committee, reiterated and supplemented some of the information already provided by Mrs. Muteba.

4.2. He affirmed, *inter alia*, that Mr. Muteba arrived in Brazzaville (Congo) on 28 October 1981; that "on or about 31 October 1981 he crossed the river Zaire by ferry and was arrested at the ferry terminal at Ngobila Beach by members of the Military Security (G 2)". He stated that it appeared that Mr. Muteba was arrested for political reasons and accused of being the leader of the Popular and Democratic Union of the Congo (Union populaire et démocratique du Congo). From the time of his arrest until about March 1982 he was detained at the "OUA II" detention centre. Mr. Humphrey stated that his client's whereabouts were then unknown.

4.3. Mr. Humphrey stressed that because the powers of the Military Security to arrest and detain do not come within the ambit of the constitutional and legal provisions of Zaire, no court review could be requested and that therefore domestic remedies did not exist in the case of Mr. Muteba.

4.4. Mr. Humphrey concluded that Mr. Muteba was a victim of breaches by Zaire of articles 2, 7, 9, 14 and 16 of the International Covenant on Civil and Political Rights.

5. The submission from the legal representative of Mr. Muteba was transmitted to the State party for information on 17 December 1982. No comments from the State party were received.

6. The Committee found, on the basis of the information before it, that it was not precluded by article 5 (2) (*a*) of the Optional Protocol from considering the communication. The Committee was also unable to conclude that, in the circumstances of the case, there were domestic remedies available to the alleged victim. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (*b*) of the Optional Protocol.

7. On 25 March 1983 the Human Rights Committee therefore decided:

(1) That the communication was admissible;

(2) That, in accordance with article 4 (2) of the Optional Protocol the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(3) That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to fulfil its responsibilities, it required specific responses to the allegations which had been made, and the State party's explanations of the actions taken by it. The State party was again requested to enclose copies of any court orders or decisions of relevance to the matter under consideration and to inform the Committee whether the alleged victim had effective contacts with a lawyer and whether he had been brought before a court;

(4) That the State party again be requested to provide the Committee with information about Mr. Muteba's state of health and to ensure that Mr. Muteba received adequate medical care.

8.1. By a letter dated 28 March 1984 Mr. Tshitenge Muteba informed the Committee that pursuant to an amnesty of 19 May 1983 he was released from imprisonment and that he joined his family in France in August of 1983. He enclosed a detailed report on his detention substantiating the allegations made by his wife and legal representative.

8.2. With regard to his arrest and subsequent treatment he states, *inter alia*:

I was arrested at Ngobila Beach on 31 October [1981] and taken to "G 2", the service responsible for military security . . . I was interrogated for nine days . . . All kinds of methods were used to torture me and force me to speak. On the first day I was beaten up at the "OUA" prison on orders given by Mr. Nsinga, Mr. Bolozi and Mr. Seti and executed by Colonel Zimbi. I was arrested in the very early morning, when I still had an empty stomach, so that by about 5 p.m. I was hungry and tired. This was the very time that was chosen for the first session of interrogation and beatings. Colonel Zimbi was accompanied by his officers and by ordinary soldiers who did the dirty work. I was stripped and subjected for an hour or more (I don't know how long) to a hail of blows from cords, slaps and kicks administered by officers to a solitary defenceless individual. Only the Colonel kept his hands off me . . . After this session I was taken back naked to my cell, which they took care to soak with water, and Sergeant-Major Lisha, a friend of Zimbi's assured me that I would not survive for more than two days. He then expressed the hope that I would refresh my memory in my flooded cell and would be able to give them all the information they wanted.

After this there were mock executions . . . First comes the mock execution in order to extract confessions from the prisoner and then the genuine execution once there is no further purpose in keeping him. The "typist"—another form of torture which consists of squeezing the prisoner's fingers after pieces of wood have been placed between them—electric shocks and withholding of food were also used during the interrogation.

After nine days of questioning, I was returned to my cell—I had been taken out a few days after my arrest and transferred to a secret villa in a rich area of Kinshasa, where members of the various security services came and interrogated me as a committee, the celebrated Committee of Analysts which prepared a consolidated report for submission to the National Security Council (CNS) that was to meet to take a decision on my case. I would recall that the National Security Council is a body which meets to deal with serious cases and includes the President of the Republic among its membership. Mr. Seti, his special security adviser, co-ordinates the activities of CNS . . .

Major Buduaga, who is the legal adviser to Colonel Bolozi, the chief of "G 2", personally escorted me back to the "OUA II" prison. My long struggle against death then commenced.

My committal order specified my crime, namely an attack on the internal and external security of the State. I was accused of having established a clandestine political party and of having, while abroad, sought ways of changing the established institutions—acts which are provided for and punished by death under Zairian law. However, they had very little evidence. Special instructions were given on how I was to be treated: no contact with the outside world; no family visits, solitary confinement; lashings morning, noon and night; no food. This special treatment is expected to result in death by torture, star-

vation or sickness. The régime also hopes that the prisoner will go mad.

However, they failed to take into account the solidarity among the prisoners and the discontent among the soldiers of the Presidential guard, who are very unhappy with their material situation. Some of these soldiers also came to prison and sometimes shared my cell. I did not miss an opportunity to talk politics with them and show them how aberrant it was to serve a régime that exploited them. I established contact with these young soldiers, and today I have friends among them who will support me to the end. Paradoxically, it was these young soldiers who fed me—very sporadically, it is true, but they enabled me to survive . . .

After being cut off from the outside world for nine months, I received visits from some members of my family without the Zairian authorities' knowledge, thanks to those young soldiers. My relatives and I were not able to see each other, but they brought me food which the soldiers passed on to me. This game of hide-and-seek continued for the last four months of my detention in the "OUA".

Thanks to these contacts, I was able to smuggle out letters to my wife, who had stayed in Europe, to the French Embassy and to other bodies that were already helping me.

During my lengthy period of detention, the International Committee of the Red Cross did not succeed in visiting me in my place of imprisonment, but the Kinshasa office received news of me owing to the help of numerous well-wishers. Soldiers of Mobutu did me a lot of personal favours. Whenever the ICRC representatives came to see me in prison I would be taken away from the gaol, but the next day they would be informed of what was going on. The régime's official position was that I had been transferred to another prison, and the confusion created on this point was long used in order to whisk me away quietly . . .

On 17 November 1982, Major Shaliba, Security Officer for the President of the Republic and Commander of the Battalion of Presidential Bodyguards, came to the prison to carry out an inspection. When he found that I was still alive, he ordered that I should be locked up and relieve myself in the cell. On 20 November the situation took a turn for the worse. They had apparently received instructions to execute me. At about 10 a.m. they came and took away the clothes with which I had been provided a few days previously by a member of my family. I was also deprived of the blanket which the ICRC had managed to send me on a very unofficial basis and was left naked . . .

On 5 February [1983] I was banished to my native region, where I remained in a village at Demba, 60 kilometres from the town of Kananga, until 19 May 1983, the date of the amnesty. On 10 June [1983] I left Kananga for Kinshasa and arranged my return to France, where my wife and childen had been waiting for me for two years.

9. The time-limit for the State party's submission under article 4 (2) of the Optional Protocol expired on 6 November 1983. A copy of Mr. Muteba's submission of 28 March 1984 was transmitted to the State party on 24 May 1984 with an indication that the Human Rights Committee intended to conclude examination of the case during its twenty-second session in July 1984. No submission was received from the State party.

10.1. The Human Rights Committee, having considered the present communication in the light of all the information made available to it by the authors as provided in article 5 (1) of the Optional Protocol, hereby decides to base its views on the following facts, which, in the absence of any submission from the State party, are uncontested.

10.2. Mr. Tshitenge Muteba was arrested on 31 October 1981 by members of the Military Security of Zaire at Ngobila Beach, Zaire, when arriving from Paris via Brazzaville (Congo). From the time of his arrest until about March 1982 he was detained at the "OUA II" prison. During the first nine days of detention he was interrogated and subjected to various forms of torture including beatings, electric shocks and mock executions. He was kept incommunicado for several months and had no access to legal counsel. After nine months of detention members of his family, who did not see him in person, were allowed to leave food for him at the prison. Although in the prison register he was charged with attempts against the internal and external security of the State and with the foundation of a secret political party, he was never brought before a judge or brought to trial. After more than a year and a half of detention he was granted amnesty under a decree of 19 May 1983 and allowed to return to France. Mr. Muteba was arrested, detained and subjected to the ill-treatment described above for political reasons, as he was considered to be an opponent of the Government of Zaire.

11. In formulating its views the Human Rights Committee also takes into account the failure of the State party to furnish any information and clarifications necessary for the Committee to facilitate its tasks. In the circumstances, due weight must be given to the authors' allegation. It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. In no circumstances should a State party fail duly to investigate and properly to inform the Committee of its investigation of allegations of ill-treatment when the person or persons allegedly responsible for the ill-treatment are identified by the author of a communication. The Committee notes with concern that, in spite of its repeated requests and reminders and in spite of the State party's obligation under article 4 (2) of the Optional Protocol, no submission whatever has been received from the State party in the present case.

12. 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 these facts disclose violations of the Covenant, in particular of:

Articles 7 and 10, paragraph 1, because Mr. Tshitenge Muteba was subjected to torture and not treated in prison with humanity and with respect for the inherent dignity of the human person, in particular because he was held incommunicado for several months;

Article 9, paragraph 3, because, in spite of the charges brought against him, he was not promptly brought before a judge and had no trial within a reasonable time;

Article 9, paragraph 4, because he was held incommunicado and effectively barred from challenging his arrest and detention;

Article 14, paragraph 3 (*b*), (*c*) and (*d*), because he did not have access to legal counsel and was not tried without undue delay;

Article 19, because he suffered persecution for his political opinions.

13. The Committee, accordingly, is of the view that the State party is under an obligation to provide Mr. Muteba with effective remedies, including compensation, for the violations which he has suffered, to conduct an inquiry into the circumstances of his torture, to punish those found guilty of torture and to take steps

to ensure that similar violations do not occur in the future.

Appendix

INDIVIDUAL OPINION

Submitted by five members of the Human Rights Committee under rule 94 (3) of the Committee's provisional rules of procedure

Communication No. 124/1982

Individual opinion appended to the Committee's vews at the request of Messrs. Andrés Aguilar, Joseph Cooray, Felix Ermacora, Roger Errera and Andreas Mavrommatis:

In our opinion the facts as appearing in the file of the communication are insufficient to sustain a finding of a violation of article 19 of the Covenant.

Communication No. 132/1982

Submitted by: Monja Jaona on 30 December 1982
Alleged victim: The author
State party: Madagascar
Date of adoption of views: 1 April 1985 (twenty-fourth session)

Subject matter: Detention of Malagasy presidential candidate

Procedural issues: Exhaustion of domestic remedies —Effective remedy—Sufficiency of State party's reply under article 4 (2)—Failure of investigation of allegations by State party—Burden of proof—Adoption of views without submission on merits by State party

Substantive issues: Arbitrary arrest—Access to counsel—Harassment and arrest of counsel—Freedom of expression—State of health of victim—Habeas corpus—*Prison conditions—Political rights—Compensation under article 9 (5)*

Articles of the Covenant: 9 (1), (2) and (5), 18 and 19
Articles of the Optional Protocol: 4 (2) and 5 (2) (b)

1. The author of the communication (initial letter dated 30 December 1982, further letters dated 12 May and 15 August 1983 and 18 January 1984) is Monja Jaona, a 77-year-old Malagasy national, former "Doyen du Conseil Suprême de la Révolution Malgache" and candidate in the presidential elections held in Madagascar on 7 November 1982, at present Member of the National People's Assembly in Madagascar. He is represented by Maître Eric Hammel, who was a lawyer in Madagascar until his expulsion on 11 February 1982, and who now resides in France.

2.1. Maître Hammel states that on 15 December 1982, Mr. Monja Jaona was arrested at his residence in Antananarivo and that, although according to an official announcement Mr. Jaona was subjected only to house arrest, he was actually taken to the military camp of Kelivondrake, 600 km south of Antananarivo, where he was detained until his release before the elections to the National People's Assembly held on 28 August 1983. Mr. Jaona was arrested under Government decree, without any reasons being given for his arrest, for an unlimited period of time and without the possibility of being brought before a judge. His arrest took place subsequent to the following events. Mr. Jaona was a candidate in the 1982 presidential elections against the incumbent President. During his campaign, he denounced the allegedly corrupt policies of the Government. It is claimed that election fraud caused Mr. Jaona's defeat, that he publicly denounced the alleged abuses and called for new elections. Maître Hammel states that Mr. Jaona was then arrested on the pretext that demonstrations organized in his support were endangering public order and security.

2.2. Maître Hammel also refers to a previous arrest of his client under similar conditions in December 1980. Maître Hammel went before the courts to seek repeal of the governmental decree and compensation for the damages suffered by Mr. Jaona, who was subsequently released on 9 March 1981, by Governmental decree, with no reasons being given. Mr. Jaona maintained his complaints before the courts. Maître Hammel claims that his own expulsion by order of the Ministry of Justice of Madagascar on 11 February 1982 was, *inter alia*, a consequence of his involvement in the case.

2.3. Maître Hammel claims that Mr. Jaona is a victim of breaches by Madagascar of article 9, paragraphs 1 and 2, article 18, paragraph 1, and article 19, paragraph 1, of the International Covenant on Civil and Political Rights.

3. By its decision of 17 March 1983, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party, requesting information and observations relevant to the question of admissibility of the communication. The Working Group also requested the State party to provide the Committee with copies of any court orders or decisions relevant to the case and to inform the Committee of the state of health of Mr. Monja Jaona.

4.1. In a further letter dated 12 May 1983, Maître Hammel submitted additional information concerning the state of health of his client and alleged that the Malagasy Government was refusing to give Mr. Jaona the necessary medical care, and that it had not authorized specialist professors, including the Dean of the Faculty of Medicine of Antananarivo, to see and examine Mr. Jaona.

4.2. Maître Hammel also enclosed a copy of a letter by Mrs. Monja Jaona, dated 19 April 1983, referring to her husband's two hunger-strikes from 10 to 14 January and again from 15 to 23 January 1983.

4.3. In an annexed statement dated 12 January 1983, Monja Jaona explained his hunger-strikes as follows:

It is the fact that I have been arrested and detained at Kelivondrake: that is arbitrary, and that is why I oppose it. There was no investigation and I was never informed of the grounds for my arrest: that is what I take exception to. I know very well that I have been arrested because of the elections. It was stated that any candidate sponsored by a party belonging to the Front could stand for election and that candidates outside the Front were not allowed to stand. The MONIMA party nominated me and I accepted. Subsequently, the way in which the elections were held made it clear to me that fraud had been committed at my expense. Those responsible were the persons in charge of the decentralized collectives and the ministers, whose departure I have long been demanding. Then, when I gave a press conference, I was totally censored. I stated that the Malagasy people had not elected Ratsiraka for the next seven years. As the press conference was censored, I reacted by calling a strike to demand the holding of new elections, the transmission by radio of my press conference and the abolition of the censorship which affects the entire press. During this period I was never summoned anywhere but was immediately placed under arrest. The aim of this arbitrary arrest is to conceal the truth. Moreover, since I stood for election to the highest office in the country, my arrest is entirely unjust.

5.1. By a note dated 15 July 1983, the State party objected to the admissibility of the communication on the ground that it did not fulfil the requirements of article 5, paragraph 2 (*b*), of the Optional Protocol, since domestic remedies had not been exhausted. The State party submitted that:

Order No. 82-453 of 15 December 1982 placing Mr. Monja Jaona under house arrest was issued under statute No. 60-063 of 22 July 1960, relating to the dissolution of certain associations and to the placing under house arrest of persons convicted of subversive activities. Article 5 of the statute provides for the possibility of appeal. Mr. Monja Jaona availed himself of that provision on 15 March 1983, by lodging an appeal with the Administrative Chamber of the Supreme Court to have Order No. 82-453 of 15 December 1982 rescinded. The case is currently pending before that court, and Mr. Monja Jaona should have awaited the decision of the Administrative Chamber before lodging a parallel appeal, if that proved necessary, with an international body.

5.2. The State party further stated that it would transmit information as to the state of health of Mr. Monja Jaona at a later date. No such information has been received yet from the State party.

6.1. On 15 August 1983, Maître Hammel forwarded his comments in reply to the State party's submission of 15 July 1983. He stated, *inter alia*:

The Malagasy Government claims that because an appeal was lodged on 15 March 1983 to the Administrative Chamber of the Supreme Court of Madagascar the petition addressed to the Human Rights Committee is inadmissible. This argument is not, however, well founded . . .

The Malagasy Government instructed a lawyer in its pay to submit a petition to the Supreme Court and the petition was submitted on 15 March 1983 or two and a half months after the communication to the Human Rights Committee. This late petition cannot constitute an argument against admissibility . . .

Possibilities for appeal are indeed provided by Malagasy law, but it has already been reported that these possibilities are purely symbolic and have been paralysed by the action of the President of the Malagasy Republic.

During the earlier internment of Mr. Monja Jaona on 10 December 1980, his counsel submitted his petition to the Administrative Chamber of the Supreme Court of Madagascar on 15 December 1980; on 3 January 1981, the Court in summary procedure issued him with a permit to communicate by visiting his client detained in Kelivondrake . . ., but the defence counsel was turned back by the camp guards who told him that, by order of the Office of the President of the Republic, permits to communicate were invalid.

The file at the Supreme Court was complete in respect of substance at the end of June 1981, but on the instructions of the President of the Malagasy Republic, the First President of the Supreme Court decided to preside himself over the court which was going to hear this case . . .

Fifteen days later, the President of the Republic decided to retire the First President of the Supreme Court and it was therefore necessary to await the appointment and installation of a new First President, whose appointment was greatly delayed; to cut short any claims, the Malagasy Government expelled the defence counsel in February 1982 before rearresting Mr. Monja Jaona on 15 December 1982.

The appeal against the first arrest on 7 July 1980 is thus still pending.

On 15 December 1980 defence counsel lodged a complaint against "X" for violation of the freedom of Mr. Monja Jaona, and by letter dated 9 January 1981 the President of the Court at Ihosy advised defence counsel that the file had been asked for and monopolized by the Minister of Justice on the orders of the Office of the President and that he could do nothing without it. The many written reminders that I sent have remained unanswered and now, almost three years later, the preliminary investigation has not yet started, while the time-limit on public action is approaching (article 4, Malagasy Code of Criminal Procedure) even before the beginning of the investigation . . .

This is clearly a case coming under . . . article 5, paragraph 2 (*b*), of the Optional Protocol; the existing remedies are being drawn out over an unreasonable period of time and are being rendered ineffective by the Office of the President of the Malagasy Republic.

6.2. Maître Hammel also forwarded to the Committee a report prepared at the end of July 1983 on the conditions of detention of Mr. Jaona "in the Chinese hospital of Mahitzy (30 km from Antananarivo), to which he was transferred at the beginning of July and where he is interned and detained under particularly severe and inhuman conditions for a sick person aged over 75 years". The text of the report reads in part:

State of health

(1) At the beginning of July, following a consultation with Prof. Andrianjatovo, who had finally been authorized to go to Kilivondrake . . . the elderly detainee was hospitalized at Mahitzy . . . The cataract from which he is suffering will require an operation, more than two months late.

(2) *His family and his friends are however very concerned, for two reasons:*

Although his physical health is good, the conditions of hospitalization (of detention as he calls it) are very trying for him and might affect his intellectual faculties (for example, he is prevented from walking during the day, and even the X-rays which he has to have are taken only at night so that he has no contact with anyone . . .).

His wife, who asked to visit him as soon as she knew officially of his hospitalization, has so far (14 July) not been authorized to do so . . .

7. By a note dated 10 November 1983, the State party commented on Maître Hammel's memorandum of 15 August 1983. It denied that the Government of Madagascar had deliberately lodged an appeal with the local courts on behalf of Monja Jaona so as to render Jaona's petition to the Human Rights Committee inadmissible. It pointed out in this connection that "defence counsel has neither the right nor the power to compel Mr. Monja Jaona to lodge an appeal with any court or, to that end, to force him to accept a court-appointed counsel". It also questioned whether Maître Hammel had sought the necessary information from his client. Without indicating the exact date of Mr. Jaona's release, the State party informed the Committee that Mr. Jaona had stood in the elections of 28 August 1983 in the electoral district of the city of Antananarivo and that he had been elected deputy of Madagascar and thus a member of the National People's Assembly.

8.1. The State party's note of 10 November 1983 was transmitted to Monja Jaona and to his counsel, Maître Hammel, on 7 December 1983 and Mr. Jaona was asked whether he wished the Committee to continue or discontinue consideration of his case.

8.2. By letter dated 18 January 1984, Maître Hammel informed the Committee that Mr. Jaona had requested him to continue the procedure before the Committee and, in a memorandum of the same date, Mr. Hammel confirmed that Mr. Jaona was released on 15 August 1983. He alleged, however, that in

Madagascar, such releases tend to mean very brief periods at liberty. Mr. Monja Jaona had, in fact, been released from his previous detention on 10 March 1981, only to be arrested again on 15 December 1982 after no more than 21 months of freedom. In Madagascar, detention is nothing more than an administrative police measure, involving no indictment, investigation or judicial inquiry. Anyone who inconveniences or displeases the régime in power is detained on the basis of a mere order, issued by the Minister of the Interior, which is valid for an unlimited period until such time as the Minister sees fit to release him . . . Mr. Monja Jaona is therefore living under the constant threat of being detained again, as he was in the past. Accordingly, he wants the present procedure to be continued until a decision is taken on the detention (or rather detentions) he has suffered. The purpose of the petition of 30 December 1982 was to establish that Mr. Monja Jaona's arrest of 15 December 1982 and his detention, in the strictest solitary confinement, at a military camp 600 km from Antananarivo constituted breaches of the International Covenant on Civil and Political Rights. Fortunately, he has been released, but that fact in no way affects the legal issue raised in the petition of 30 December 1982 . . .

In his memorandum of 15 August 1983, the undersigned established that the procedures theoretically possible in Madagascar were rendered ineffective by the authorities, which refused to part with the files (as confirmed in the note from the President of the Court at Ihosy) and instructed the First President of the Supreme Court to preside over the court that was to hear the case (while, at the same time, sending the First President into retirement).

The appeals lodged in Madagascar at the time of the previous detention of Mr. Monja Jaona on 15 December 1980 with the Court at Ihosy (complaint in respect of violation of freedom) and with the Administrative Chamber of the Supreme Court (against the detention order) remained unanswered and are still pending. On his release in March 1981, the undersigned notified the courts that it was his intention to ensure that both cases were continued and ruled on.

The offence of violation of freedom (article 114 of the Penal Code), punishable by loss of civil rights together with detention for a period of up to five years (article 34 of the Penal Code), is now statute-barred (three years, as stipulated in article 4 of the Malagasy Code of Criminal Procedure) since the file has remained for more than three years with the Ministry of Justice, i.e. before even starting the preliminary police inquiry.

Hence it is evident that in Madagascar political matters involve indefinite time-limits and are therefore unreasonably prolonged.

In these circumstances, Mr. Monja Jaona's petition is certainly admissible and it is also founded on arbitrary orders for indefinite detention without any form of indictment or legal proceedings, contrary to the articles of the Covenant cited in the petition of 30 December 1982.

Moreover, in its memorandum of 10 November 1983, the Malagasy Government did not reply to the arguments set forth by the undersigned in his memorandum of 15 August 1983, particularly those relating to the outcome of the proceedings instituted in Madagascar in December 1980 (at the time of Mr. Monja Jaona's previous detention). Its silence presumably signifies that it cannot produce any argument.

9.1. When considering the admissibility of the communication, the Committee noted that it had not received any information that the subject-matter had been submitted to another procedure of international investigation or settlement. Accordingly, the Committee found that the communication was not inadmissible under article 5, paragraph 2 (*a*), of the Optional Protocol.

9.2. With regard to article 5, paragraph 2 (*b*), of the Optional Protocol, the Committee duly took note of the State party's contention in its note of 15 July 1983 that Mr. Jaona had not exhausted domestic remedies. The Committee also noted that Mr. Jaona was released in August 1983. It assumed therefore that the Supreme Court was no longer seized of the case. In the absence of any indication of the existence of another remedy still available to Mr. Jaona in regard to the matters complained of (see para. 2.4), the Committee found that the communication was not inadmissible under article 5, paragraph 2 (*b*), of the Optional Protocol. It indicated, however, that this point could be reviewed in the light of further explanations which the State party might submit under article 4, paragraph 2, of the Optional Protocol, giving specific details of domestic remedies which it claims to have been available to the alleged victim, together with evidence that there would be a reasonable prospect that such remedies would be effective.

10. On 6 April 1984 the Human Rights Committee decided:

(1) That the communication was admissible as regards Mr. Jaona's complaints of violation of article 9, paragraphs 1 and 2, article 18, paragraph 1, and article 19, paragraph 1, arising from his arrest of 15 December 1982 and subsequent detention until 15 August 1983;

(2) That, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(3) That the State party be informed that the written explanations or statements submitted by it under article 4, paragraph 2, of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to fulfil its responsibilities, it required specific responses to the allegations which had been made, and the State party's explanations of the actions taken by it;

(4) That the State party be again requested to provide the Committee with copies of any court orders or decisions relevant to this case.

11. The time-limit for the State party's submission under article 4, paragraph 2, of the Optional Protocol expired on 9 November 1984. The Committee has not received any further explanations or specific responses to the author's allegations, as requested in operative paragraph 3 of the Committee's decision on admissibility. Moreover, the State party has not furnished the Committee with copies of any relevant court orders or decisions, as requested in operative paragraph 4 of the decision on admissibility. No further explanations were received from the State party concerning the question of availability of domestic remedies.

12.1. The Human Rights Committee, having examined the present communication in the light of all the information made available to it by the parties as provided in article 5, paragraph 1, of the Optional Protocol, hereby decides to base its views on the following

facts, which appear uncontested, except for denials of a general character offering no particular information or explanations.

12.2. Monja Jaona is a 77-year-old Malagasy national and leader of MONIMA, a political opposition party. In the elections held in Madagascar in November 1982, he was the presidential candidate of his party. Following the re-election of President Ratsiraka, Mr. Jaona challenged the results and called for new elections at a press conference. Shortly afterwards, on 15 December 1982, Mr. Jaona was placed under house arrest in Antananarivo and subsequently detained at the military camp of Kelivondrake, 600 km south of Antananarivo. He was not informed of the grounds for his arrest and there is no indication that charges were ever brought against him or investigated. An appeal against his arrest was lodged on 15 March 1983, but there is no indication that the appeal was ruled on. Mr. Jaona was released on 15 August 1983. He was elected deputy to the National People's Assembly in elections held on 28 August 1983.

13. In formulating its views, the Human Rights Committee also takes into account the failure of the State party to furnish the requested information and clarifications necessary for the Committee to discharge its tasks. The State party has submitted that Mr. Jaona was placed under house arrest on the basis of a law relating to the dissolution of certain associations and to the placing under house arrest of persons convicted of subversive activities. It has adduced no evidence, however, that this law was applicable in the case of Mr. Jaona. In the circumstances, due weight must be given to the author's allegation. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. On the basis of the information before it, the Committee therefore cannot conclude that Mr. Jaona was engaged in any activities prohibited by the law in question.

14. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that these facts disclose violations of the Covenant, in particular of:

Article 9, paragraph 1, because Monja Jaona was arrested in December 1982 and detained until August 1983 on account of his political opinions;

Article 9, paragraph 2, because he was not informed of the reasons for his arrest or of any charges against him;

Article 19, paragraph 2, because he suffered persecution on account of his political opinions.

15. While giving due weight to the allegations made by the author, the Committee, nevertheless, observes that the claim that Monja Jaona is a victim of a breach by the State party of article 18, paragraph 1, of the Covenant, protecting the right of freedom of thought, conscience and religion, is not sustained by the information which the Committee has before it. The Committee will, therefore, make no finding in this respect.

16. The Committee, accordingly, is of the view that the State party is under an obligation to take effective measures to remedy the violations which Monja Jaona has suffered, to grant him compensation under article 9, paragraph 5, of the Covenant, on account of his arbitrary arrest and detention, and to take steps to ensure that similar violations do not occur in the future.

Communication No. 138/1983

Submitted by: Ngalula Mpandanjila *et al.* on 3 March 1983
Alleged victims: The authors
State party: Zaire
Date of adoption of views: 26 March 1986 (twenty-seventh session)

Subject matter: Zairian parliamentarians—Banishment of Zairian citizens after amnesty decree

Procedural issues: Exhaustion of domestic remedies—Admissibility decision without rule 91 submission from State party—Sufficiency of State party's reply under article 4 (2)—Adoption of views without submission on merits by State party—State party's duty to investigate—Burden of proof

*Substantive issues: Arbitrary arrest and detention—Freedom of movement—Internal exile—Banishment—Fair and public hearing—Ill-treatment during banishment—Persecution for opinions held—Denial of right to take part in public affairs—Detention after amnesty—Political rights—Freedom of expression—*Habeas corpus*—Release of victim from imprisonment*

Articles of the Covenant: 9 (1), 10 (1), 12 (1), 14 (1), 19 and 25

Articles of the Optional Protocol: 4 (2) and 5 (2) (b)

1. The communication was initially submitted to the Human Rights Committee by two Belgian lawyers, Eric Vergauwen and Robert-Charles Goffin (initial letter of 3 March 1983) on behalf of their 13 Zairian clients, Messrs. Ngalula, Tshisekedi, Makanda, Kapita, Kyungu, Lumbu, Kanana, Kasala, Lusanga, Dia, Ngoy and Kibassa, former Zairian members of parliament, and Mr. Birindwa, a Zairian businessman. At the time of the initial submission (3 March 1983), all 13 individuals were detained in various prisons in Zaire and were allegedly unable to present their cases to the Committee themselves. As evidence of their authority to act, the lawyers furnished a copy of a letter, dated

2 September 1982, signed by the wives of the 12 former parliamentarians, requesting them to submit the cases of their husbands to the Human Rights Committee. The lawyers' submissions further show that they also represented the thirteenth alleged victim, the businessman Mr. Birindwa, in connection with the steps taken to exhaust remedies before the domestic courts, prior to the submission of the communication to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights.

2.1. The facts, as described by the lawyers in the initial and further submissions are as follows: in 1980, the parliamentarians sent an "open letter" to President Mobutu, which was subsequently held by the Central Committee of the Mouvement populaire de la révolution (MPR) to be grossly improper both in form and content. In consequence, the Party stripped them of their membership of parliament and deprived them of their civil and political rights, including their right to hold public office, for a period of five years, with some of them being subjected, as of December 1980, to detention, or house arrest, or an administrative banning measure, the effect of which was to relocate them to a distant region against their will. Although these latter measures were the subject of a decree of amnesty of 17 January 1981, the amnesty did not become effective until 4 December 1981, at which time the individuals concerned were able to return to their homes.

2.2. During February 1982, while the former parliamentarians were negotiating with representatives of the President of Zaire concerning the establishment of a new political party, the Union pour la démocratie et le progrès social (UDPS), seven of them were arrested and subsequently all 12 were brought to trial before the State Security Court on charges of plotting to overthrow the régime and planning to establish a political party. The businessman, Mr. Birindwa, was also brought to trial before the State Security Court on charges of having secreted documents concerning the establishment of UDPS.

2.3. The trial of the 13 accused took place on 28 June 1982. On 1 July 1982, they were sentenced to 15 years' imprisonment, with the exception of Mr. Birindwa, who was sentenced to 5 years' imprisonment. The two lawyers, who assisted their defence at the trial, alleged that due process of law had not been observed by the magistrates (three accused were not heard at the pre-trial stage, no summonses were served on two others, the trial was not held in public, etc.).

2.4. On 7 July 1982, the lawyers filed appeals with the Supreme Court of Justice (*pourvoi en cassation*) on behalf of their clients against the judgement of 1 July 1982. By a decision of 26 October 1982 (*ordonnance de classement sans suite*), the Supreme Court declined to consider the appeals because the court fees had not been paid. In this connection, the lawyers point out that they had taken steps to ensure that the requirement of payment of the court fees be complied with. They state that, since their clients were scattered among several detention centres and it was impossible to communicate with them, a Zairian lawyer, Maître Mukendi, *bâtonnier* of Kinshasa, was asked to carry out the necessary formalities for depositing the fees. By a letter dated 15 September 1982, they urged Maître Mukendi to contact Mrs. Birindwa (the wife of one of the alleged victims), who was supposed to collect the necessary funds. At the same time, they wrote to the Chief Justice of the Supreme Court to inform the Court of the steps taken to comply with the necessary formalities. It later transpired that Mrs. Birindwa had not been in Kinshasa at the time in question and that the intended collection and payment of the court fees had not been made. The lawyers contend, however, that the efforts made to comply with the formalities, although unsuccessful, should be considered as satisfactory, in particular as the decision not to take action on the appeals was taken relatively shortly after the Supreme Court was informed of the efforts being made to collect and deposit the court fees. They submit that, since the decision of the Supreme Court not to consider the appeals could not be challenged under Zairian law, domestic remedies had been exhausted within the meaning of article 5, paragraph 2 (*b*), of the Optional Protocol. They further point out in this context that under article 33 of the Code of Procedure for the Supreme Court of Justice, the President of the Court could have waived the deposit.

2.5. At this stage in the presentation of the communication, the lawyers alleged that the State party had violated a number of articles of the International Covenant on Civil and Political Rights, as follows:

Article 14. The Central Committee of MPR, which was not an independent and impartial tribunal, took disciplinary measures of a penal character against the parliamentarians; the State Security Court, which rendered the judgement of 1 July 1982, was also not an independent and impartial tribunal since its judges were members of MPR; the trial was not held in public; no summonses were served on two of the accused; and in three cases the accused were not heard at the pre-trial stage;

Article 19. The parliamentarians were punished solely because of their opinions;

Article 22. The criminal proceedings before the State Security Court resulted from the defendants' attempts to establish a political party (a right implicit in the right to freedom of association);

Article 15. The order, issued by the Central Committee of MPR, to strip the parliamentarians of their parliamentary mandate was based on internal regulations adopted only on 7 January 1981, i.e., after the date of the alleged offence—the sending of the "open letter"—which occurred in 1980;

Articles 9 and 12. The measures of arrest, internal exile or house arrest to which the parliamentarians were subjected in December 1980 continued until 4 December 1981, although an amnesty had been decreed on 17 January 1981, and therefore constituted arbitrary arrests and detentions; these measures were also contrary to the provisions of article 12, paragraph 1;

Articles 7 and 10. The alleged victims were subjected to ill-treatment in detention.

2.6. By a letter dated 23 June 1983, the lawyers informed the Human Rights Committee that the alleged victims had all benefited from a new amnesty decree,

promulgated on 21 May 1983. They therefore asked that consideration of the communication be suspended to allow them time to contact their clients for further instructions. Consideration of the communication was, accordingly, suspended temporarily.

2.7. By a letter dated 9 January 1984, the lawyers requested the Committee to resume consideration of the communication. As to the developments after the amnesty of May 1983, they stated that the President had adopted "an administrative banning measure" against their clients and that they had been deported along with their families to different parts of the country. They further conveyed the concern of their clients' family members living in Belgium, who had been unable to contact the alleged victims since the deportation.

2.8. By a letter dated 24 January 1984, the lawyers reiterated their request that consideration of the communication be resumed, alleging that the current situation of their clients constituted a violation by the State party of article 9 of the Covenant. In substantiation, they enclosed a copy of a letter of 25 December from Mrs. Ngalula, the wife of one of the alleged victims, describing the situation of some of the alleged victims. She, however, mentioned that two of the lawyers' clients, namely Mr. Ngoy Mukendi and Mr. Kapita Shabangi, had rejoined the government party (MPR) and that they were now working for that party.

2.9. In a further letter, dated 19 June 1984, the lawyers stated that the banning order against their clients, being of a purely administrative nature, could not be subject to any judicial control and that the deprivation of liberty of their clients constituted violations by the State party of articles 9 and 12 of the Covenant. In substantiation, they enclosed a copy of a letter addressed to them on 18 June 1984 by Mrs. Marie-Claire Ngalula-Mbomba, the eldest daughter of the alleged victim Ngalula Mpandanjila, describing the situation as follows:

> As soon as he was arrested and banished to the village of Tshilunde, my father was joined by the rest of his family, who had also been arrested and forcibly brought to the same village. The banned family members include children still of elementary-school age, adolescent boys and girls who are now prevented from continuing their studies, and married brothers who are heads of families and whose wives have been left at Kinshasa alone with small childen and without any means of support.
>
> All the news that has reached me gives evidence of:
>
> *Deprivation of the minimum needed to live.* They are not allowed to obtain the money they need for their survival or for their housing, and no one, not even a member of the family, is allowed to help them;
>
> *Total deprivation of medical attention.* They are therefore at the mercy of all kinds of diseases and are the ideal targets of malnutrition. The closest town is 65 kilometres from the place to which they have been exiled. There is no road infrastructure for rapidly evacuating the sick in case of need;
>
> *Deprivation of liberty.* Victims of an arbitrary banning measure, they are deprived of liberty even within the locality. A large security force has been installed all around the locality to prevent any contact with the outside. The inhabitants of the village are prohibited, under pain of imprisonment, from speaking to the banned persons (who are to consider themselves as being in prison) even concerning problems connected with the very administration of the village. The customary chief of the village was arrested for having allowed villagers to communicate with the family during the first few days of their exile to the village.
>
> My father, who was deported with 17 persons, is living under conditions that could not be more precarious. Most of the childen sleep on the tables of the little local market's stalls, which they must leave at dawn to make room for the traders, while others must make do with secretly borrowed mats and cloths spread on the ground under the open sky.
>
> As if all these violations and humiliations were not enough, our main house in Kinshasa has been robbed and the managers of businesses have been arrested, so as not to leave any resources, however small, that would enable them to live "decently" in the place to which they have been exiled.
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> I consider it important to point out:
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> That they were covered by the general amnesty of 19 May 1983;
>
> That no charge justifies these new measures against them and still less against small children;
>
> That these measures are not based on any judicial decision;
>
> That is the situation of my family at this time.
>
> As to the other members of the Group of Thirteen, I can state that their situation is similar to that of my family.

3.1. Consideration of the communication was resummed at the Committee's twenty-second session and on 5 July 1984 the Working Group of the Human Rights Committee decided that the communication be transmitted, 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. The Working Group also requested the State party to transmit to the Committee copies of any court orders or decisions relevant to the case.

3.2. The time-limit for the State party's submission under rule 91 of the provisional rules of procedure expired on 14 October 1984. At the time of adoption of the decision on admissibility on 9 July 1985, no submission had been received from the State party.

4.1. Before deciding on the admissibility of the communication, the lawyers were asked to clarify for the Committee, which of the initial 13 alleged victims still wished to pursue the matter before the Human Rights Committee. By a telegram dated 26 February 1985, the lawyers stated that they had received no instructions from Kapita Shabangi, Ngoy Mukendi, Dia Oken and Kasala Kalomba, and that, although they had not been able to contact the other petitioners directly, they understood from their friends and families that it was their intention to pursue the matter.

4.2. In the light of the above clarification, the Human Rights Committee decided to continue consideration of the communication with respect to the cases of nine of the initial 13 alleged victims and that Messrs. Kapita Shabangi, Ngoy Mukendi, Dia Oken and Kasala Kalomba were no longer deemed to be parties to the communication.

5.1. Before considering a communication on the merits, the Committee must ascertain whether it fulfils all conditions relating to its admissibility under the Optional Protocol. With regard to article 5, paragraph 2 (*a*), of the Optional Protocol, the Committee had not received any information that the subject-matter had been submitted to another procedure of international investigation or settlement. Accordingly, the Committee found that the communication was not inadmissible under article 5, paragraph 2 (*a*), of the Optional Protocol.

5.2. Regarding the requirement of exhaustion of domestic remedies under article 5, paragraph 2 (*b*), of the Optional Protocol, the Committee observed with regard to events prior to 26 October 1982 (the day on

which the Supreme Court decided not to take action on the alleged victims' appeals) that the Supreme Court's decision rendered the remedy of appeal ineffective, at a time when the Supreme Court had been informed that steps were being taken on behalf of the alleged victims to collect and to deposit the required court fees. The Committee noted the particular difficulties facing the authors, who were allegedly scattered among different detention centres, in paying their court fees in timely fashion. The Committee also noted the speed of the Supreme Court's decision, against which there was no appeal, to dismiss the cases on that ground, and found that local remedies could not be deemed not to have been exhausted. In the circumstances, the Committee concluded that the communication was not inadmissible in that respect by virtue of article 5, paragraph 2 (*b*), of the Optional Protocol. Regarding the events said to have taken place after the amnesty decree of 21 May 1983, the State party did not refute the contention that the banning order imposed on the alleged victims, being purely of an administrative nature, was not subject to any judicial review. The Committee was therefore unable to conclude that there were effective remedies available to the alleged victims which they had failed to exhaust. Accordingly, the Committee found that the communication was not inadmissible by virtue of article 5, paragraph 2 (*b*), of the Optional Protocol in that respect.

6. On 9 July 1985 the Human Rights Committee therefore decided:

(1) That the communication was admissible in so far as it related to Messrs. Ngalula Mpandanjila, Tshisekedi Wa Mulumba, Makanda Mpinga Shambuyi, Kyungu Wa Ku Mwanga, Lumbu Maloba Ndoba, Kanana Tshion Go, Lusanga Ngiele, Kibassa-Maliba and Birindwa;

(2) That, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of the decision, written explanations or statements clarifying the matter and the remedy, if any, that might have been taken by it.

7.1. The time-limit for the State party's submission under article 4, paragraph 2, of the Optional Protocol expired on 1 February 1986. No submission was received from the State party.

7.2. No further submission has been received from the authors following the Committee's decision on admissibility.

8.1. The Human Rights Committee, having considered the present communication in the light of all the information made available to it by the authors as provided in article 5, paragraph 1, of the Optional Protocol, hereby decides to base its views on the following facts, which, in the absence of any submission from the State party, are uncontested.

8.2. The authors are eight former Zairian parliamentarians and one Zairian businessman. In December 1980, they were subjected to measures of arrest, banishment or house arrest on account of the publication of an "open letter" to Zairian President Mobutu. The eight parliamentarians were also stripped of their membership of parliament and forbidden to hold public office for a period of five years. Although they were covered by an amnesty decree of 17 January 1981, they were not released from detention or internal exile until 4 December 1981. They were subsequently brought to trial before the State Security Court on 28 June 1982 on charges of plotting to overthrow the régime and planning the creation of a political party, and of secreting documents concerning the establishment of said party. The trial was not held in public; no summonses were served on two of the accused; and in three cases the accused were not heard at the pre-trial stage. The accused were sentenced to 15 years' imprisonment with the exception of the businessman, who was sentenced to 5 years' imprisonment. The authors were released pursuant to an amnesty decree promulgated on 21 May 1983, but they were then subjected to an "administrative banning measure" and deported along with their families to different parts of the country. The banned family members include children still of elementary-school age, adolescent boys and girls and married brothers who are heads of families and whose wives have been left in Kinshasa alone with small children and without any means of support. The authors were subjected to ill-treatment during the period of banishment and deprived of adequate medical attention.

9. In formulating its views, the Human Rights Committee also takes into account the failure of the State party to furnish any information and clarifications necessary for the Committee to facilitate its tasks. In the circumstances, due weight must be given to the authors' allegation. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. The Committee notes with concern that, despite its repeated requests and reminders and despite the State party's obligation under article 4, paragraph 2, of the Optional Protocol, no submission whatever has been received from the State party in the present case.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that these facts disclose violations of the Covenant, with respect to:

Article 9, paragraph 1, because the authors were subjected to arbitrary arrest and detention and were not released until 4 December 1981, despite an amnesty decreed on 17 January 1981;

Article 10, paragraph 1, because they were subjected to ill-treatment during the period of banishment;

Article 12, paragraph 1, because they were deprived of their freedom of movement during long periods of administrative banishment;

Article 14, paragraph 1, because they were denied a fair and public hearing;

Article 19, because they suffered persecution because of their opinions;

Article 25, as to the eight former members of the Zairian parliament, because they were deprived of

the right equally to take part in the conduct of public affairs.

11. The Committee, accordingly, is of the view that the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations that the authors have suffered, to grant them compensation, to conduct an inquiry into the circumstances of their ill-treatment, to take action thereon as appropriate and to take steps to ensure that similar violations do not occur in the future.

Communication No. 139/1983

Submitted by: Ilda Thomas (victim's mother)—later joined by Hiber Conteris as co-author on 16 March 1983
Alleged victim: Hiber Conteris
State party: Uruguay
Date of adoption of views: 17 July 1985 (twenty-fifth session)

Subject matter: Detention and trial of Uruguayan civilian by military authority—Tupamaros

Procedural issues: Confirmation of allegations by victim after release—Failure of investigation of allegations by State party—Sufficiency of State party's reply under article 4 (2)—Withdrawal of communication from IACHR—Burden of proof

Substantive issues: Arbitrary arrest and detention—Detention incommunicado—Access to counsel— Ex officio *counsel—Delays in proceedings—Fair trial—Fair and public hearing—Trial* in absentia*—Equality of arms—*Habeas corpus*—Ill-treatment of detainees—Torture—Prison conditions—Confession under duress—Amnesty—Release of victim from imprisonment*

Articles of the Covenant: 4, 7, 9 (1), (2), (3) and (4), 10 (1), 14 (1) and (3) (b), (c), (d) *and* (g)
Articles of the Optional Protocol: 4 (2), and 5 (2) (a)

1.1. The author of the communication (initial letter dated 16 March 1983 and further letters dated 12 May and 8 November 1983 and 12 March, 14 June and 1 July 1985) is Ilda Thomas, the alleged victim's sister, at present residing in the United States of America. She is legally represented. She submits the communication on behalf of her brother, Hiber Conteris, a Uruguayan national born on 23 September 1933, who was detained at Libertad Prison in Uruguay until 10 March 1985.

1.2. The author stated that Hiber Conteris worked as pastor for the Methodist Church from 1955 to 1965 and that for many years he was a staff writer for *Marcha*, a weekly magazine banned in 1974. He was a professor of the History of Ideas at the National University of Uruguay's School of Law and Social Sciences from 1968 to 1972. In the late 1960s Mr. Conteris was a member of the Movement for National Liberation (Tupamaros), but the author claims that he completely disassociated himself from them in 1970 as political and economic tensions rose and the Tupamaros turned to progressively more violent means.

1.3. On 2 December 1976, Mr. Conteris was arrested by the security police, allegedly without a warrant, at Carrasco Airport, Montevideo, upon returning from a Christian Peace Conference held in Brno, Czechoslovakia. He was taken to the intelligence service headquarters in the city. Two weeks later when his familywent to these offices to bring him food, they were given his belongings and told that he had been transferred to "an army establishment". This was the last they heard of him for three months. On 4 March 1977, his daughter was allowed to see him for 15 minutes under strict supervision. He was in a deplorable physical condition and had lost 20 kilos in weight. His arms were scarred. The family later learned that he had been moved between several military establishments, including the most notorious centre known as "El Infierno"—the 13th Armoured Infantry Battalion. He was also held at the Sixth Cavalry Headquarters and, during the initial two weeks at the intelligence service headquarters (DINARP) in Montevideo.

1.4. During this three-month period of detention, incommunicado, Mr. Conteris was allegedly tortured. He was hanged by the wrists for 10 days and was subjected to burnings and repeated "submarino"—immersing the head of the victim in water fouled by blood, urine and vomit almost to the point of drowning. Under these conditions of extreme ill-treatment Mr. Conteris was forced to sign a confession that he had been an active guerrilla, taking part in kidnapping and/or murder. Approximately four months after his arrest, Mr. Conteris was taken to Libertad Prison.

1.5. The author also alleged that, since his arrest in 1976, Mr. Conteris was never brought before a judge or granted a public hearing at which he could defend himself. No judgement against him has ever been made public. It is also alleged that Mr. Conteris had been detained for over two years before he was informed of the charges against him. The date of Mr. Conteris' first trial is unclear. He was convicted and sentenced *in absentia* by a military court of the first instance, for "subverting the Constitution", "criminal and political association", "unlawful entry" and "kidnapping". Although a

civilian, he was tried by a military court under the Law of National Security enacted in 1972 because he was charged with subversive activities. Mr. Conteris was assigned "legal counsel" (*abogado de oficio*), designated by the military as Dr. Alcimar Perera.[1] Mr. Conteris never saw Dr. Perera before the trial. It was only after the proceedings that Mr. Conteris had a brief meeting with him. Mr. Conteris never heard from him again. Mr. Conteris submitted his own statement to the military court of first instance but this statement was ignored and not included in the record. He was sentenced to 15 years' imprisonment and in addition to one to five years' precautionary detention (*medidas de seguridad eliminativas*). Without the assistance of legal counsel, he appealed against the decision of the court of first instance to the Supreme Military Tribunal in August 1980. In a letter dated 24 May 1981, he described the appeal as follows:

> . . . I had hoped to be able to speak to the lawyer assigned to me, to know his defence in my case, to ask for clarification of the charges formulated by the judge of the first instance who took no notice of my statements, nor did these appear in the instructions for the hearing, and I hoped to have the opportunity to reply to the charges before the members of the Supreme Military Tribunal. None of this happened. My lawyer never came to see me, I did not appear in person before the members of the Tribunal, a junior functionary confined himself to reading the sentence and asking for my signature, and the whole hearing took no more than three or four minutes. So there I am, after the higher appeal in my case with a sentence of 15 years' imprisonment and one to five years' precautionary detention without having been able to articulate my defence with the assistance of a lawyer who took my case seriously, or having personally appeared before any judge in any of the three instances.[2]

1.6. The author stated that since Mr. Conteris' transfer to Libertad Prison, he did not report the kind of severe torture he experienced in the Sixth Cavalry Headquarters and the 13th Armoured Infantry Battalion. He did, however, experience other forms of physical and psychological abuse. Mr. Conteris was repeatedly subjected to solitary confinement and was held in the coldest part of the prison, the first floor. He was plagued with severe rheumatism in his spine, which often prevented him from leaving his cell for a few minutes' exercise when allowed. Periodically, he was transferred from one floor to another, a method used to increase the prisoner's feelings of distrust and insecurity.

1.7. It was alleged that at the time of submission no effective legal remedy existed for Hiber Conteris or his family under Uruguayan law since the writ of *habeas corpus* and the basic guarantees against arbitrary arrest and for fundamental fairness and due process set forth in the 1967 Constitution had been totally denied in virtually every case of a person held under the prompt security measures or the Law of National Security. In the case of Hiber Conteris the Supreme Military Tribunal was the court of last instance.

1.8. A case concerning Mr. Conteris, which had been submitted to the Inter-American Commission on Human Rights (IACHR) by an unrelated third party, was withdrawn at the request of the Conteris family dated 12 May 1983.

1.9. The author claims that the above facts reveal breaches by Uruguay of a number of articles of the International Covenant on Civil and Political Rights, including articles 7, 9, 10 and 14. It is also alleged that articles 4, 12, 15, 18 and 19 have been violated.

2. By its decision of 6 April 1983, 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. The Working Group also requested the State party to transmit to the Committee copies of any court orders or decisions relevant to this case.

3. In a submission dated 27 September 1983 the State party informed the Committee

that Mr. Conteris was arrested on 2 December 1976 because of his connection with the kidnapping of the former Consul of Brazil, Mr. Aloisio M. de Diaz Gomide, as well as for having taken part in the meeting of the Tupamaros National Liberation Movement at which the decision was taken to assassinate Mr. Dan Mitrione, a United States citizen. He was tried and subsequently sentenced to 15 years' rigorous imprisonment and 5 to 8 years' precautionary detention measures for "criminal conspiracy", "conspiracy to undermine the Constitution followed by criminal preparations", "usurpation of functions" and "theft and co-perpetration of kidnapping, with a combination of principal and secondary offences". Mr. Conteris was not persecuted for his political opinions, but, rather, tried for committing acts which constitute offences under existing legislation. The procedure followed for his trial took place in accordance with the existing legal rules and at no time was he subjected to any kind of physical or psychological coercion.

4.1. On 8 November 1983, the author submitted comments on the State party's submission under rule 91 and forwarded a copy of the transcript of the indictment of the Fourth Military Court of Investigation, dated 1 March 1977, and of the judgement of the Supreme Military Tribunal, dated 5 August 1980, obtained by Mr. Conteris' lawyer.

4.2. She stated that the crimes her brother was accused of having committed occurred after he had disassociated himself from the Movement for National Liberation (Tupamaros). Even while he was a member, there is no indication that Mr. Conteris took any active role. The Uruguayan Government has never alleged that he was one of their leaders, and therefore would have been privy to high-level decision-making such as plans to kidnap. In fact, he was hardly a leader. He was a professor, a writer, a former minister. The extent of his involvement in the Tupamaros was to meet with fellow intellectuals, in small meetings, in a private apartment.

4.3. In the transcript of the indictment of the Fourth Military Court of Investigation, dated 1 March 1977, the Prosecutor stated that "there is *prima facie* evidence that the accused . . . is guilty of the offences which are provided for in articles 150 (criminal conspiracy), 132 in conjunction with 137 (conspiracy to undermine the Constitution followed by criminal preparations), 346 (kidnapping) and 294 (unlawful entry into the home) of the Ordinary Penal Code". The Court agreed with this opinion and ordered that the prisoner "be indicted and held incommunicado" and that he be summoned to appear "at the hearing on 2 March . . . at which he shall be informed of the name of his defence counsel to be appointed from among those on the roster". On 2 March 1977, the Court appointed as defence counsel Dr. Daniel Artecona.

[1] According to the text of the indictment it appears that Mr. Conteris had a different *ex-officio* lawyer, Dr. Artecona. See para. 4.3.

[2] It appears that the three instances are; (i) the military court of investigation, (ii) the military court of first instance and (iii) the Supreme Military Tribunal.

4.4. Hiber Conteris was also indicted for offences under articles 166 (usurpation of functions) and 340 (theft) of the Ordinary Penal Code. By the judgement of first instance rendered by the Fourth Military Court presided over by Judge Colonel Luis G. Blanco Vila, Mr. Conteris was sentenced to a term of 15 years' rigorous imprisonment and 5 to 8 years' precautionary detention.

4.5. The judgement by the Supreme Military Tribunal, dated 5 August 1980, reviewed the particular characteristics of Mr. Conteris' involvement in the Tupamaros movement. It found that he did not completely break with the movement until September of 1970; that up to that date he had participated in numerous conspiratorial meetings, many of which took place in his apartment in Montevideo, and that he also gave the key to the apartment to conspirators who met there in his absence. The Supreme Military Tribunal upheld the sentence of the court of first instance, found Mr. Conteris guilty of a further offence provided for in article 133 of the Ordinary Penal Code (acts exposing the Republic to the risk of war or reprisals) and sentenced him to an additional term of one to five years' precautionary detention.

5.1. When considering the admissibility of the communication, the Committee found that it was not precluded by article 5, paragraph 2 (*a*), of the Optional Protocol from considering the communication, because the case before IACHR was submitted by an unrelated third party and in any event was withdrawn at the request of the Conteris family. The Committee was also unable to conclude that in the circumstances of the case there were effective remedies available to the alleged victim which he had failed to exhaust. It noted in this connection that Mr. Conteris appealed to the Supreme Military Tribunal which confirmed his conviction. Accordingly, the Committee found that the communication was not inadmissible under article 5, paragraph 2 (*b*), of the Optional Protocol.

5.2. The Committee observed that there were a number of factual issues in dispute in the case, which had to be assessed during consideration of the case on the merits. For instance, it had to be determined whether the allegation of ill-treatment and torture and whether the allegations of denial of judicial guarantees were well founded. The Committee stated that it would rely on both parties to clarify any factual issues in dispute.

5.3. On 30 March 1984, the Human Rights Committee therefore decided:

1. That the communication was admissible;

2. That, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of transmittal to it of the decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

3. That the State party be informed that the written explanations or statements submitted by it under article 4, paragraph 2, of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to perform its responsibilities, it required specific responses to the allegations which had been made by the author of the communication, and the State party's explanations of the actions taken by it;

4. That the State party be again requested to furnish the Committee with decisions taken against Mr. Hiber Conteris which are not already in the possession of the Committee, in particular the judgement of the Fourth Military Court.

6.1. The decision on admissibility containing the Committee's request for specific information was transmitted to the State party and to the author on 8 May 1984. The time-limit for the State party's response expired on 8 November 1984.

6.2. By a note of 25 March 1985, the new Government of Uruguay informed the Committee that Mr. Hiber Conteris had been released from prison on 10 March 1985, but shed no further light on the factual issues in dispute.

7.1. The Committee observes in this connection that the author of the communication has submitted detailed allegations of ill-treatment and that the State party has adduced no evidence that these allegations have been duly investigated. A general refutation of these allegations merely stating that "at no time was he subjected to any kind of physical or psychological coercion" (see para. 3 above) is not sufficient. The Committee also observes that the author has made detailed allegations that Hiber Conteris was denied judicial guarantees set out in a number of provisions of article 14 of the Covenant. In its submission of 27 September 1983, the State party merely informed the Committee that "the procedure followed for his trial took place in accordance with the existing legal rules" (see para. 3 above). Again, a refutation in such general terms is not sufficient.

7.2. The Committee recalls that it has already established in other cases (e.g. Nos. 30/1978[3] and 85/1981[4]) that the burden of proof cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities and to furnish to the Committee the information available to it. In cases where the author has submitted to the Committee allegations supported by witness testimony, as in this case, and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party.

7.3. The author's allegations of breaches of the provisions of article 9 of the Covenant have not been commented on by the State party and are, therefore, treated as uncontested.

7.4. The author's allegations of breaches of the provisions of articles 12, 15, 18 and 19 of the Covenant are not adequately substantiated. The Committee, therefore, makes no finding in respect to these articles.

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[3] See *Selected Decisions . . .*, vol. 1, pp. 109-112.

[4] See above, pp. 116-118.

7.5. With regard to the author's allegations of a breach of article 4, the Committee notes that the State party has not purported to rely on any derogation from provisions of the Covenant pursuant to article 4. The Committee, therefore, regards it as inappropriate to make a finding in respect to this article.

8. In a notarized personal affidavit dated 14 June 1985, Mr. Hiber Conteris described in detail aspects of his interrogation, trial and detention, thus confirming the information submitted by the author on his behalf. In a telegram dated 1 July 1985, his wish that the Committee continue its consideration of the case was confirmed.

9.1. The Human Rights Committee, having examined the present communication in the light of all the information made available to it by the parties as provided in article 5, paragraph 1, of the Optional Protocol, hereby decides to base its views on the following facts, which have either been essentially confirmed by the State party or are uncontested except for denials of a general character offering no particular information or explanations.

9.2. Hiber Conteris was arrested without a warrant by the Security Police on 2 December 1976, at the Carrasco airport, Montevideo, and taken to the intelligence service headquarters in the city. He was later transferred to different military establishments, including the establishment known as "El Infierno" and the Sixth Cavalry Headquarters. From 2 December 1976 to 4 March 1977, he was held incommunicado, and his relatives were not informed of his place of detention. During this period Mr. Conteris was subjected to extreme ill-treatment and forced to sign a confession. On 4 March 1977, when his daughter was allowed to see him for the first time after his arrest, she witnessed that his physical condition was very poor and that he had lost 20 kilos of weight. Since that time he was kept at Libertad prison under harsh and, at times, degrading conditions, including repeated solitary confinements. The remedy of *habeas corpus* was not available to Hiber Conteris. He was never brought before a judge and was kept uninformed of the charges against him for over two years. He was not granted a public hearing at which he could defend himself and he had no opportunity to consult with his court appointed lawyer in preparation for his defence. He was tried and sentenced by a military court of first instance to 15 years' imprisonment and, it appears, to one to five years of precautionary detention. His own statements to the military court of first instance were ignored and not entered into the court records. Without the assistance of legal counsel, he appealed to the Supreme Military Tribunal in August 1980, which upheld the conviction and sentenced him to 15 years' imprisoment and 5 to 8 years of precautionary detention for "criminal conspiracy", "conspiracy to undermine the Constitution followed by criminal preparations", "usurpation of functions" and "theft and co-perpetration of kidnapping, with a combination of principal and secondary offences". After the change of Government in Uruguay Mr. Conteris was released on 10 March 1985 pursuant to the Law of Amnesty of 8 March 1985.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee disclose violations of the Covenant, in particular of:

Article 7, because of the severe ill-treatment which Hiber Conteris suffered during the first three months of detention and the harsh and, at times, degrading conditions of his detention since then;

Article 9, paragraph 1, because the manner in which he was arrested and detained, without a warrant, constitutes an arbitrary arrest and detention, irrespective of the charges which were subsequently laid against him;

Article 9, paragraph 2, because he was not informed of the charges against him for over two years;

Article 9, paragraph 3, because he was not brought promptly before a judge and because he was not tried within a reasonable time;

Article 9, paragraph 4, because he had no opportunity to challenge his detention;

Article 10, paragraph 1, because he was held incommunicado for over three months;

Article 14, paragraph 1, because he had no fair and public hearing;

Article 14, paragraph 3 (*b*), because he had no effective access to legal counsel for the preparation of his defence;

Article 14, paragraph 3 (*c*), because he was not tried without undue delay;

Article 14, paragraph 3 (*d*), because he was not tried in his presence and could not defend himself in person or through legal counsel of his own choosing;

Article 14, paragraph 3 (*g*), because he was forced by means of torture to confess guilt.

11.1. The Committee, accordingly, is of the view that the State party is under an obligation to take effective measures to remedy the violations which Mr. Hiber Conteris has suffered and to grant him compensation.

11.2. The State party has provided the Committee with a number of lists indicating the names of persons released from prison since August 1984 and until the newly elected Government came to power on 1 March 1985. The Committee has further learned that, pursuant to an amnesty law enacted by the new Government on 8 March 1985, all political prisoners have been released and all forms of political banishment have been lifted. The Committee expresses its satisfaction at the measures taken by the State party towards the observance of the Covenant and co-operation with the Committee.

Communications Nos. 146/1983 and 148 to 154/1983

Submitted by: Kanta Baboeram-Adhin, Johnny Kamperveen, Jenny Jamila Rehnuma Karamat Ali, Henry François Leckie, Vidya Satyavati Oemrawsingh-Adhin, Astrid Sila Bhamini-Devi Sohansingh-Kanhai, Rita Dulci Imanuel-Rahman and Irma Soeinem Hoost-Boldwijn, on 5 July, 31 July and 4 August 1983

Alleged victims: John Khemraadi Baboeram (husband of K. Baboeram-Adhin), André Kamperveen (father of Johnny Kamperveen), Cornelis Harold Riedewald (husband of Jenny Jamila Rehnuma Karamat Ali), Gerald Leckie (brother of Henry François Leckie), Harry Sugrim Oemrawsingh (husband of Vidya Satyavati Oemrawsingh-Adhin), Somradj Robby Sohansingh (husband of Astrid Sila Bhamini-Devi Sohansingh-Kanhai), Lesley Paul Rahman (brother of Rita Dulci Imanuel-Rahman), and Edmund Alexander Hoost (husband of Irma Soeinem Hoost-Boldwijn)

State party: Suriname

Date of adoption of views: 4 April 1985 (twenty-fourth session)*

Subject matter: Summary execution of members of political opposition

Procedural issues: Joint examination of communications (rule 88)—Exhaustion of domestic remedies —"Same matter" under investigation by other procedure of international investigation or settlement—Sufficiency of State party's reply under article 4 (2)—Non-participation of Committee member in decision—Failure of investigation of allegations by State party—Weight of evidence—Adoption of views without submission on merits by State party

Substantive issues: Right to life—Death of victims—Summary or arbitrary executions

Article of the Covenant: 6 (1)

Articles of the Optional Protocol: 4 (2) and 5 (2) (a) *and* (b)

Rules of Procedure: 85 and 88

Communication No. 146/1983

1.1. The author of communication No. 146/1983 (initial letter dated 5 July 1983 and further letters of 4 November 1983 and 3 January 1985) is Kanta Baboeram-Adhin, a Surinamese national, at present residing in the Netherlands. She submits the communication on behalf of her deceased husband, John Khemraadi Baboeram, a Surinamese lawyer who was allegedly arrested by Surinamese military authorities on 8 December 1982 and whose corpse was delivered to the mortuary on 9 December 1982 showing signs of severe maltreatment and numerous bullet wounds.

1.2. It is stated that on 8 December 1982 at around 2 a.m. a number of persons in Paramaribo, Suriname, were taken from their beds and arrested, including John Baboeram, whose corpse along with the corpses of 14 other persons was identified on 10 December 1982 and was described in the "Report of the Dutch Lawyers Committee for Human Rights" (United Nations Commission on Human Rights document E/CN.4/1983/55, submitted by the author as an annex to her communication) as "heavily and brutally maltreated in the face. He for instance had a broken upper jaw. Almost all his teeth, except for one, on the upper right hand side, were beaten inwards and his lips were pulped. He had a horizontal gash on his forehead. In addition he had a bullet wound on the left side of his nose, which was later covered by a plaster. Further he had wounds, cuts on the cheeks and internal haemorrhages."

1.3 The persons arrested and allegedly killed were four journalists, four lawywers, amongst whom was the Dean of the Bar Association, two professors, two businessmen, two army officers and one trade union leader. The names of the victims are John Baboeram, Bram Behr, Cyrill Daal, Kenneth Gonçalves, Eddy Hoost, André Kamperveen, Gerald Leckie, Sugrim Oemrawsingh, Lesley Rahman, Soerindre Rambocus, Harold Riedewald, Jiwansingh Sheombar, Jozef Slagveer, Somradj Sohansingh and Frank Winjngaarde. The executions are said to have taken place at Fort Zeelandia.

2.1 The author of the communication states that she has not submitted the matter to any other procedure of international investigation.

2.2 With respect to the exhaustion of domestic remedies, the author states that no recourse has been made to any court in Suriname because "it became obvious from different sources that the highest military authority . . . was involved in the killing", because the official judicial investigation required in such a case of violent death had not taken place, and "because of the atmosphere of fear one would find no lawyer prepared to [plead] such a case, considering the fact that three lawyers have been killed, apparently because of their concern with human rights and democratic principles". The author also refers to the report of the International Commission of Jurists' mission to Suriname, dated 21 March 1983, which, *inter alia*, surveys the situation in Suriname with respect to freedom of the press, freedom of association, freedom from arbitrary arrest, the right to protection of life and bodily integrity and the right of recourse to effective legal remedies. The report confirms the author's contention that there are no effective legal remedies.

2.3. The author claims that her husband was a victim of violations of articles 6, 7, 9, 10, 14 and 17 of the International Covenant on Civil and Political Rights.

3. By its decision of 27 July 1983, the Working Group of the Human Rights Committee transmitted communication No. 146/1983 under rule 91 of the pro-

* Pursuant to rule 85 of the provisional rules of procedure, Mr. S. Amos Wako did not participate in the adoption of the views of the Committee under article 5 (4) of the Optional Protocol on this matter.

visional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication. The Working Group also requested the State party to transmit to the Committee copies of the death certificate and medical report and of a report on whatever inquiry has been held in connection with the death of John Khemraadi Baboeram.

4. In a submission dated 5 October 1983, the State party objected against the admissibility of communication No. 146/1983 on the ground that the same matter had already been submitted to and was "being examined under another procedure of international investigation or settlement," referring in this connection to "investigations regarding the human rights situation in Suriname by international organizations dealing with human rights such as the Inter-American Commission on Human Rights and the International Committee of the Red Cross." The State party also mentioned that "the Special Rapporteur on summary or arbitrary executions of the United Nations Commission on Human Rights, Mr. Amos Wako," would pay a visit to Suriname during the week beginning 31 October 1983.[1]

5. In her comments dated 4 November 1983, the author of communication No. 146/1983 rejected the State party's contention that "the same matter" had been submitted to another procedure of international investigation or settlement. She submitted that the procedures mentioned by the Government of Suriname for the study of the human rights situation in that country were not comparable with the procedure for the examination of individual cases under the Optional Protocol to the International Covenant on Civil and Political Rights.

Communications Nos. 148 to 154/1983

6.1. Five communications Nos. 148/1983, 149/1983, 150/1983, 151/1983 and 152/1983 dated 31 July 1983 and two communications Nos. 153/1983 and 154/1983 dated 4 August 1983 were submitted by close relatives of 7 of the 15 persons allegedly killed in Suriname on 8/9 December 1982. All seven authors, at present residing in the Netherlands, allege that the deceased were victims of violations by the Government of Suriname of articles 6, 7, 9, 10, 14, 17 and 19 of the International Covenant on Civil and Political Rights. The facts of these cases are similar to those of communication No. 146/1983 concerning John Khemraadi Baboeram.

6.2. The authors of these seven cases are Johnny Kamperveen, on behalf of his late father André Kamperveen, formerly a business man in Paramaribo (No. 148/1983); Jenny Jamila Rehnuma Karamat Ali, on behalf of her late husband Cornelis Harold Riedewald, formerly a lawyer in Paramaribo (No. 149/1983); Henry François Leckie, on behalf of his late brother Gerald Leckie, formerly a professor at the Faculty of Social Sciences of the University of Suriname (No. 150/1983); Vidya Satyavati Oemrawsingh-Adhin, on behalf of her late husband Harry Sugrim Oemrawsingh, formerly a professor at the Technical Faculty of the University of Suriname (No. 151/1983); Astrid Sila Bhamini-Devi Sohansingh-Kanhai, on behalf of her late husband Somradj Robby Sohansingh, formerly a businessman in Paramaribo (No. 152/1983); Rita Dulci Imanuel-Rahman, on behalf of her late brother Lesley Paul Rahman, formerly a journalist and trade union leader from Aruba, Netherlands Antilles (No. 153/1983); and Irma Soeinem Hoost-Boldwijn, on behalf of her late husband Edmund Alexander Hoost, formerly a lawyer in Paramaribo (No. 154/1983).

6.3. Common to all of these communications are the following allegations: the alleged victims were arrested at their respective homes in the early morning hours of 8 December 1982; in the evening of the same day it was declared by Surinamese authorities that a coup attempt had been foiled and in the evening of 9 December 1982 it was declared that a number of arrested persons had been killed during an attempt to escape; the bodies of the 15 persons lay in the mortuary of the Academic Hospital from 10 to 13 December 1982 and were seen by family members and other persons; the bodies showed numerous wounds, apparently inflicted from the front side. Neither autopsies nor official investigations of the killings have taken place. The relevant facts are also described in United Nations Commission on Human Rights document E/CN.4/1983/55, which some of the authors incorporate by reference.

6.4. A summary of the specific allegations in the individual cases follows:

André Kamperveen was allegedly subjected to violence upon his arrest. Much damage was done to his house through firearms and hand-grenades; his radio station ABC was burned down. His body reportedly showed injuries to the jaw and a swollen face, 18 bullet wounds in the chest, a shot wound in the right temple, a fractured femur and a fractured arm.

Cornelis Harold Riedewald was arrested by military police who allegedly did not show a warrant. His body showed a bullet wound through the right temple, severe injuries on the left side of the neck and numerous bullet wounds in the chest.

Gerald Leckie was arrested by military police who allegedly did not show a warrant. His body had internal haemorrhages in the face and bullet holes in the chest.

Harry Sugrim Oemrawsingh was arrested by military police who allegedly did not show a warrant. His body had a wound in the right cheek and bigger wound on the left temple.

Somradj Robby Sohansingh had already been detained seven months and allegedly subjected to mistreatment, but had been released pending trial for his alleged participation in the coup attempt of 13 March 1982. He was rearrested by military police on 8 December 1982. His body had wounds on the face, his teeth were beaten inwards and one of his cheekbones was fractured. He had six bullet wounds in the chest and abdominal area.

Lesley Paul Rahman was arrested by military police who allegedly did not show a warrant. His body had lumps on the forehead and parts of the skin of the upper thigh were torn off.

Edmund Alexander Hoost was arrested by military police who allegedly did not show a warrant. His body

[1] The visit subsequently took place between 22 and 27 July 1984.

had several wounds from bullets which had entered the body from the front.

6.5. The authors of the seven communications state that they have not submitted the same matter to any other procedure of international investigation or settlement.

6.6. With respect to exhaustion of domestic remedies, the authors explain in an annex common to all seven communications that no recourse has been made to any court in Suriname because, *inter alia:*

1. The highest military and civilian authorities were involved in planning and carrying out the murders. 2. Taking into account the general atmosphere of fear and the fact that three lawyers were killed apparently because of their involvement in defending opponents of the régime one would find no lawyer prepared to defend such a case. 3. From official side there was neither an autopsy, nor an investigation of the death of the 15 victims as is required in such a case of violent death . . .

7. By decisions of 20 October 1983, the Working Group of the Human Rights Committee transmitted communications Nos. 148/1983 to 154/1983 to the State party concerned under rule 91 of the Committee's provisional rules of procedure, requesting information and observations relevant to the question of admissibility of the communications. The Working Group also requested the State party to provide the Committee with copies of the death certificates and medical reports and reports of whatever inquiry has been held in connection with the deaths of the alleged victims.

8. In a submission dated 6 April 1984 the State party objected against the admissibility of communications Nos. 148/1983 to 154/1983 on the grounds already set out in its submission of 5 October 1982 in respect of communication No. 146/1983 (see para. 4 above), namely, that the matter had already been submitted to and is "being examined under another procedure of international investigation or settlement". The State party added the following:

In this regard, the Government of the Republic of Suriname wishes to refer once more to investigations regarding the human rights situation in Suriname by international organizations dealing with human rights, such as the Inter-American Commission on Human Rights of the Organization of American States, the International Committee of the Red Cross, the International Labour Organisation, the International Commission of Jurists, Amnesty International, as well as the proposed visit to Suriname of the United Nations Special Rapporteur on summary or arbitrary executions . . .

9.1. With respect to the admissibility of the communications the Human Rights Committee observed first that a study by an intergovernmental organization either of the human rights situation in a given country (such as that by IACHR in respect of Suriname) or a study of the trade union rights situation in a given country (such as the issues examined by the Committee on Freedom of Association of the ILO in respect of Suriname), or of a human rights problem of a more global character (such as that of the Special Rapporteur of the Commission on Human Rights on summary or arbitrary executions), although such studies might refer to or draw on information concerning individuals, cannot be seen as being the same matter as the examination of individual cases within the meaning of article 5, paragraph 2 (*a*), of the Optional Protocol. Secondly, a procedure established by non-governmental organizations (such as Amnesty International, the International Commission of Jurists or the ICRC, irrespective of the latter's standing in international law) does not constitute a procedure of international investigation or settlement within the meaning of article 5, paragraph 2 (*a*), of the Optional Protocol. Thirdly, the Human Rights Committee ascertained that, although the individual cases of the alleged victims had been submitted to IACHR (by an unrelated third party) and registered before that body, collectively, as case No. 9015, that case was no longer under consideration. Accordingly, the Human Rights Committee concluded that it was not barred by the provisions of article 5, paragraph 2 (*a*), of the Optional Protocol from considering the communications.

9.2. With regard to article 5, paragraph 2 (*b*), of the Optional Protocol, the Committee noted that the State party did not challenge the author's contention that there were no effective legal remedies to exhaust. The Committee recalled that it had already established in numerous other cases that exhaustion of domestic remedies could be required only to the extent that these remedies were effective and available within the meaning of article 5, paragraph 2 (*b*), of the Optional Protocol. Accordingly, the Human Rights Committee concluded that it was not barred by the provisions of article 5, paragraph 2 (*b*), of the Optional Protocol from considering the communications.

10.1. On 10 April 1984, the Human Rights Committee therefore decided:

1. That the communications were admissible;

2. That, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it. These should include copies of the death certificates and medical reports and of reports of whatever inquiry has been held in connection with the deaths of John Khemraadi Baboeram, André Kamperveen, Cornelis Harold Riedewald, Gerald Leckie, Harry Sugrim Oemrawsingh, Somradj Robby Sohansingh, Lesley Paul Rahman and Edmund Alexander Hoost.

10.2. The Committee also decided, pursuant to rule 88 (2) of its provisional rules of procedure, to deal jointly with all eight communications, i.e. communications Nos. 146/1983 and 148/1983 to 154/1983.

11.1. In response to the Committee's request for explanations or statements in accordance with article 4, paragraph 2, of the Optional Protocol the State party submitted a note, dated 12 November 1984, a death certificate, issued by the medical staff of the University Hospital in Suriname on 25 October 1984, and a copy of Suriname's observations dated September 1983, on a report prepared by the Inter-American Commission on Human Rights on the human rights situation in Suriname, following an IACHR visit to Suriname from 20 to 24 June 1983.

11.2. In its note of 12 November 1984, the State party indicates that the investigation of the Special Rapporteur on summary or arbitrary executions, Mr. Amos Wako, temporarily deferred in 1983, was finalized during the period of 17 to 21 July 1984. "[T] his important investigation concentrated on the unfortunate occur-

rences of 8 and 9 December 1982, the causes of these occurrences, the plans to promote democratization of the Surinamese society, as well as the maintenance of the constitutional state in our society and the measures taken to prevent a repetition of the occurrences referred to before."[2]

11.3. In the relevant parts of Suriname's observations on the IACHR report the State party notes:

> The right to life is only being discussed in connection with the death of 15 persons early in December 1982, whereas this right comprises much more. The Surinamese authorities deeply regret the death of these persons not because they are said to be of "National Stature" but because they were citizens of this country . . .
>
> It is regretted that the IACHR hardly pays any attention to the information supplied on the Surinamese side concerning the developments of Suriname regarding the occurrences of early December 1982. Beforehand, the reply of the Surinamese authorities seems to be regarded as of no importance, whereas great value is attached to information of the "responsible sources". . .
>
> Again and again the oppositional view is being given which leads to the Committee's conclusion that 15 prominent Surinamese citizens have been eliminated because they led a critical movement for the return to democracy. Nowhere is the analysis objectively and systematically entertained which has been expressed in official talks, about the part which the deceased played in the planning of the overthrow of the legal authority.
>
> See . . . the intensified continuation of these attempts with mercenaries after 8 December 1982 as well as the CIA disclosures about this matter.

12.1. On 3 January 1985, the author of communication No. 146/1983, Kanta Baboeram-Adhin submitted her comments on the State party's submission under article 4, paragraph 2, of the Optional Protocol. Identical comments were submitted by the author of communication No. 151/1983, Vidya S. Oemrawsingh-Adhin, on 5 January 1985.

12.2. In their comments the authors claim that the State party has failed to clarify the matters placed before the Human Rights Committee by the authors and that no information has been given about measures taken to remedy the alleged violations. The authors further point out that the official version of the killings had maintained that the victims had been shot while trying to escape. However, "in a recent interview with a well-known Dutch magazine 'Elsevier' the military leader, also the highest authority in Suriname, admits that the victims were executed and that it was a matter of 'their lives or ours' and that 'we killed them first before they could kill us' ".

13.1. The Human Rights Committee has considered the present communications in the light of all information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol. The Committee bases its views on the following facts, which are not in dispute or which are unrefuted by the State party.

13.2. In the early hours of 8 December 1982, 15 prominent persons in Paramaribo, Suriname, including journalists, lawyers, professors and businessmen, were arrested in their respective homes by Surinamese military police and subjected to violence. The bodies of these 15 persons, among them eight persons who close relatives are the authors of the present communications, were delivered to the mortuary of the Academic Hospital, following an announcement by Surinamese authorities that a coup attempt had been foiled and that a number of arrested persons had been killed while trying to escape. The bodies were seen by family members and other persons who have testified that they showed numerous wounds. Neither autopsies nor official investigations of the killings have taken place.

14.1. In formulating its views, the Human Rights Committee also takes into account the following considerations, which reflect a failure by the State party to furnish the information and clarifications requested by the Committee. The Committee notes that the death certificate submitted by the State party is dated nearly two years after the killings and does not indicate whether the medical doctors who signed the certificate had carried out any autopsies or whether they had actually seen the bodies. The death certificate merely confirms that "on 9 December 1982 the following persons died, probably as a result of gunshot wounds . . . ".

14.2. In operative paragraph 2 of its decision on admissibility of 10 April 1984, the Committee requested the State party to forward copies of medical reports and of reports of whatever inquiry has been held in connection with the deaths of the eight named victims. No such reports have been received by the Committee. In this connection, the Committee stresses, as it has done in a number of other cases (e.g. Nos.30/1978, 84/1981) that it is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by evidence submitted by the authors and where further clarification of the cases depends on information exclusively in the hands of the State party, the Committee may consider the authors' allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party.

14.3. Article 6 (1) of the Covenant provides:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

The right enshrined in this article is the supreme right of the human being. It follows that the deprivation of life by the authorities of the State is a matter of the utmost gravity. This follows from the article as a whole and in particular is the reason why paragraph 2 of the article lays down that the death penalty may be imposed only for the most serious crimes. The requirements that the right shall be protected by law and that no one shall be arbitrarily deprived of his life mean that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State. In the present case it is evident from the fact that 15 prominent persons lost their lives as a result of the deliberate action of the military police that the deprivation of life was intentional. The State party has failed to submit any evidence proving that these persons were shot while trying to escape.

15. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the In-

[2] The report of the Special Rapporteur of the Commission on Human Rights on summary or arbitrary executions was submitted to the forty-first session of the Commission (document E/CN.4/1985/17). Annex 5 to the report deals with the Special Rapporteur's visit to Suriname.

ternational Covenant on Civil and Political Rights, is of the view that the victims were arbitrarily deprived of their lives contrary to article 6 (1) of the International Covenant on Civil and Political Rights. In the circumstances, the Committee does not find it necessary to consider assertions that other provisions of the Covenant were violated.

16. The Committee therefore urges the State party to take effective steps (i) to investigate the killings of December 1982; (ii) to bring to justice any persons found to be responsible for the death of the victims; (iii) to pay compensation to the surviving families; and (iv) to ensure that the right to life is duly protected in Suriname.

Communication No. 147/1983

Submitted by: Felicia Gilboa de Reverdito (victim's aunt) on 5 July 1983, later joined by Lucia Arzuaga Gilboa as co-author
Alleged victim: Lucía Arzuaga Gilboa
State party: Uruguay
Date of adoption of views: 1 November 1985 (twenty-sixth session)

Subject matter: Detention of Uruguayan civilian by military authority

Procedural issues: Confirmation of allegations by victim—Exhaustion of domestic remedies—Failure of investigation of allegations by State party—Burden of proof—Unsubstantiated allegations.

Substantive issues: Detention incommunicado—Prison conditions—Torture—Prompt security measures—Effective remedy—Ill-treatment of detainees—Release of victim from imprisonment

Articles of the Covenant: 7, 10 (1) and 14
Articles of the Optional Protocol: 4 (2) and 5 (2) (b)

1. The original author of the communication (initial letter dated 5 July 1983 and further letters of 26 September 1983, 20 March and 15 September 1984) is Felicia Gilboa de Reverdito, a Uruguyan national living in France at the time of submission and now residing again in Uruguay. She submitted the communication on behalf of her niece, Lucía Arzuaga Gilboa, a 26-year-old Uruguayan citizen and university student, who was detained in Uruguay from 15 June 1983 until 3 September 1984 and who was at the time of submission not in a position to present her case herself before the Human Rights Committee. She joined as co-author of the communication after her release (letters of 2 March and 14 October 1985). Felicia Gilboa de Reverdito alleged that her niece was a victim of violations of the following articles of the International Covenant on Civil and Political Rights: 7, 9, paragraphs 1 and 4, 10, paragraphs 1, 2 (*b*) and 3, 14, paragraphs 1, 2 and 3 (*a*) (*c*), (*d*) and (*g*), 15, paragraph 1, 17, paragraph 1, 18, paragraph 1, 19, paragraphs 1 and 2, 22, paragraphs 1 and 2, 25 and 26.

2.1. Felicia Gilboa de Reverdito described the relevant facts as follows: her niece was arrested in Montevideo on 15 June 1983. She was kept incommunicado until 30 June 1983 and during that period her whereabouts were unknown. On 30 June 1983 she reappeared at the Police Headquarters in Montevideo, having been brought to trial (*procesada*) on charges of "subversive association".

2.2. Regarding the circumstances of her niece's arrest, Mrs. Reverdito pointed out that she had been involved in students' activities, that since June 1983 many arrests of students had taken place in Montevideo, that more than 30 such cases were already known and that it was the Government's policy to suppress any attempt to form students' associations.

2.3. Mrs. Reverdito stated that Lucia Arzuaga Gilboa suffered from the consequences of meningitis contracted in 1982 and required special medical treatment.

2.4. Mrs. Reverdito further claimed that there were no effective domestic remedies available to her niece because:

(*a*) *Habeas corpus* was not available for those arrested under the "prompt security measures";

(*b*) The entire procedure before the military courts was in violation of article 14 of the Covenant and therefore remedies available under criminal military law were equally defective;

(*c*) The remedy of appeal against the indictment (*apelación contra el auto de procesamiento*) was in fact inapplicable since the Supreme Court of Justice had never accepted such an appeal.

2.5 Mrs. Reverdito finally stated that her niece's case had not been submitted to another procedure of international investigation or settlement.

3. By its decision of 27 July 1983, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party, requesting information and observations relevant to the admissibility of the communication and asking the State party to provide the Committee with copies of any court orders or decisions relevant to the case and to inform the Committee of the state of health of Lucía Arzuaga Gilboa. The author was also requested to furnish detailed information in support of her allegations of violations of the Covenant, including the complaint that "the entire procedure before the military courts is in violation of article 14 of the Covenant and therefore remedies available under military criminal law are equally defective".

4.1. In response to the Working Group's request, Mrs. Reverdito, on 26 September 1983, furnished additional information which she claimed had not been in her possession at the time when she had submitted the initial letter.

4.2. With respect to article 14 of the Covenant, Mrs. Reverdito made detailed submissions on the provisions which she claimed were violated by proceedings before Uruguayan military courts. Moreover, she claimed that pursuant to a decree of June 1973, the publication of any judgements of military courts was expressly prohibited.

4.3. With respect to alleged violations of articles 7 and 10, paragraph 1, of the Covenant, Mrs. Reverdito claimed that her niece had been subjected to torture and various forms of cruel and degrading treatment:

> This happened almost continuously during the period when she was held incommunicado, i.e., from her arrest until the submission of her case to the military court, a period 15 days. This period was devoted wholly to subjecting the large group of young university students arrested with my niece to the most cruel treatment, with a view to extracting "confessions" concerning political activities or concerning adherence to persecuted ideologies. All the interrogations and all the "documents" which the authorities attempted to force them to sign dealt exclusively with questions of this type.
>
> I am now in a position to describe in some detail the main types of ill-treatment to which my niece has been subjected:
>
> (*a*) *Physical violence* was a constant part of the treatment, beginning at the time of arrest. My niece was brutally beaten at that time, on the street itself and in full view of passers-by;
>
> (*b*) The *"electric prod"*, particularly in the genital region;
>
> (*c*) *Stringing up.* My niece was strung up, handcuffed, by the chain of her handcuffs. This was carried out in an open yard, in mid-winter, with the victim naked, and happened only once. As a result, she lost consciousness, so that she is unable to say how long she was kept in that position;
>
> (*d*) *Various forms of continuous degradation and violence*, such as always having to remain naked with the guards and torturers, threats and insults and promises of further acts of cruelty.
>
> I am unable to state specifically the *effect and result* of this treatment in the case of my niece, because it has not yet been possible to obtain any clinical information or to have her examined by a reliable doctor. However, there are a number of symptoms which give cause for alarm in this regard. After being strung up, as described above, my niece suffered attacks of vomiting and other symptoms, as a result of which she was taken on a number of occasions, after her trial and transfer to her current place of imprisonment, for examinations, the nature and results of which it has not been possible to ascertain. It is known, however, that some of the examinations involved electroencephalograms. In this regard, it should be borne in mind that, as I stated in my initial communication, my niece contracted meningitis last year. The blows to the head which she received were therefore particularly dangerous in her case.

4.4. Mrs. Reverdito further claimed that her niece was held at the political prison for women at Punta de Rieles (Military Detention Establishment No. 2), 13 kilometres from Montevideo, that the treatment which she was receiving there was in gross violation of the standards provided for in the Covenant (and in the Uruguayan Constitution). The methods used were allegedly intended gradually to destroy the personalities of detainees by continuously assaulting their psychological equilibrium and undermining their physical integrity; "The means employed there do not involve direct brutal torture, but are calculated to work slowly, gradually and cumulatively. They involve deliberately arbitrary treatment, continuous harassment, inadequate nutrition, physical labour and other forms of harsh treatment which produce long-term effects."

5. In its submission under rule 91, dated 31 January 1984, the State party commented on the author's initial communication and also on her further submission of 3 November 1983, and informed the Committee that Lucía Arzuaga Gilboa had been brought to trial for the offence of "subversive association", provided for in article 60 (V) of the Military Criminal Code, and that no judgement had yet been rendered at first instance. "Consequently, the Government of Uruguay, in accordance with article 5, paragraph 2 (*b*), of the Optional Protocol to the International Covenant on Civil and Political Rights, opposes the admissibility of the communication in question on the grounds that, given the stage which the trial proceedings have reached, remedies are still available under the relevant internal legislation. The Committee is informed, however, that the state of health of Arzuaga Gilboa is good."

6. In a further letter dated 20 March 1984, Mrs. Reverdito reiterated that there were no internal remedies which could have been applied effectively and that the military criminal proceedings themselves constituted a breach of the guarantees laid down in article 14 of the Covenant.

7.1. When considering the question of admissibility of the communication, the Committee found, on the basis of the information before it, that it was not precluded by article 5, paragraph 2 (*a*), of the Optional Protocol from considering the communication, as the author's indication that the same matter had not been submitted to another procedure of international investigation or settlement was not contested by the State party.

7.2. With regard to article 5, paragraph 2 (*b*), of the Optional Protocol, the Committee took note of the State party's assertion that remedies were still available under the relevant Uruguayan legislation. The Committee also noted, however, that Mrs. Reverdito's allegations concerned not only possible irregularities in the pending trial proceedings, but also instances of torture and ill-treatment as to which the State party had not contended that there were available remedies. Moreover the Committee had established in numerous other cases that domestic remedies must be effective and "available" within the meaning of article 5, paragraph 2 (*b*), of the Optional Protocol (R.16/66, R.21/84, etc.). This entails that procedural guarantees for "a fair and public hearing by a competent, independent and impartial tribunal" must be scrupulously observed. With respect to alleged violations of article 14 of the Covenant, the Committee considered the author's submissions in substantiation of her allegation that "the entire procedure before the military courts is in violation of article 14 of the Covenant", but it found that, in view of the fact that the trial proceedings had not yet been completed, it could not be claimed at that stage that Lucía Arzuaga Gilboa had already personally become a victim of violations of that article. With respect to alleged violations of articles 7 and 10, paragraph 1, of the Covenant, the Committee noted that Mrs. Reverdito had made specific allegations as to instances of torture and ill-treatment which Lucía Arzuaga Gilboa had purportedly endured; in this connection, the Committee recalled numerous other cases where the authors had made specific allegations of torture and the State party

failed to establish that there were effective remedies available. Similarly, in this case, the State party had not informed the Committee concerning the remedies available to Lucía Arzuaga Gilboa with respect to her allegation of being a victim of torture. The Committee stressed, moreover, that it was implicit in the Covenant and in the Optional Protocol that the State party had the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities. Accordingly, with respect to the allegations of violations of articles 7 and 10, paragraph 1, of the Covenant, the Committee found that the communication was not inadmissible under article 5, paragraph 2 (*b*), of the Optional Protocol. The Committee observed that its decision could be reviewed in the light of further explanations which the State party might submit under article 4, paragraph 2, of the Optional Protocol, giving specific details of domestic remedies claimed to have been available to the alleged victim, together with evidence that there would be a reasonable prospect that such remedies would be effective. The Committee also observed that other alleged breaches of various articles of the Covenant had not been satisfactorily substantiated.

8. On 12 April 1984 the Human Rights Committee therefore decided:

(1) That the communication was admissible with respect to allegations of violations of articles 7 and 10, paragraph 1, of the Covenant;

(2) That, in accordance, with article 4, paragraph 2, of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter in so far as allegations of violations of articles 7 and 10, paragraph 1, of the Covenant are concerned and the remedy, if any, that may have been taken by it;

(3) That the State party be informed that the written explanations or statements submitted by it under article 4, paragraph 2, of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to perform its responsibilities, it required specific responses to the allegations which had been made by the author of the communication and the State party's explanations of the actions taken by it.

9. In a further letter of 15 September 1984, Mrs. Reverdito informed the Committee that her niece had been released from detention in Uruguay on 3 September 1984. She stated, however, that her niece continued to suffer from restrictions upon her rights, in particular her political rights. She requested the Committee to continue consideration of the case and to adopt its views on the substance of the matter.

10. By a letter dated 2 March 1985, Lucía Arzuaga confirmed that it was her wish that the Committee continue consideration of her case. In a further letter, dated 14 October 1985, she confirmed the description of the facts, set out in paragraphs 2.1 to 2.4 and 4.2 to 4.4 above.

11. In its submission under article 4, paragraph 2, of the Optional Protocol dated 28 September 1984, the State party confirmed that Lucía Arzuaga had been provisionally released on 3 September 1984. It offered no further details.

12. When adopting its decision on admissibility on 12 April 1984, the Committee observed that the decision could be reviewed in the light of further explanations which the State party might submit under article 4, paragraph 2, of the Optional Protocol with respect to the allegations of violations of articles 7 and 10, paragraph 1, of the Covenant. The Committee notes in this regard that no details have been furnished to it of any domestic remedies claimed to have been available to the alleged victim at the material time. The Committee therefore sees no reason for reviewing its decision on admissibility.

13.1. The Human Rights Committee, having examined the present communication in the light of all the information made available to it by the parties as provided in article 5, paragraph 1, of the Optional Protocol, hereby decides to base its views on the following facts, which appear uncontested.

13.2. Lucía Arzuaga Gilboa was arrested in Montevideo on 15 June 1983 and kept incommunicado at an unknown place of detention until 30 June 1983. During this period she was subjected to torture (beatings, "electric prod", stringing up) and her whereabouts were unknown. On 30 June 1983 she reappeared at the Police Headquarters in Montevideo. She was charged with the offence of "subversive association" and taken to the prison of Punta de Rieles (Military Detention Establishment No. 2). She was released on 3 September 1984.

14. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee, disclose violations of the Covenant, in particular:

Article 7, because Lucía Arzuaga Gilbao was subjected to torture and to cruel and degrading treatment in the period between 15 and 30 June 1983; and

Article 10, paragraph 1, because she was held incommunicado for a period of 15 days and subjected to inhuman prison conditions for 14 months until her release in September 1984.

15.1. The Committee, accordingly, is of the view that the State party is under an obligation to take effective measures to remedy the violations which Lucía Arzuaga has suffered and to grant her compensation.

15.2. The State party has provided the Committee with a number of lists indicating the names of persons released from prison since August 1984 and until the newly elected Government came to power on 1 March 1985. The Committee has further learned that, pursuant to an amnesty law enacted by the new Government on 8 March 1985, all political prisoners have been released and all forms of political banishment have been lifted. The Committee expresses its satisfaction at the measures taken by the State party towards the observance of the Covenant and co-operation with the Committee.

Communication No. 155/1983

Submitted by: Eric Hammel on 1 August 1983
Alleged victim: The author
State party: Madagascar
Date of adoption of views: 3 April 1987 (twenty-ninth session)

Subject matter: Expulsion of Malagasy barrister of French nationality from Madagascar—Human Rights lawyer

Procedural issues: Exhaustion of domestic remedies—Unreasonably prolonged remedies—Effective remedies—Sufficiency of State party's reply under article 4 (2)

Substantive issues: Arbitrary arrest—Detention incommunicado—Habeas corpus—*Expulsion order—Denial of right to challenge expulsion order—Scope of article 13 of the Covenant—General comment on the position of aliens under the Covenant—National security*

Articles of the Covenant: 2, 9 (4) and 13
Article of the Optional Protocol: 5 (2) (b)

1. The author of the communication (initial letter dated 1 August 1983 and further letters of 12 December 1983, 18 September and 17 October 1985, 30 May and 18 August 1986 and 25 February 1987) is Maître Eric Hammel, a French national and resident of France, formerly a practising attorney in Madagascar until his expulsion in February 1982. He claims to be a victim of violations by the State party of articles 9, 13 and 14 of the International Covenant on Civil and Political Rights. He also alleges a breach of article 2, paragraph 3 (*b*), of the Covenant.

2.1. Maître Hammel states that he was called to the Madagascar bar in May 1963 and practised law at Antananarivo. He claims to have built up over a period of 19 years one of the best law practices in Madagascar and that he defended the principal leaders of the Malagasy political opposition as well as other political prisoners. He alleges that on two occasions, in 1980 and 1981, he was detained by DGID (Malagasy political police) and released after one day of questioning. On 8 February 1982, the political police arrested him again at his law office, kept him in incommunicado detention in a basement cell of the prison of the political police and subsequently deported him from Madagascar on 11 February 1982, giving him only two hours to pack his belongings.

2.2. With regard to the exhaustion of domestic remedies, the author alleges that on 1 March 1982 he applied to the Malagasy Ministry of the Interior for the abrogation of the expulsion order as illegal and unfounded. In the absence of any response from the Ministry, the author formally applied to the Administrative Chamber of the Supreme Court of Madagascar on 10 June 1982 requesting abrogation of the expulsion order.

2.3. The author alleges certain interference with his correspondence by the Malagasy postal services and governmental interference in various court proceedings in which he was engaged.

2.4. It is claimed that the proceedings started by the author were deliberately paralysed by the Malagasy Government in violation of domestic laws and of the International Covenant on Civil and Political Rights. In this connection the author substantiates his allegations as follows:

Article 13: After 19 years as a member of the Madagascar bar, I was expelled from Madagascar as a French national by order of 11 February 1982, with 24 hours' notice. I was notified of the order on 11 February 1982 and there was a plane leaving at 8 p.m. I had two hours to pack my baggage at my home under surveillance by political police officers. I thus had no opportunity to avail myself of any of the remedies of appeal against the expulsion order that are provided for by law. When I later applied to the Administrative Chamber of the Supreme Court to have the expulsion order repealed, the proceedings . . . were thwarted by the Government.

. . .

Article 14, paragraph 1: The Government has prevented the courts and tribunals from reviewing and ruling on the appeals and charges I have filed . . ., although the Covenant provides that everyone shall be entitled in a suit at law to a hearing by the competent tribunal.

3. By its decision of 6 April 1984, 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. The Committee also requested the State party to forward copies of any court orders or decisions relevant to the case.

4. The deadline for the State party's submission under rule 91 of the Committee's provisional rules of procedure expired on 14 July 1984. No submission was received from the State party prior to adoption of the Committee's decision on admissibility on 28 March 1985.

5.1. With regard to article 5, paragraph 2 (*a*), of the Optional Protocol, the Committee noted that it had not received any information that the subject-matter had been submitted to another procedure of international investigation or settlement.

5.2. With regard to article 5, paragraph 2 (*b*), of the Optional Protocol, the Committee was unable to conclude, on the basis of the information before it, that there were effective remedies which the alleged victim should have pursued.

6. On 28 March 1985, the Human Rights Committee decided that the communication was admissible. In accordance with article 4, paragraph 2, of the Optional Protocol, the State party was requested to submit to the Committee, within six months of the date of the transmittal to it of the decision on admissibility, written explanations or statements clarifying the matter and the remedy, if any, that might have been taken by it.

7.1. By letter dated 18 September 1985, the author submitted further clarification of the facts outlined in his original communication, in particular with respect to his arrest on 8 February and expulsion on 11 February

1982. He describes the search of his law offices carried out by the Malagasy political police on 8 February 1982 and continues:

On the conclusion of the search, I was taken away by officers of the Malagasy political police and held in a basement cell in the Malagasy political police prison . . . I was then informed that, in fact, I was suspected of being an international spy in view of my contacts and communications with Amnesty International and the Human Rights Committee since, according to the Malagasy political police, those contacts constituted the crime of international espionage. Consequently, from 8 to 11 February 1982, I was questioned solely about that alleged crime of international espionage and my contacts with the above-mentioned organizations. During that period, I was detained in the Malagasy political police prison (in an unlit, underground cell measuring 1.50 metres by 2.50 metres with no sanitary facilities and containing only a wooden platform on which to sleep) in the strictest solitary confinement, prohibited from contacting a fellow lawyer, the Catholic chaplain or my family and from receiving, writing or sending letters . . . In the early afternoon of 11 February 1982, . . . I . . . was notified of the expulsion order, No. 737/82 of 11 February 1982, issued against me. . . . In the early evening of Thursday, 11 February 1982, I was escorted back to my home and office where I was permitted to pack my belongings under the surveillance of two officers of the Malagasy political police. However, I was forbidden to contact anyone. I was then driven to the airport at Antananarivo in a Malagasy political police (DGID) vehicle guarded by the two police officers (reinforced by four soldiers armed with sub-machine-guns) and was immediately taken on board the aircraft leaving for Paris in the late evening of 11 February 1982. Even the representative of the French Embassy was not allowed to contact me at the airport . . . Although I was arrested for so-called conspiracy, I was immediately informed that I was actually suspected of being an international spy. However, I was never indicted or brought before a magistrate on that charge.

7.2. These facts, the author alleges, also constitute a violation of article 9 of the International Covenant on Civil and Political Rights.

8.1. In its submission under article 4, paragraph 2, of the Optional Protocol, dated 27 September 1985, the State party objected to the admissibility of the communication, arguing that domestic remedies had not yet been exhausted. In particular, the State party rejected the author's allegations that the Government of Madagascar had "deliberately paralysed" (*délibérément paralysées*), the author's legal proceedings, stating that:

As regards the two applications lodged with the Administrative Chamber, the application concerning the Postal Administration will be placed on the case list very shortly. The application for abrogation of the expulsion order is, however, held up at the present time because Maître Eric Hammel has not received the last memoranda from the State. The latter were returned by the French postal service, with the envelopes marked "not resident at the address indicated 9202". The Court regards Maître Eric Hammel's reply to those memoranda as essential for the settlement of the dispute . . .

These facts make it quite clear that the inquiries into the cases involving Maître Eric Hammel have always taken a normal course without any move on the part of the Malagasy Government to interfere with them.

Furthermore, Maître Eric Hammel never took the trouble to find out from the court concerned what stage had been reached in the proceedings instituted by him. If he felt that the court or judge was guilty of gross professional negligence by failing to deal with his application or suit, or that there was a denial of justice, he was free to make use of the procedure for claiming damages for miscarriage of justice as provided for under articles 53 to 63 of the Malagasy Code of Civil Procedure.

8.2. As to the merits, the State party denied the alleged violation of article 13 of the Covenant, arguing that Maître Hammel had been expelled in pursuance of a decision reached in accordance with Malagasy law, i.e ., on the basis of an order from the Minister of the Interior acting pursuant to article 14 of Act No. 62-006 of 6 June 1962, which stipulates that "expulsion may be ordered by decision of the Minister of the Interior if the residence of the alien in Madagascar may give rise to a breach of the peace or threatens public security".

8.3. With respect to the requirement of article 13 that an alien subject to expulsion be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority, the State party makes reference to articles 15 and 16 of Act No. 62-006, pursuant to which Maître Hammel could have requested a review of his case:

At no point, however, did Maître Eric Hammel make any such request. He preferred to make use of the administrative remedy and to apply to the Minister of the Interior. In the absence of any response on the part of the latter, he took his case directly to the Administrative Chamber of the Supreme Court where he was able to make his submissions for the defence without restriction. Under Malagasy administrative case law, the Administrative Chamber of the Supreme Court is competent to question the lawfulness of an expulsion measure not only from the legal standpoint but also from the standpoint of the material facts on the grounds of which the Administration took the measure.

8.4. Concerning the alleged violation of the provisions of article 2, paragraph 3 (*b*), and of article 14, paragraph 1, of the Covenant, the State party notes:

This accusation is unfounded and is not substantiated by any evidence. It is not part either of the principles or of the practice of the Malagasy Government to obstruct the course of justice in any way. Not for the first time, or for the last, has an administrative act been the subject of appeal and the Administrative Chamber of the Supreme Court had before it an application for the abrogation of an administrative decision. Since attaining independence, the Malagasy State has always upheld the principle of legality and the subordination of the Administration to the law. The Administrative Chamber was established with a view to ensuring supervision of administrative acts; it has not hesitated to order the annulment of irregular measures on a number of occasions.

9.1. In his comments, dated 17 October 1985, the author denies the State party's assertion that he had the possibility of challenging his expulsion before a special commission provided for by Act No. 62-006. After reiterating the circumstances of his arrest and detention, the author indicates that early in the afternoon of 11 February 1982 he was taken from his cell to the offices of the political police, where he was served a notification of his expulsion. He continues:

I was then taken back to the cell, from which I was removed again at about 6 p.m. and taken home under the supervision of two inspectors of the political police to pack my bags and then taken by the same inspectors, assisted by four soldiers armed with sub-machine-guns, to the airport and placed directly aboard the aircraft about to take off for Paris. In addition, the expulsion order notified to me on Thursday, 11 February 1982, at 2 p.m. provided for a deadline of 24 hours, which was thus to expire on Friday, 12 February at 2 p.m. There is a flight to France on Thursdays at 8 p.m. and another on Saturdays at 8 p.m. I was taken *manu militari* to the aircraft on Thursday, 11 February, but it would obviously have been impossible for me to take the Saturday flight since the expulsion deadline was 2 p.m. on Friday. It was thus materially impossible for me, as a result of the arrangements made by the political police, to use the remedies provided for by Act No. 62-006, since the period of eight days provided for by that Act would have ended on 19 February 1982 at 2 p.m., whereas the deadline for expulsion was 2 p.m. on 12 February 1982, and I was officially placed aboard the aircraft by the political police on the evening of 11 February 1982 and prevented from communicating with anybody whatsoever from the notification of the expulsion until my departure. The arrangements made by the Malagasy political police had precisely the purpose of preventing me from making use of the remedies against expulsion.

9.2. Finally, with respect to the State party's assertion that the proceedings were delayed by the author's change of address in France, Maître Hammel encloses as evidence copies of seven registered letters with his letterhead and exact address (including a specific indication as to his change of address), four of which are addressed to the President of the Administrative Chamber of the Supreme Court (dated 17 January 1983, 7 April 1983, 2 April 1985 and 10 April 1985) and three addressed to the Dean of the Examining Magistrates of the Antananarivo Court (dated 12 December 1982, 7 April 1983 and 2 April 1985). Maître Hammel alleges that all of these letters have remained unanswered, in some cases for more than three years, and he concludes that:

> From the end of 1982 or the beginning of 1983, the relevant branches of the Malagasy judiciary had my exact address and could have sent me or informed me of any documents, but have done nothing . . . These letters are, moreover, requests for information concerning the proceedings in progress and the argument of the Malagasy party that I had never taken the trouble to find out what stage had been reached in the proceedings is thus negated by this evidence which shows, on the contrary, that the Malagasy judiciary was not prepared to inform me of the stage reached in the proceedings I had instituted.

10. In its further observations under article 4, paragraph 2, dated 13 January 1986, the State party again rejects the author's contention that the Government of Madagascar tried to paralyse the judicial proceedings commenced by him and reaffirms the independence of the Malagasy judiciary. According to the State party, the procedural delays in the case are attributable to the fact that the author is outside Madagascar.

11. In an interim decision dated 2 April 1986 the Human Rights Committee, noting the State party's observation that Maître Hammel could have sought review of the expulsion order pursuant to Act No. 62-006, requested the author to clarify further why he did not pursue this remedy from France during the week from 12 to 19 February 1982, i.e. within the time-limit provided for in the law.

12. In a reply dated 30 May 1986, Maître Hammel explains that article 15 of Act No. 62-006 provides for an administrative or voluntary remedy in respect of a contested decision. This, he states, involves the lodging of an appeal with the authorities calling for an administrative review of the decision in question and, under Malagasy law, has the effect of staying execution of the decision, since the aim is to bring about a review of the decision, with a view to its repeal before it is put into effect. The administrative appeal thus provides that the individual concerned is brought before and is heard by a special commission, which gives an opinion, with the final ruling being made by the Minister of the Interior. Once the expulsion has been carried out, the possibility of being heard by the commission no longer exists. Because of the circumstances of his detention and the rapidity of his expulsion, the author states, he was unable to lodge an appeal under Act No. 62-006 before he was expelled on 11 February 1982. Upon his arrival in France on 12 February 1982, he adds, an appeal under Act No. 62-006 had become pointless, as he could no longer be brought before and heard by the commission. Consequently, he opted for contentious appeal before the Administrative Chamber of the Supreme Court to obtain the cancellation of the expulsion order.

13.1. In its interim decision the Committee also requested the State party "to indicate when the proceedings lodged by Maître Eric Hammel before the Administrative Chamber of the Supreme Court are expected to be concluded, if pursued in a timely fashion by the parties" and "further to inform the Committee as to the reasons for Maître Eric Hammel's expulsion at such short notice, without his being able to seek review of the decision to expel him prior to his expulsion."

13.2. By note of 5 July 1986 the State party informed the Committee that a ruling on Maître Hammel's application requesting the cancellation of the expulsion order should be made in July 1986. With regard to the urgency of the enforcement of the expulsion order, the State party submits that, under Malagasy legislation, an order for the expulsion of an alien may be enforced at short notice, that the Minister of the Interior is alone responsible for deciding how soon an expulsion order will be enforced, that a unilateral decision by the Administration is enforceable as soon as it has been signed, and that Maître Hammel's expulsion was linked to a case of conspiracy against the security of the State tried in January 1982.

14. In a letter dated 20 August 1986, the author commented on the State party's reply to the interim decision as follows:

> The Malagasy State acknowledges having expelled me with such haste that I was prevented from pursuing the remedies provided for by law . . . The Malagasy State maintains that I was expelled for having been involved in a plot in January 1982 . . . I was in fact arrested allegedly because of this plot, but on my arrival at the political police prison I was informed that I had been arrested on those alleged grounds only in order that I might be detained without limitation of time in the political police prison and that in fact I had been charged with international espionage because of my contacts with Sean MacBride, Chairman of the International Executive Committee of Amnesty International, and with the Human Rights Committee in Geneva . . .

The author further claims that already in February 1980 the chief of the political police, in the presence of witnesses, threatened him with expulsion for "having defended persons accused of political offences and having obtained their discharge . . . I was summoned on 1 March 1980 . . . by the political police and questioned the whole day, before being released in the evening. I was again summoned by the political police on 4 November 1980 and questioned the whole day before being released."

15. In a further submission dated 13 January 1987, the State party, commenting on the author's allegations, observes that "Maître Hammel continues to make deceitful and tendentious assertions with the intention of discrediting the Malagasy Government and judicial authorities." The State party also enclosed a copy of the text of the decision of the Administrative Chamber of the Supreme Court of Madagascar, dated 13 August 1986. As to the grounds for Maître Hammel's expulsion, the Court observes, *inter alia*, as follows:

> Whereas it is apparent from the investigation that Mr. Eric Hammel, making use both of his status as a corresponding member of Amnesty International and of the Human Rights Committee [*sic*] at Geneva, and as a barrister, of his own free will took the liberty of discrediting Madagascar by making assertions of such gravity that they should have been upheld by irrefutable evidence; whereas this has

not always been the case; whereas this is also true of the assertion in his most recent memorandum that the camp of Tsiafaha, situated approximately 20 km south of Antananarivo on the Antsirabe road is obviously a camp for political prisoners, although the person in question has not been able to supply the slightest proof for his allegations that any internment has actually taken place; whereas, in addition, it is apparent from the documents in the case file that the applicant did not fail to inform his acquaintances abroad of the situation in Madagascar, blackening it to his convenience, without any concern for the difficult environment prevailing in the country, regardless of any assessment of the nature of the régime itself.

Whereas conduct of this type was *per se* incompatible with the status of an alien and gave rise to the greatest suspicions as to the applicant's real intentions; whereas the Minister of the Interior was therefore right to have considered it his duty to proceed to the expulsion of Mr. Eric Hammel, in so far as his continued presence in Madagascar would have disturbed public order and security.

The court therefore rejected Maître Hammel's application to quash the expulsion order of 11 February 1982 and ordered him to pay costs.

16. In a further letter of 25 February 1987, the author observes that the State party has failed to give any valid reasons for his expulsion and none whatever for such urgency on the grounds of national security as could have justified imediate execution of the expulsion order. He emphasizes the relevance of his prior allegation that the chief of the political police threatened him with expulsion in 1980 because of his human rights activities and states that, in spite of such intimidation and two arrests by the political police in 1980, he pursued his profession as a human rights lawyer. He denies the State party's submission that he made false assertions about conditions in Madagascar, in particular at the camp of Tsiafaha, but admits that he saw it as his duty to bring to the attention of Amnesty International the conditions at Tsiafaha camp, which he considered to be in violation of human rights. He further states that the General Assembly of Malagasy Lawyers, in a resolution of 3 April 1982, protested against the conditions of his arrest and expulsion.

17. 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, paragraph 1, of the Optional Protocol. Before adopting its views, the Committee took into consideration the State party's late objection to the admissibility of the communication, but the Committee can see no justification for reviewing its decision on admissibility on the basis of the State party's contention that the author had not exhausted domestic remedies. It is clear that the author was expelled in circumstances which excluded an effective remedy under Act No. 62-006. The processing of the author's subsequent applications from France by registered communications to obtain the repeal of the expulsion order was delayed for over four years and, thus, was unreasonably prolonged in the sense of article 5, paragraph 2 (*b*), of the Optional Protocol.

18.1. The Committee therefore decides to base its views on the following facts which are undisputed or have not been refuted by the State party.

18.2. Maître Hammel is a French national and resident of France, formerly a practising attorney in Madagascar for 19 years until his expulsion on 11 February 1982. In February 1980 he was threatened with expulsion and was detained and interrogated on 1 March and again on 4 November 1980 in this connection. On 8 February 1982, he was arrested at his law office in Antananarivo by the Malagasy political police, who took him to a basement cell in the Malagasy political prison and kept him in incommunicado detention until 11 February 1982 when he was notified of an expulsion order against him issued on that same date by the Minister of the Interior. At that time he was taken under guard to his home where he had two hours to pack his belongings. He was deported on the same evening to France, where he arrived on 12 February 1982. He was not indicted nor brought before a magistrate on any charge; he was not afforded an opportunity to challenge the expulsion order prior to his expulsion. The proceedings concerning his subsequent application to have the expulsion order revoked ended with the decision of the Administrative Chamber of the Supreme Court of Madagascar, dated 13 August 1986, in which the Court rejected Maître Hammel's application and found the expulsion order valid on the grounds that Maître Hammel allegedly made "use both of his status as a corresponding member of Amnesty International and of the Human Rights Committee [sic] at Geneva, and as a barrister" to discredit Madagascar.

19.1. In this context, the Committee observes that article 13 of the Covenant provides, at any rate, that an alien lawfully in the territory of a State party "may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority".

19.2. The Committee notes that, in the circumstances of the present case, the author was not given an effective remedy to challenge his expulsion and that the State party has not shown that there were compelling reasons of national security to deprive him of that remedy. In formulating its views the Human Rights Committee also takes into account its general comment 15 (27),[1] on the position of aliens under the Covenant, and in particular points out that "an alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one".

19.3. The Committee further notes with concern that, based on the information provided by the State party (para. 15 above), the decision to expel Eric Hammel would appear to have been linked to the fact that he had represented persons before the Human Rights Committee. Were that to be the case, the Committee observes that it would be both untenable and incompatible with the spirit of the International Covenant on Civil and Political Rights and the Optional Protocol thereto, if States parties to these instruments were to take exception to anyone acting as legal counsel for persons placing their communications before the Committee for consideration under the Optional Protocol.

[1] *Official Records of the General Assembly, Forty-first Session, Supplement No. 40* (A/41/40), annex VI.

19.4. The issues raised in this case also relate to article 9, paragraph 4, of the Covenant, in the sense that, during his detention preceding expulsion, Eric Hammel was unable to challenge his arrest.

19.5. The Committee makes no findings with regard to the other claims made by the author.

20. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee disclose violations of the International Covenant on Civil and Political Rights with respect to:

Article 9, paragraph 4, because Eric Hammel was unable to take proceedings before a court to determine the lawfulness of his arrest;

Article 13, because, for grounds that were not those of compelling reasons of national security, he was not allowed to submit the reasons against his expulsion and to have his case reviewed by a competent authority within a reasonable time.

21. The Committee, accordingly, is of the view that the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations which Maître Hammel has suffered and to take steps to ensure that similar violations do not occur in the future.

Communication No. 156/1983

Submitted by: Katy Solórzano de Peña (author's sister) on 8 August 1983, later joined by Luis Alberto Solórzano as co-author
Alleged victim: Luis Alberto Solórzano
State party: Venezuela
Date of adoption of views: 26 March 1986 (twenty-seventh session)*

Subject matter: Detention of Venezuelan citizen by military authorities

Procedural issues: Confirmation of communication by victim after release—Events prior to entry into force of Covenant—Failure of investigation of allegations by State party—State party's duty to investigate—Exhaustion of domestic remedies—Non-participation of Committee member in decision—Burden of proof—Weight of evidence—Sufficiency of State party's reply under article 4 (2)—Inadmissibility ratione materiae *and* temporis

Substantive issues: Habeas corpus—*Fair hearing—Equality of arms—Examination of witnesses—Ill-treatment of detainees—Detention despite release order—Delay in proceedings—Amnesty—Release of victim from imprisonment*

Articles of the Covenant: 2, 9 (3), 10 (1) and 14 (3) (c)
Articles of the Optional Protocol: 4 (2) and 5 (2) (b)
Rule of Procedure: 85

1.1. The original author of the communication (initial letter, undated, received on 8 August 1983 and further letters of 9 September 1983 and 16 February 1984) is Katy Solórzano de Peña, a Venezuelan citizen, living in Caracas, Venezuela. She submitted the communication on behalf of her brother, Luis Alberto Solórzano, stating that he was imprisoned at the San Carlos military barracks (Cuartel San Carlos) in Venezuela and that he was unable to submit the communication himself. Mr. Solórzano was released by virtue of a Presidential Decree of 21 December 1984. In a letter to the Committee (undated), received on 27 June 1985, he joined as co-author of the communication.

1.2. Katy Solórzano stated that her brother (born on 8 November 1952) had been arrested at his home on 28 February 1977 without any warrant of arrest and that his house had been searched without a search warrant. She further stated that he had been subjected to severe torture and gave the names of five officers allegedly responsible, all of them members of the Dirección de los Servicios de Inteligencia y Prevención (DISIP). These events, as well as some of those described below, occurred before the entry into force of the Covenant and the Optional Protocol for Venezuela (10 August 1978).

1.3. Soon after Mr. Solórzano's arrest, a military tribunal ordered his detention on charges of having joined in armed rebellion. On 12 December 1977, he was indicted. In that connection, the prosecutor affirmed the existence of a clandestine armed movement, called "Grupo de Comandos Revolucionarios" which aimed to overthrow the Government of Venezuela through guerrilla warfare and which was responsible for the kidnapping of a citizen of the United States of America, William Frank Niehous, allegedly undertaken to obtain funds for the promotion of the Group's political activities. Katy Solórzano did not contest her brother's links with the Group, but only his participation in the kidnapping of Mr. Niehous.

1.4. In a summary of the legal issues, Mr. Solórzano's defence lawyer observed that after December 1977, Salóm Meza Espinoza and David Nieves, two individuals whose cases were linked with the case of Mr. Solórzano, had been elected deputies to the Venezuelan Congress. On the basis of their new parliamentary immunity, both of them had requested

* Pursuant to rule 85 of the provisional rules of procedure, Mr. Andrés Aguilar did not participate in the consideration of this communication or in the adoption of the views of the Committee under article 5, paragraph 4, of the Optional Protocol in this matter.

their release, which had been subsequently ordered by a court martial. The military prosecutor had appealed the decision before the Supreme Court of Justice, to which the case had been transferred in mid-1979. All proceedings in the case, including those against Mr. Solórzano, had been adjourned pending a ruling of the Supreme Court on the question of the legality of the release of the two deputies.

1.5. Katy Solórzano alleged that there had been various irregularities in the proceedings against her brother. She indicated that:

Her brother, a civilian, had been tried by a military tribunal, although that was contrary to the Venezuelan Constitution;

The evidence presented by her brother and his lawyer had been disregarded by the military tribunal; in particular, the lawyer could not obtain the attendance and examination of witnesses on her brother's behalf;

Her brother's trial had been defective since, for example, false declarations had been admitted in evidence. In that connection, Mr. Decaril, Mr. Solórzano's lawyer, had stated that, *inter alia*, his client's detention and the charges against him had been based on declarations, made by policemen and other witnesses, which for one reason or another should have been considered invalid.

1.6. Katy Solórzano claimed that her brother had been subjected to inhuman prison conditions, that in February 1983 he had been severely beaten at the Cuartel San Carlos (the name of the responsible officer was given), that after those incidents and similar ones in other prisons, political detainees all over the country, including her brother, had carried out a month-long hunger strike to obtain better conditions of detention, that, due to the above-mentioned events, her brother had required medical treatment and his transfer to a hospital had been recommended, but that the prison authorities had not heeded the recommendation.

1.7. It was claimed that Mr. Solórzano was a victim of violations of articles 7, 9, paragraphs 1 and 4, 10, paragraph 1, and 14, paragraph 3 (*c*) and (*e*) of the International Covenant on Civil and Political Rights, and that no domestic remedies were available in the case.

1.8. Katy Solórzano further indicated that the present case was not being examined under another procedure of international investigation or settlement.

2. By its decision of 20 October 1983, the Working Group of the Human Rights Committee, having decided that Katy Solórzano was justified in acting on behalf of the alleged victim, 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. The Working Group also requested the State party to transmit to the Committee copies of court decisions concerning Mr. Solórzano.

3.1. In a submission dated 16 January 1984, the State party informed the Committee that Luis A. Solórzano had been arrested in the course of the criminal proceedings instituted in connection with the kidnapping of a United States citizen, William Frank Niehous, by "an armed movement consisting of a group of persons forming a paramilitary organization known as Grupo de Comandos Revolucionarios, Operación Argimiro Gabaldon". Following pre-trial detention by the police authorities, as authorized in article 60.1, third paragraph, of the Constitution, an order confirming his detention had been issued on 7 March 1977 by the Permanent Second Military Court of First Instance of Caracas, after the Court had determined the existence of military rebellion and had found that there was firm evidence of guilt on the part of Mr. Solórzano, as required by article 182 of the Code of Criminal Procedure and article 202 of the Code of Military Justice. The State party submitted that Mr. Solórzano's arrest had been effected in accordance with the Constitution and relevant criminal laws, and therefore it could not be described as arbitrary and that the allegation of violation of article 9, paragraph 4, of the Covenant was similarly inadmissible "since the remedies of complaint and/or appeal against a detention order are provided for in article 190 of the Code of Criminal Procedure and article 203 of the Code of Military Justice and should have been duly utilized, even if they would have been unsuccessful".

3.2. The State party further submitted that the allegations of torture had not been accompanied by any supporting evidence, while the allegations of maltreatment of detainees "could well refer to acts of prison mutiny, which are quite outside the scope of the Covenant". The State party added that it would seem unlikely that those allegations of maltreatment and torture were true, particularly as they had been investigated by the Public Prosecutor's Department.

3.3. The State party observed that the author's allegations regarding irregularities in the proceedings (both, apparently, at the pre-trial stage and after the trial started with the indictment of the alleged victim on 12 December 1977), legal manœuvres to delay proceedings and obstruction regarding the cross-examination of witnesses could not be taken seriously since Mr. Solórzano's lawyer had stated that "the investigation then proceeded normally until the indictment was made. The period for giving evidence was observed, and some of the witnesses summoned to appear by the court were cross-examined".

3.4. The State party also rejected the allegation that the trial of Mr. Solórzano had been delayed to prevent his release. In that connection, it stated that, in the decision handed down on 22 February 1979, the Court had ordered the unconditional release of Salóm Meza Espinoza and David Nieves, who had been charged along with Mr. Solórzano and another person for military rebellion and other offences; that was because they had been elected deputies to the National Congress and consequently enjoyed parliamentary immunity under article 143 of the Constitution. In the same decision, the above-mentioned Military Court had ruled that the Permanent Military Court of Caracas should forward the dossier to the Supreme Court of Justice for the purposes laid down in article 215 (2) of the Constitution, which stated that one of the powers of the Supreme Court of Justice was "to declare whether or not there are grounds for the trial of members of Congress". The State party had further stated that while the case was being heard by the full Court, a presidential pardon had been granted on 28 November 1983 to

Deputy Salóm Meza Espinoza, and, on 4 December 1983, David Nieves had been re-elected a deputy to the National Congress.

At this point, on 16 December 1983, the Government Attorney requested the Supreme Court of Justice to effect a separation of the case and to transfer the dossier to the Permanent Military Court of Caracas for the continuation of the proceedings against Luis A. Solórzano and others for the offences already mentioned. The Supreme Court of Justice acceded to this request in an order dated 21 December 1983 referring the dossier to the Permanent Military Court of Caracas to enable the proceedings in question to continue. . . .

As far as the allegations considered here are concerned, the most important consideration is that the proceedings against Luis Alberto Solórzano again followed the normal course, once the question of the special status of his co-defendants had been resolved.

3.5. The State party contended that domestic remedies had not been exhausted "since the trial is entering the phase of summing-up and sentencing at first instance. This leaves all the second instance procedure untouched, as well as the appeal to set aside the judgement, in accordance with the procedural legislation in force".

4.1. In a further submission dated 16 February 1984, Katy Solórzano commented on the State party's submission and reiterated that her brother's detention was unlawful for the following reasons:

He was arrested more than one year after the kidnapping of the American citizen, so that there is no qustion of *flagrante delicto*, which is an exception provided for in article 60, paragraph 1, of the Constitution;

He is being detained without any written order by the competent official.

4.2. Katy Solórzano alleged that her brother's right to defend himself had not been respected. In particular she mentioned that the right to cross-examine witnesses had been denied (names were given). She added that "the court failed to take any firm action when the only witness to appear voluntarily, on being cross-examined, admitted that she had made her statement against Luis Alberto Solórzano because DISIP (Political Police) had threatened her with imprisonment if she did not do so, and also retracted her earlier statement against him. The name of this witness is Aurora Alonso de Sánchez, and the text of her statement can be found in the record of proceedings". As to the State party's contention that Mr. Solórzano's lawyer had conceded that procedural guarantees were observed and some witnesses cross-examined, Katy Solórzano stated that that had been done in order to secure her brother's release.

4.3. Katy Solórzano stressed that article 68 of the Venezuelan Constitution stipulated that the right to a defence was an inviolable right at every stage and level of proceedings and she recalled that her brother had been deprived of a trial for more than five years. In that connection she commented:

While it is proper for the Supreme Court to take the *proper time* to issue a decision, nevertheless, the fact that this proper time should already have extended over more than five years surely defies all logic.

4.4. The author reiterated that her brother had been subjected to brutal ill-treatment in February 1983 resulting in injuries to the head and other parts of the body and that he—as well as other detainees—had undertaken a hunger strike in protest against the maltreatment inflicted on many of them. In March and April 1983, agreements had been signed by a mediation commission (composed of civilian and military attorneys, members of Parliament and representatives of prisoners—among them Mr. Solórzano) in order "to guarantee and ensure observance of the physical and moral integrity of persons on trial".

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

5.2. Article 5, paragraph 2 (*a*), of the Optional Protocol precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. The Committee noted that there was no indication that that applied in the present case.

5.3. Article 5, paragraph 2 (*b*), of the Optional Protocol precludes the Committee from considering a communication if all available domestic remedies have not been exhausted. The Committee therefore examined whether the authors' various claims met that requirement.

5.4. As to the claim that Mr. Solórzano was a victim of a violation of article 9, paragraphs 1 and 4, of the Covenant, the Human Rights Committee observed that the arrest had taken place prior to the entry into force of the Covenant and the Optional Protocol for Venezuela. The claim, in so far as it related to the alleged victim's initial arrest and detention was therefore found to be inadmissible *ratione temporis*. In so far as the communication might be understood as implying that the continued detention of Mr. Solórzano (after 10 August 1978) constituted, as such, a violation of article 9, paragraphs 1 and 4, of the Covenant, the Committee referred to the observations of the State party set out in paragraph 3.1 above and concluded that the issue was also inadmissible, because of non-exhaustion of domestic remedies.

5.5. In so far as the claim concerning the alleged torture and ill-treatment of Mr. Solórzano, in violation of articles 7 and 10, paragraph 1, of the Covenant, related to events said to have taken place prior to 10 August 1978, the Committee observed that it was inadmissible *ratione temporis*. In so far as the claim related to events alleged to have taken place in February 1983 (para. 1.6 above), the Committee noted the observations of the State party (para. 3.2 above), and the author's comments thereon (para. 4.4 above). It was established that inquiries into the events in question had taken place and had led to an agreement signed, among others, by Mr. Solórzano. The implications of that agreement, which might have constituted a remedy in regard to the ground of complaint, were not clear. The Committee found that that part of the claim, therefore, belonged to the examination of the case on the merits and was not inadmissible.

5.6. In so far as Katy Solórzano claimed that the prolonged delays in the court proceedings affecting Mr. Solórzano constituted a violation of article 14, paragraph 3 (*c*), of the Covenant, the Committee observed that the claim also concerned article 9, paragraph 3, of the Covenant (which provided for the right to trial within a reasonable time or to release from detention). The continued detention of Mr. Solórzano since 28 February 1977, without trial, clearly raised an

issue under both of those provisions, which had to be examined on the merits. The Committee noted in that connection that the trial of Mr. Solórzano was, according to the State party, entering the phase of summing-up and sentencing at first instance and thus all the second instance procedure was untouched as well as the appeal to set aside the judgement in accordance with the procedural legislation in force (para. 3.5 above). This seemed to imply that considerable time might still pass until a final judgement was rendered. The Committee noted, furthermore, that, in fact, the proceedings in the case had been adjourned between February 1979 and December 1983. The Committee finally noted that, in the meantime, a considerable effort, although in vain, had been made to obtain the release of Mr. Solórzano and that no particulars had been submitted by the State party to show that other remedies might have been available, either to expedite the proceedings or to obtain his release. In those circumstances, the Committee concluded that such remedies either did not exist, or could not be shown to be effective in his situation, and in any event that their application was being unreasonably prolonged. Accordingly, the Committee found that the claim was not inadmissible under article 5, paragraph 2 (*b*), of the Optional Protocol.

5.7. As to Katy Solórzano's claim that Mr. Solórzano had been denied the right to examine, or have examined, the witnesses against him in violation of article 14, paragraph 3 (*e*), of the Covenant, it appeared that she related that claim both to the period of pre-trial investigation (which ended with an indictment on 12 December 1977, i.e., before the Covenant entered into force for Venezuela) and to the trial period which followed thereafter (including some months from the entry into force of the Covenant for Venezuela on 10 August 1978, until the trial proceedings were adjourned in February 1979). Considering that she did not indicate any dates in support of her claim that article 14, paragraph 3 (*e*), had not been respected and taking into account the other information before it in regard to the claim, the Human Rights Committee concluded that it should be deemed inadmissible. The issue might, however, be seen as subsumed in the claim that Mr. Solórzano was the victim of a breach of article 14, paragraph 3 (*c*), which was to be considered on the merits.

6. On 26 October 1984, the Human Rights Committee therefore decided:

(1) That the communication was admissible in so far as it related to alleged ill-treatment of Mr. Solórzano in February 1983 and in so far as it related to the duration of the judicial proceedings;

(2) That the communication was inadmissible in respect of the other claims raised by the author.

7. In its submission under article 4, paragraph 2, of the Optional Protocol, dated 25 April 1985, the State party informed the Committee that "Dr. Jaime Lusinchi, President of the Republic of Venezuela, undertook, through Presidential Decree No. 441, of 21 December 1984 . . . the dismissal of the proceedings against Luis Alberto Solórzano", and that Mr. Solórzano had been released. The State party thus requested the Committee to close the case.

8.1. Before taking further action, the Committee instructed the Secretariat to ascertain from Mr. Solórzano whether he wished the Committee to continue consideration of the case and, if so, to confirm the facts of the case as presented by his sister and to correct any inaccuracies in that respect.

8.2 In a reply (undated) received on 27 June 1985, Mr. Solórzano requested the Committee to continue consideration of the case, confirmed the information submitted to the Committee by his sister and added the following observations:

> . . . this dismissal of proceedings against me for *military rebellion*, which had been continuing since 1977, demonstrates that:
>
> 1. Since there is no judgement against me, no civilian or military entity or authority is legally in a position to take a decision on presumed guilt or innocence.
>
> 2. In other words, I was detained for almost eight years, during which this trial did not culminate in a judgement, a fact which shows the arbitrary and irregular character of the proceedings to which I was subjected.
>
> 3. Because the same characteristics attached to my release, it may be stated that my country's Government interfered in the proceedings as it pleased, refusing me the right to defence throughout the period when the trial was paralysed.

9. By a note dated 24 September 1985, the State party observed that:

> The Permanent Third Military Court of First Instance of Caracas issued a detention order against Luis Alberto Solórzano, who was presumed to have committed the offence of military rebellion, which is punishable under article 476 of the Code of Military Justice. The fact is that the Venezuelan legal system includes dismissal as one of the means of staying trials or proceedings. In this case, the President of the Republic, pursuant to the terms of article 54, paragraph 3, of the Code of Military Justice and in keeping with Presidential Decree No. 441 of 31 December 1984, published in *Official Gazette* of the Republic No. 33131 of the same date, ordered dismissal of the proceedings against Luis Alberto Solórzano. In the opinion of the Government of Venezuela, the case brought against Luis Albert Solórzano has come to a complete end in accordance with the above. In any event, under our legal system, citizen Luis Alberto Solórzano is entitled to bring any legal action he deems appropriate against any person, natural or legal, before the competent courts. In the present instance, his intentions are against the Venezuelan Government, which would, in the event of legal action by Solórzano, be represented by the Attorney-General of the Republic, who, under article 202, paragraph 1, of the Constitution, is assigned the task of court or out-of-court representation and defence of the interests of the Republic.

10.1 The Human Rights Committee, having examined the present communication in the light of all the information made available to it by the parties as provided in article 5, paragraph 1, of the Optional Protocol, hereby decides to base its views on the following facts, which are either uncontested or are contested by the State party only by denials of a general character offering no particular information or explanations.

10.2 Mr. Luis Alberto Solórzano was arrested on 28 February 1977 on suspicion of participation in armed rebellion, brought before a military tribunal and kept in detention until his release by virtue of a Presidential Decree of 21 December 1984, that is, after more than seven years of detention. Although he was indicted on 12 December 1977 by the Permanent Military Court of Caracas, proceedings were interrupted in 1979 because two co-defendants had been elected deputies to the National Congress, and their cases remained pending until severed by order of the Supreme Court of Justice in December 1983. At the time of his release in December 1984, no judgement had been passed against Mr. Solórzano. He was subjected to ill-treatment during deten-

tion, particularly in February 1983 when he suffered injuries to the head and other parts of the body.

11. In formulating its views, the Human Rights Committee also takes into account the failure of the State party to furnish certain information and clarifications necessary for the Committee to facilitate its tasks, in particular with regard to the treatment in February 1983 of which Mr. Solórzano has complained. In the circumstances, due weight must be given to the authors' allegations. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. In no circumstances should a State party fail to investigate duly and to inform the Committee properly of its investigation of allegations of ill-treatment when the person or persons allegedly responsible for the ill-treatment are identified by the author of a communication. A denial of the authors' allegations in general terms and the reference to an unsubmitted investigation by the Public Prosecutor's Department are not sufficient. The Committee would need precise information and reports, *inter alia*, on the questioning of prison officials accused of maltreatment of prisoners.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee disclose violations of the Covenant with respect to:

Article 10, paragraph 1, because of the ill-treatment that Mr. Solórzano suffered during detention, in particular in February 1983;

Articles 9, paragraph 3, and 14, paragraph 3 (*c*), because he was not brought promptly before a judge nor tried within a reasonable time, and because he was kept in detention without judgement for over seven years.

13. The Committee, accordingly, is of the view that the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations that Mr. Solórzano has suffered and to grant him compensation, to investigate said violations, to take action thereon as appropriate and to take steps to ensure that similar violations do not occur in the future.

Communication No. 157/1983

Submitted by: André Alphonse Mpaka-Nsusu on 15 August 1983
Alleged victim: The author
State party: Zaire
Date of adoption of views: 26 March 1986 (twenty-seventh session)

Subject matter: Detention and banishment of Zairian presidential candidate

Procedural issues: Failure of investigation of allegations by State party—Admissibility decision without rule 91 submission from State party—Sufficiency of State party's reply under article 4 (2)—Adoption of views without submission on merits by State party—Burden of proof

Substantive issues: Arbitrary arrest—Banishment— Internal exile—Freedom of movement—Freedom of expression—Access to public service—Political rights—Habeas corpus

Articles of the Covenant: 1, 9 (1), 12 (1), 19 and 25
Article of the Optional Protocol: 4 (2)

11. The author of the communication (initial letter dated 15 August 1983 and further letters dated 8 January and 8 May 1984) is André Alphonse Mpaka-Nsusu, a Zairian national at present living in exile. He claims to be a victim of breaches by Zaire of articles 1, 9, 14 and 26 of the International Covenant on Civil and Political Rights. He is represented by an attorney.

1.2. The facts as described by the author are as follows: on 21 November 1977 he presented his candidacy for the presidency of the Mouvement populaire de la révolution (MPR) and, at the same time, for the presidency of Zaire in conformity with existing Zairian law. After the rejection of his candidacy—which he alleges was in contravention of law No. 77-029 (concerning the organization of presidential elections)—Mr. Mpaka-Nsusu, on 31 December 1977, submitted a proposal to the Government requesting recognition of a second, constitutionally permissible, party in Zaire, the Federal Nationalist Party (PANAFE).

1.3. He claims that he acted in accordance with article 4 of the Constitution of 24 June 1967 which envisages a two-party system, but despite this he was arrested on 1 July 1979 and detained without trial until 31 January 1981 in the prison of the State Security Police (CNRI). He claims that his detention was based on unfounded charges of subverting State security. After being released from prison, he was banished to his village of origin for an indefinite period. This banishment ended *de facto* on 15 February 1983 when he fled the country.

1.4. The author states that although he filed a suit on 1 October 1981 before the Supreme Court of Justice of Zaire ((i) contesting the legality of the institutionalization of MPR as sole party as being counter to the dual party structure set out in the Constitution; (ii) therefore

requesting that parts of laws No. 74-020 of 15 August 1974 and No. 80-012 of 15 November 1980 be declared unconstitutional (modifying by ordinary law constitutional provisions); and (iii) seeking reparation for damages suffered during detention), the Supreme Court of Justice refused to consider it. Furthermore, the author notes that individuals have no access to the Constitutional Court of Zaire. Accordingly, the author contends that he has exhausted all domestic remedies available to him.

2. By its decision of 9 November 1983, 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 in so far as it might raise issues under articles 9, 25 and 26 of the Covenant. The Committee also requested the State party to transmit to the Committee any copies of court orders or decisions relevant to the case. Furthermore, the Committee requested the author to provide more detailed information concerning the grounds for alleging violations of article 1 of the Covenant.

3. In response to the Committee's request, the author, by a letter dated 8 January 1984, explained that the people of Zaire, in a constitutional referendum held from 4 to 24 June 1967, had declared themselves in favour of a bipartisan constitutional system. He asserted that it was contrary to the Constitution of Zaire, in particular article 39, to prohibit the establishment of a second political party, and that he had been a victim of persecution because of his political activities as leader of PANAFE.

4. By a note dated 18 January 1984, the State party informed the Committee that an inquiry into the case of Mr. Mpaka-Nsusu was in progress in Zaire and that a reply would be forwarded to the Committee by the end of February 1984. By a note dated 6 April 1984, the State party informed the Committee that the inquiry had not yet been completed and that a reply would be submitted by the end of April. No further submission from the State party has been received, despite repeated reminders.

5. Before considering a communication on the merits, the Committee must ascertain whether it fulfils all conditions relating to its admissibility under the Optional Protocol. With regard to article 5, paragraph 2 (*a*), of the Optional Protocol, the Committee had not received any information that the subject-matter had been submitted to another procedure of international investigation or settlement. Accordingly, the Committee found that the communication was not inadmissible under article 5, paragraph 2 (*a*), of the Optional Protocol. The Committee was also unable to conclude that in the circumstances of the case there were effective remedies available to the alleged victim which he had failed to exhaust. Accordingly, the Committee found that the communication was not inadmissible under article 5, paragraph 2 (*b*), of the Optional Protocol.

6. On 28 March 1985, the Human Rights Committee therefore decided that the communication was admissible, and in accordance with article 4, paragraph 2, of the Optional Protocol, requested the State party to submit to the Committee, within six months of the date of the transmittal to it of the Committee's decision, written explanations or statements clarifying the matter and the remedy, if any, that might have been taken by it.

7.1. The time-limit for the State party's submission under article 4, paragraph 2, of the Optional Protocol expired on 2 November 1985. No submission has been received from the State party.

7.2. No further submission has been received from the author.

8.1. The Human Rights Committee, having considered the present communication in the light of all the information made available to it, as provided in article 5, paragraph 1, of the Optional Protocol, hereby decides to base its views on the following facts, which have not been contested by the State party.

8.2. Mr. André Alphonse Mpaka-Nsusu is a Zairian national at present living in exile. In 1977, he presented his candidacy for the presidency of Zaire in conformity with existing Zairian law. His candidacy, however, was rejected. On 1 July 1979, he was arrested and subsequently detained in the prison of the State Security Police without trial until 31 January 1981. After being released from prison, he was banished to his village of origin for an indefinite period. He fled the country on 15 February 1983.

9.1. In formulating its views, the Human Rights Committee also takes into account the failure of the State party to furnish any information and clarifications necessary for the Committee to facilitate its tasks. In the circumstances, due weight must be given to the author's allegations. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. The Committee notes with concern that, despite its repeated requests and reminders and despite the State party's obligation under article 4, paragraph 2, of the Optional Protocol, no submission has been received from the State party in the present case, other than two notes of January and April 1984 informing the Committee that an inquiry into the case of Mr. Mpaka-Nsusu was in progress.

9.2. The Committee observes that the information before it does not justify a finding as to the alleged violation of article 1 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that these facts disclose violations of the Covenant, with respect to:

Article 9, paragraph 1, because André Alphonse Mpaka-Nsusu was arbitrarily arrested on 1 July 1979, and detained without trial until 31 January 1981;

Article 12, paragraph 1, because he was banished to his village of origin for an indefinite period;

Article 19, because he suffered persecution for his political opinions;

Article 25, because, notwithstanding the entitlement to stand for the presidency under Zairian law, he was not so permitted.

11. The Committee, accordingly, is of the view that the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to provide Mr. Mpaka-Nsusu with effective remedies, including compensation, for the violations that he has suffered, and to take steps to ensure that similar violations do not occur in the future.

Communication No. 159/1983

Submitted by: Ruth Magri de Cariboni (victim's wife) on 18 October 1983, later joined by Raúl Cariboni as co-author
Alleged victim: Raúl Cariboni
State party: Uruguay
Date of adoption of views: 27 October 1987 (thirty-first session)

Subject matter: Detention of Uruguayan citizen by military authorities

Procedural issues: Confirmation of allegations by victim after release—Events prior to entry into force of the Covenant

Substantive issues: Detention incommunicado—Fair and public hearing—Fair trial—Ill-treatment of detainees—Torture—State of health of victim—Confession under duress—Delays in proceedings—Equality of arms—Political rights—Heavier sentence upon appeal

Articles of the Covenant: 7, 10 (1), 14 (1) and (3) (c) *and* (g)
Article of the Optional Protocol: 4 (2)

1. The original author of the communication (initial letter dated 18 October 1983 and further submission dated 10 July 1984), Ruth Magri de Cariboni, is a Uruguayan national residing in Uruguay. She submitted the communication on behalf of her husband, Raúl Cariboni da Silva, a Uruguayan national born on 22 December 1930, former professor of history and geography, who was detained in Uruguay from 1973 until 13 December 1984. He joined as co-author of the communication after his release (letter of 26 August 1985).

2.1. Ruth Magri de Cariboni states that her husband was arrested on 23 March 1973 and alleges that he was subjected to torture. Confessions obtained under torture were allegedly later used in the penal proceedings leading to his conviction. On the fourth day after his arrest he suffered a heart attack. Subsequent to the entry into force of the Optional Protocol for Uruguay on 23 March 1976, Mr. Cariboni was allegedly again subjected to torture (in April and May 1976) and suffered a second heart attack.

2.2. Mrs. Cariboni also states that on 4 May 1973 Mr. Cariboni's case was submitted to the military judge of first instance, who ordered his preventive detention. He was kept incommunicado for 42 days with no access to counsel. On 25 May 1973, he was transferred to Libertad Prison. On 4 May 1973, Mr. Cariboni was charged with "subversive association" and "attempts against the Constitution in the degree of conspiracy, followed by preparatory acts". Proceedings against him lasted for six years and the Supreme Military Tribunal sentenced him in 1979 to 15 years' imprisonment on the basis of confessions that had been extracted by torture. No further remedies were available to Mr. Cariboni following the sentence of the Military Tribunal, since the extraordinary review by cassation can only examine errors of law, but not reopen the case to verify the facts. Mrs. Cariboni draws attention to the irregularities in the proceedings which were instituted against Mr. Cariboni by the military courts, in which violations of his right to a fair and public hearing allegedly took place with regard to his right to an independent and impartial tribunal, since military courts during the years of military dictatorship were neither independent nor impartial, his right to be presumed innocent until proven guilty, because he was presumed guilty as of the arrest and treated as such, his right to be tried without undue delay, because the sentence was pronounced six and a half years after the arrest, his right to counsel, because he had no legal assistance while he was incommunicado, and the sentence was based on confessions obtained under torture during that period and his right not to be compelled to testify against himself or to confess guilt, since he was tortured to obtain a confession against himself in 1973 and in 1976. Mrs. Cariboni states that all these alleged violations of his right to a fair hearing made possible his arbitrary 15-year sentence.

2.3. Mrs Cariboni further states that the conditions under which her husband served his sentence were cruel, inhuman and degrading. The prison was used exclusively for political offenders and it was administered by military personnel on short-term service and not by specialized personnel. Prisoners remained in their small cells for 23 hours a day; the one-hour "recreation" was allegedly afforded arbitrarily and in an unpredictable manner. Prisoners were allowed to read only certain books and many had been withdrawn or even destroyed (books donated by the International Committee of the Red Cross (ICRC) were openly burnt in February 1983).

Visits from relatives were frequently cancelled arbitrarily; prisoners were isolated from the outside world and kept under constant psychological pressure. Allegedly, the purpose of detention in Libertad Prison was thus not to rehabilitate the prisoner but to break him physically and psychologically. The goal was to depersonalize prisoners, to keep them in uncertainty, to deprive them of routine and an orderly schedule of activities, to intimidate them by unannounced raids on their cells.

2.4. Mrs. Cariboni expressed deep concern about her husband's state of health. She mentioned that he had suffered two heart attacks during torture. He was examined in December 1976 at the Central Hospital of the Armed Forces and the medical board concluded that only heart surgery could save him. He was examined again in December 1978 and in 1982 at a private clinic and advised to have special examinations (phonocardiograms) every six months, but such examinations were not made possible in the prison. Mrs. Cariboni also stated that her husband was listed by ICRC among the prisoners in the most precarious state of health, after visits made in 1980 and in 1983, and that he was in danger of dying suddenly unless he received adequate medical attention and could enjoy conditions of life different from those he was subjected to in prison.

2.5. Mrs. Cariboni indicated that the same matter had been submitted to the Inter-American Commission of Human Rights (IACHR) but that the case had been withdrawn by letter of 23 August 1983. The secretariat of IACHR confirmed that the case of Raúl Cariboni da Silva was not before that body.

3.1. By its decision of 22 March 1984, the Working Group of the Human Rights Committee decided that Mrs. Cariboni was justified in acting on behalf of her husband and 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 the admissibility of the communication. The Working Group also requested the State party to provide the Committee with information on the state of health of Raúl Cariboni da Silva.

3.2. Under cover of a note dated 6 February 1985, the State party furnished the Committee with a list of names of persons who had been released from prison since August 1984. The list contained the name of Mr. Cariboni da Silva, and gave the date of his release as 13 December 1984. No further information has been received from the State party concerning his case.

4. By a letter of 26 August 1985, the alleged victim himself, Raúl Cariboni da Silva, requested the Human Rights Committee to continue consideration of the case against the State of Uruguay, although the current Government of Uruguay, which took office on 1 March 1985, should not be held morally responsible for the violations of the International Covenant on Civil and Political Rights which he had suffered. He confirmed the information submitted by his wife, but added the following details and clarifications concerning his trial and treatment while in detention:

In the communication it is stated that I was apparently convicted on the basis of statements extracted from me under torture in Mechanized Cavalry Regiment No. 4, the unit where I was detained. I confirm this, with the following clarification. In the light of the statements in question, the Office of the Prosecutor requested a sentence of nine years' imprisonment and then, on the basis of the same charges, without further judicial investigation, without any further charges and hence without further evidence, I was sentenced on first instance to 13 years' imprisonment and on final instance by the Supreme Military Court, to 15 years' imprisonment. Of this 15 years' sentence, I served 11 years and 8 months in prison.

It is thus apparent that, on the same charge, I was sentenced to six years more than the penalty requested by the Office of the Prosecutor.

From the foregoing, it will be clear that the effects of the violations of human rights prior to the entry into force of the International Covenant on Civil and Political Rights in connection with my arrest, interrogation and trial in March-April 1973 extended well beyond the date of the entry into force of the Covenant. The legal irregularities mentioned (increasing the sentence from 9 to 15 years' imprisonment without any further evidence) occurred subsequent to the entry into force of the Covenant: the sentence on first instance was handed down in 1977 and the sentence on second instance in 1979.

The statements which were extracted from me under torture do not include any reference to a classifiable offence or any act of violence and relate solely to participation in political, ideological and trade-union activities considered as offences by virtue of the rules enacted under the state of emergency and applied during that period by the military courts. Thus, even under torture, not a shred of evidence was obtained to substantiate the penalty requested by the Office of the Prosecutor and still less the heavier penalties handed down by the courts of first and final instance.

With regard to the torture to which I was subjected subsequent to the entry into force of the International Covenant on Civil and Political Rights, I wish to state the following:

On 4 April 1976, I was unexpectedly taken from Libertad Prison early in the morning. My head was covered with a hood and I was taken, lying on the floor of a military vehicle, to the headquarters of a military unit which I am now able to identify as one of the places of interrogation of the Antisubversion Commandos Organization (OCOA) at the barracks of Mechanized Infantry Battalion No. 13, at Avenida de las Instrucciones No. 1933.

There I was kept hooded and sitting up straight day and night (*"plantón de silla"* or *"cine"*, in the jargon of the torturers) until 11 April 1976. I was not allowed to move, and the little food I was given had to be eaten by kneeling on the floor and using the same chair as a table.

We were given the food—usually a very hot clear soup with hardly anything in it—in a tin bowl and nothing else, so that we had to use our fingers. Under the hood, I had been blindfolded with towelling material which made my eyes inflamed and purulent, something that continued for a number of days even after the blindfold was removed when I left OCOA on 11 April 1976. My wrists were bound with wire all the time and I was taken only twice a day to the bathroom.

The only opportunity I had to sleep was on the cement floor when I fell unconscious from the chair, fainting from exhaustion or overcome by sleep. I was roused with kicks, even to my head, and only when I fell down repeatedly, thus showing that I had no strength to stay seated in the chair, was I permitted to lie on the floor. I was then allowed to sleep, for periods I cannot estimate precisely. I was not given any regular medical care, and was watched over only by a male military nurse who was on guard all the time.

I fainted on several occasions and for two of them I have definite reason to believe I was injected with substances about which I was not told anything. There is no doubt that I was given hallucinogenic substances, but I do not know whether this was done orally (with the food) or by injection. Drugs of this kind were certainly used, because their effects were clearly perceptible.

The method chiefly used in my case was mental torture. For many hours at a time I could hear piercing shrieks which appeared to come (and perhaps did come) from an interrogation under torture; the shrieks were accompanied by loud noises and by music played at a very high volume. I was repeatedly threatened with torture and on several occasions I was abruptly transferred to other places, amid threats and ill-treatment.

I lost any notion of time because I was hooded for such a prolonged period, and it was impossible to keep count of day or night. I suffered a feeling of oppression and persistent pain in the chest. On two occasions, I experienced suffocation and acute pain in the chest and shouted out to the guard. The result was that I was made to swallow pills, but was still kept sitting up straight, with the hood on.

On one occasion, I fainted with breathing trouble; while I was semi-conscious and in acute pain, I realized I was being given an injection

and I heard someone say that it was a "heart attack". After that incident (perhaps on the Thursday or Friday of that week), I was allowed to lie longer on the floor, but after auscultation by somebody (as I said, the hood was never removed), I was taken back to the chair.

Two, perhaps three days later, I was sent to the prisoner's depot at Infantry Battalion No. 4, which had its headquarters in Colonia; there I was examined, on admission to the depot, by the unit's Army Medical Corps doctor. He ordered that I should be provided with pillows and that my hood should be lifted while I was in the cramped space (a stable box without doors) where I was to stay for approximately one and a half months, after which I was once again transferred to Libertad Prison. I was taken back to the prison at the end of May 1976.

5.1. Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules of procedure, decide whether the communication is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

5.2. The Human Rights Committee therefore ascertained, as required under article 5, paragraph 2 (*a*), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement. As regards the requirement of prior exhaustion of domestic remedies, the Committee concluded, based on the information before it, that there were no further domestic remedies that the author could have resorted to in the particular circumstances of his case.

6. On 22 October 1985, the Committee therefore decided that the communication was admissible in so far as it related to events said to have occurred on or after 23 March 1976, the date on which the Covenant and the Optional Protocol entered into force for Uruguay.

7. In its submission under article 4, paragraph 2, of the Optional Protocol, dated 24 July 1986, the new Government of the State party observed:

1. The unfortunate events which occurred in Uruguay in 1973 led to a breakdown in the rule of law. This state of affairs lasted until the year 1985, when the authorities elected democratically in 1984 took over.

2. On 8 March 1985, the democratic Government of Uruguay promulgated Act No. 15,737 for the purpose of ensuring national reintegration and peace. In this context, among other measures, a broad and generous amnesty was promulgated in respect of all political offences, as well as all ordinary military offences connected with political offences, committed since 1 January 1962.

3. Pursuant to the above-mentioned Act, prisoners covered by it were released, budgetary allocations for prisons were cancelled, all restrictive measures still pending with regard to the property of the amnestied persons were lifted and all sums of money deposited as bail were returned.

4. As for public officials dismissed on ideological, political or trade-union grounds, or in a purely arbitrary fashion, Act No. 15,783 of 28 November 1985 acknowledged their right to be reinstated in their respective posts, with restoration of their career rights.

5. Since neither the original author of the communication, Mrs. Ruth Magri de Cariboni, nor Mr. Raúl Cariboni da Silva, seem to have appeared before the democratic authorities of Uruguay to claim their rights, it would be appropriate for the person concerned to be informed that all the procedures provided for in the Constitution and laws of the Republic of Uruguay are available to him for the submission of his case.

8. The State party's submission together with the text of Act No. 15,737 were forwarded to the authors for comments on 4 September 1986. No further comments from the authors have been received.

9.1. The Human Rights Committee, having examined the present communication in the light of all the information made available to it by the parties as provided in article 5, paragraph 1, of the Optional Protocol, hereby decides to base its views on the following facts, which appear uncontested.

9.2. Raúl Cariboni was arrested on 23 March 1973, charged with "subversive association" and "attempts against the Constitution in the degree of conspiracy, followed by preparatory acts". He was forced to make a confession, which was later used as evidence in the military penal proceedings against him. Proceedings against him lasted six years. Although the prosecutor requested a sentence of nine years' imprisonment, he was sentenced in 1979 to 15 years' imprisonment by the Supreme Military Court, partly on the basis of his forced confession. He served 11 years and eight months of his sentence before his release on 13 December 1984. From 4 to 11 April 1976, he was subjected to torture for the purpose of extracting information with regard to his ideological convictions, and political and trade-union activities. His treatment during detention at Infantry Battalion No. 4 and at Libertad Prison was inhuman and degrading.

9.3. In formulating its views, the Committee has taken account of the change of government in Uruguay on 1 March 1985 and the enactment of special legislation aimed at the restoration of rights of victims of the previous military régime.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee, in so far as they occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay), disclose violations of the International Covenant on Civil and Political Rights, particularly of:

Article 7, because Raúl Cariboni was subjected to torture and inhuman and degrading treatment;

Article 10, paragraph 1, because he was subjected to inhuman prison conditions until his release in December 1984; and

Article 14, paragraph 1, paragraph 3 (*c*) and paragraph 3 (*g*), because he was compelled to testify against himself and was denied a fair and public hearing, without undue delay, by an independent and impartial tribunal.

11.1. The Committee, accordingly, is of the view that the State party is under an obligation to take effective measures to remedy the violations which Raúl Cariboni has suffered and, in particular, to grant his adequate compensation.

11.2. The Committee expresses its appreciation for the measures taken by the State party since March 1985 to ensure observance of the Covenant and co-operation with the Committee.

Communication No. 161/1983

Submitted by: Joaquín David Herrera Rubio on 1 December 1983
Alleged victims: The author and his deceased parents, José Herrera and Emma Rubio de Herrera
State party: Colombia
Date of adoption of views: 2 November 1987 (thirty-first session)

Subject matter: Detention of Colombian civilian by military authority

Procedural issues: Admissibility decision without rule 91 submission from State party—Sufficiency of State party's reply under article 4 (2)—State party's duty to investigate—Burden of proof

Substantive issues: Ill-treatment of detainees—Torture—Death of victims—Right to life—Scope of article 6

Articles of the Covenant: 2, 6, 7 and 10 (1)
Article of the Optional Protocol: 4 (2)

1.1. The author of the communication (initial letter dated 1 December 1983 and subsequent letter dated 4 October 1986) is Joaquín David Herrera Rubio, born on 3 December 1958, a Colombian citizen, living in Bogotá, Colombia. He submits the communication on his own behalf and in respect of his deceased parents, José Joaquín Herrera and Emma Rubio de Herrera.

1.2. The author alleges that on 17 March 1981 he was arrested in Cartagena del Chairá, Colombia, by members of the armed forces, taken to a military camp and subjected to torture in an attempt to extract from him information about a guerrilla movement. The author describes in detail the tortures to which he was allegedly subjected, including being hanged by his arms and beaten until he lost consciousness and being thrown into the river Caguán inside a sack until he nearly drowned. He states that he did not have any information concerning the movement, but that his interrogators kept on insisting and he was severely beaten. After three days he was transferred to the military barracks of Doncello and again subjected to torture ("submarine", "hanging" and beatings). In addition, he was told that his parents would be killed if he refused to sign a confession prepared by his captors. After several days he was moved to the military barracks of Juananbú in the city of Florencia. He was again beaten (the name of the responsible officer is given) and threatened with his parents' possible death. He was then taken before Military Tribunal No. 35 and allegedly forced to sign a confession, pleading guilty, *inter alia*, of having kidnapped a man called Vicente Baquero, who later declared that he had never been kidnapped.

1.3. On 5 April 1981, the author was taken to the prison in Florencia and informed that his parents had been killed. At his request, he was immediately brought again before the military judge, before whom he retracted his "confession" and denounced the death threats received earlier concerning his parents. His new declaration allegedly disappeared from his dossier.

1.4. The author states that on 13 December 1982 he was released from prison due to Amnesty Law No. 35 of 1982 concerning political detainees.

1.5. With regard to his parents' deaths, the author states the following:

His father, José Joaquín Herrera, 54 years old, was treasurer of the Council of Community Action (*Junta de Acción Comunal*) in the village of Gallineta belonging to the municipality of Doncello; his mother, Emma Rubio de Herrera, 52 years old, had been elected town Councillor for the *Frente Democrático*; they were both farmers. In February 1981, his parents' home was searched by approximately 20 members of the armed forces and the author's father was ordered to follow them. He returned one hour later bearing signs of beatings.

One week later the same group, part of the *Batallón Colombia*, led by a captain, a lieutenant and a corporal (their names are given), detained his father for several hours during which he was subjected to torture. The same happened the following day.

On 27 March 1981, at 3 a.m., a group of individuals in military uniforms, identified as members of the "counter-guerrilla", arrived at the home of the author's parents and ordered his father to follow them. When his mother objected, she was also obliged to follow them.

The author's brothers reported the disappearance of their parents immediately afterwards to the Tribunal of Doncello. One week later they were called by the authorities of Doncello to identify the bodies of their parents; their father's body was decapitated and his hands tied with a rope.

1.6. With regard to the question of exhaustion of domestic remedies, the author states that from prison he wrote to the President of Colombia, to the Office of the Attorney-General and to the responsible military authorities, but never received a reply. He further states that the copies which he had kept of these letters were removed from his cell by the prison authorities during a search. He adds that all incidents complained of occurred in a region under military control where violations of the rights of the civilian population have allegedly become general practice.

1.7. The author claims that his communication reveals violations of articles 6, 7, 9, 10 and 17 of the International Covenant on Civil and Political Rights. He indicates that the present case is not being examined under another procedure of international investigation or settlement.

2. By its decision of 22 March 1984, 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. The Working Group also requested the State party to provide the Committee, with (*a*) copies of any court orders or de-

cisions relevant to the case of Joaquín David Herrera Rubio and (*b*) copies of the death certificates and medical reports and of the reports of whatever inquiry was held in connection with the deaths of José Joaquín Herrera and Emma Rubio de Herrera.

3. No reply was received from the State party in this connection. The time-limit established by the Working Group's decision expired on 15 July 1984.

4. The Committee found, on the basis of the information before it, that it was not precluded by article 5, paragraph 2 (*a*), of the Optional Protocol from considering the communication. The Committee was also unable to conclude that, in the circumstances of the case, there were effective domestic remedies which had not been exhausted. Accordingly the Committee found that the communication was not inadmissible under article 5, paragraph 2 (*b*), of the Optional Protocol.

5. On 26 March 1985 the Human Rights Committee therefore decided:

(*a*) That, in addition to acting on his own behalf, the author was justified in raising the case of his deceased parents, José Joaquín Herrera and Emma Rubio de Herrera;

(*b*) That the communication was admissible;

(*c*) That in accordance with article 4, paragraph 2, of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of the current decision, written explanations or statements clarifying the matter and the remedy, if any, that might have been taken by it;

(*d*) That the State party again be requested to furnish the Committee with (i) copies of any court orders or decisions taken against Joaquín David Herrera Rubio and (ii) copies of the death certificates and autopsy reports and of the reports of whatever inquiry was held in connection with the death of José Joaquín Herrera and Emma Rubio de Herrera.

6.1. In its submission under article 4, paragraph 2, of the Optional Protocol, dated 11 August 1986, the State party indicates that the killings of José Herrera and Emma Rubio de Herrera were duly investigated and that no evidence was found to support charges against military personnel. The investigation was therefore closed by order of the Attorney-General delegate for the Armed Forces, dated 15 August 1984. In a subsequent letter of the Attorney-General delegate for the Armed Forces to the Colombian Attorney-General, dated 20 October 1985, it is stated that the dossier was closed:

> . . . because it was established that no member of the armed forces took part in those events. The report includes telegram No. 5047, dated 24 May 1984, signed by the commanding officer of the Ninth Brigade with headquarters in Neiva, stating that the Honourable Disciplinary Court had on 29 March 1984 ascribed jurisdiction to investigate these murders to the Third High Court of Florencia (Caquetá), which, by telegram No. 157 of 18 September 1986 addressed to this office, reported that proceedings to date had revealed no involvement of any member of the armed forces and that the dossier had been temporarily closed in conformity with article 473 of the Code of Criminal Procedure.

6.2. The State party also forwarded the text of a decision of the Penal Chamber of the Superior Court of Florencia, dated 18 February 1983, finding, after a judicial investigation lasting from 24 September 1982 to 25 January 1983, that the killings had been perpetrated by armed persons, without, however, being able to determine to which group they belonged. This decision also quotes the testimony of the author's brother Luis Herrera Rubio, who stated that his parents had no enemies in the community and that they had only had problems with members of the Colombian army, who had repeatedly searched their home and detained his father on a previous occasion.

6.3. With respect to the criminal proceedings instituted against the author and to the author's allegations that he had been subjected to torture, the Attorney-General Delegate for the Armed Forces stated that:

> The Military Court of Criminal Investigation No. 37 [hereinafter: Court No. 37] attached to the Juanabú Battalion (Florencia), acting on a report dated 17 February 1981, signed by the officer commanding the Colombia Airborne Battalion, opened on 18 February 1981 a criminal investigation against Alvaro Hurtatiz and others on the charge of rebellion (involvement in the FARC [Fuerzas Armadas Revolucionarias de Colombia] rebel group), in connection with events that occurred in Caquetá in the years 1979, 1980 and 1981. During this investigation, the accused's statement given on 3 April 1981 implicated Joaquín Herrera Rubio (alias El Guara), who was arrested by a patrol of the Colombia Battalion on 17 March 1981 in Cartagena del Chiará (Caquetá). By decision dated 8 April 1981, Court No. 37 ordered the pre-trial detention of Joaquín Herrera Rubio on the charge of rebellion. In applications dated 7 May and 11 June 1981, Joaquín Herrera Rubio requested the permission of Court No. 37 to make an addition to his unsworn statement. In this statement to the Court on 15 June 1981 he gave an account of the tortures to which he had been subjected by members of the Colombia Battalion. The charges of torture were also made on oath during the inquiry and Court No. 37 also received a sworn statement about them during its proceedings. Joaquín Herrera Rubio stated that the torture described in the reports of the Office of the Attorney-General of the nation and in those in the possession of the United Nations Human Rights Committee were inflicted on him in the Colombia Battalion, that he did not know the names of the soldiers who tortured him since they blindfolded him first, that he brought no charges against the Military Court but that he did bring charges against military personnel, namely, Captain Pérez and Lieutenant Moncaleano.
>
> By decision dated 24 June 1982, the Command of the Ninth Brigade—the Court of First Instance—referred the proceedings to the Florencia High Court (Allocation Division) as having jurisdiction. By prior decision No. 44 dated 20 April 1981, issued by the Command of the Ninth Brigade, Joaquín Herrera Rubio had been sentenced to three years' imprisonment for breach of article 10, paragraph 2, of Decree 1923/78.
>
> The Florencia High Court, according to the photocopy of the register annexed, by court order dated 23 June 1983,* declared the amnesty applicable to the investigation by virtue of the provisions of Act 35/82 and consequently ordered that all proceedings against Joaquín Herrera Rubio and others on the charges of rebellion, extortion and aggravated theft should be stayed. The court decision . . . made no reference to and did not investigate the torturing of Joaquín David Herrera Rubio.

6.4. On 21 March 1986, the Attorney-General Delegate for the Armed Forces decided not to open a formal investigation with regard to the allegations of torture in the author's case. The decision reads in part:

> Mr. Herrera Rubio complained of the alleged tortures to Court No. 37 in additions, made on 15 June 1981 and 28 October 1981, to his statement as an accused person. These statements assert that, when he was arrested on 17 March 1981, army personnel from the Doncello Military Base and the Cartagena del Chairá Military Base tortured him, but as they blindfolded him before doing so, he could not identify them.
>
> The Florencia regional office of the Attorney-General was instructed to take a further statement from the complainant but it was not possible to discover his whereabouts in the Department of Caquetá; it was stated that he was possibly living in Puerto Lleras.

* The author states in paragraph 1.4 above that he had already been released from imprisonment on 13 December 1982.

Inquiries were ordered to be made at the Municipal Prison into the physical condition of the complainant on his arrival there. The medical officer in charge of prisons under the High Court states that, since medical records for each inmate had begun to be kept only from the last three months of 1983, he cannot substantiate the allegation.

On the index card kept by the legal counsel's office, relating to Herrera Rubio held on a charge of rebellion, there is no record that he entered the prison with marks of torture or injuries. It states that he entered the prison of the judicial district on 11 August 1981.

In view of the difficulties of obtaining evidence about events which happened five years ago, this office can take a decision only on the basis of the account given by the alleged victim to Court No. 37 in 1981.

His statement on the alleged acts of torture are not credible in view of the fact that three months elapsed from the time of the alleged ill-treatment before the complainant reported it to the Court. On witnessing his statement as an accused person made on 3 April 1981, this office put on record that "the accused appeared normal physically and mentally . . ."; the person in question under investigation for rebellion had been sentenced for illegally carrying weapons. Finally, his charges contain no specific details.

7.1. In his comments, dated 4 October 1986, the author dismisses the State party's response as "a prime example of the various legal subterfuges used by the armed forces, with the collusion of the other branches of government, to safeguard their impunity".

7.2. The author refutes the State party's arguments in the following way:

In its reply concerning the murder of my parents, the Colombian Government totally absolves the armed forces from blame, claiming that the fact of wearing military uniform is in no way proof of the presence of members of the armed forces and insinuating that the crime might have been committed by the FARC guerrilla group.

This reply is completely at odds with the facts of the case, as reported to the Committee; members of the armed forces repeatedly searched the home of my parents, tortured my father and repeatedly told me, while I was in prison, that they would kill my parents, as indeed they did.

The complaint submitted to the Committee gives the names of various serving members of the armed forces responsible for the searches, torture and threats, yet the Attorney-General has nothing to say on the subject.

. . .

The insinuation that a guerrilla group such as FARC carried out these killings is absolutely inconsistent with other information in the case. One of the documents attached by the Attorney-General states that I was charged with rebellion because of my alleged links with FARC. It also notes that my mother was a councillor for the Democratic Front, a political organization enjoying FARC support in the region. It would therefore be absurd to imagine that FARC could have committed this crime, when it thereby would have been killing its own sympathizers.

Regarding the torture of which I was a victim, the Attorney-General states that the investigation into this matter was also closed because, *inter alia*:

At the time, prisoners were not given a medical examination;

There are difficulties in obtaining evidence about events which happened five years ago;

It was only three months after the ill-treatment that the injured party decided to report it.

The Attorney-General fails to explain why the petitions written by me in prison and addressed to the Office of the President of the Republic, the office of the Attorney-General and the Ninth Army Brigade went unanswered.

. . .

The Attorney-General would also appear to be unaware of the psychological pressure on a prisoner who has been subjected to cruelty and harassment and lacks any means of defence. Such prisoners often decide not to file a complaint so as to save themselves or their families from further and even more cruel acts in retaliation. So it was with me, in deciding to report the torture and threats which I had suffered only when I learned that my parents had been killed by the armed forces and could not therefore be subjected to further criminal reprisals.

Lastly, in order to understand the nature of this crime, the Committee needs to have some idea of its context.

In 1981, the Department of Caquetá was the scene of a military counter-insurgency operation under cover of which all kinds of crimes were committed.

Since this is a semi-forest area somewhat isolated from the centre of the country and with poor communications, this operation was largely passed over in silence by the media.

Most villages in the area were subjected to stringent controls by the armed forces on the supposition that every peasant was "collaborating with the guerrillas". Most of the population suffered searches, intimidation, plunder of their household goods, crops and cattle, and cruel, inhuman and degrading treatment; torture was widely and systematically practised and there were numerous disappearances and killings. Many peasants were arrested and then taken by military helicopter to villages where they were not known; there they were killed and their bodies thrown on to a road or into a river (the number of persons killed may approach 1,000).

This array of premeditated crimes had the full backing of the various branches of Government. That is why domestic complaints were useless and all these crimes have so far gone absolutely unpunished.

8.1. The author's comments were transmitted to the State party on 27 November 1986.

8.2. In view of the conflicting statements by the parties, the Working Group of the Human Rights Committee, at a special session in December 1986, decided to request more detailed information from the State party. By note verbale of 18 December 1986, the following specific questions were formulated:

(*a*) What investigations have been undertaken with regard to those military officers who have been specifically named by the author and accused of having committed torture, carried out raids and made threats?

(*b*) What investigations are now being carried out with regard to the deaths of the parents of Mr. Herrera Rubio and with regard to his allegations of torture?

(*c*) Have charges been brought against anyone?

9.1. Under cover of a note dated 22 January 1987, the State party forwarded copies of various documents relating to the investigation of the author' case, but did not provide specific answers to the questions posed by the Working Group. No reference was made to the specific issues raised by the author in his comments of 4 October 1986.

9.2. The documents forwarded by the State party appear to confirm that no further investigations have been undertaken or are pending in the Herrera case.

9.3. By a further letter, dated 8 July 1987, the Ministry of Foreign Affairs of Colombia confirmed that the investigations in the author's case have been concluded and that no legal proceedings against military personnel could be initiated because of lack of sufficient evidence. The State party therefore requests the committee to consider the explanations and statements already submitted in adopting its views in the case.

10.1. The Human Rights Committee, having examined the present communication in the light of all the information made available to it by the parties as provided in article 5, paragraph 1, of the Optional Protocol, hereby decides to base its views on the following facts and considerations.

10.2. Joaquín Herrera Rubio was arrested on 17 March 1981 by members of the Colombian armed forces on suspicion of being a "guerrillero". He claims that he was tortured ("submarine", "hanging" and beatings)

by Colombian military authorities who also threatened him that unless he signed a confession his parents would be killed. On 27 March 1981, several individuals wearing military uniforms, identifying themselves as members of the counter-guerrilla, came to the home of the author's parents and led them away by force. One week later the bodies of José Herrera and Emma Rubio de Herrera were found in the vicinity. At that time the District of Caquetá is reported to have been the scene of a military counter-insurgency operation, during which most villages in the area were subjected to stringent controls by the armed forces. The State party has shown that a judicial investigation of the killings was carried out from 24 September 1982 to 25 January 1983, and claims that it was established that no member of the armed forces had taken part in the killings. With respect to the author's allegations of torture, the State party contends that they are not credible in view of the fact that three months elapsed from the time of the alleged ill-treatment before the author's complaint was brought to the attention of the Court.

10.3. Whereas the Committee considers that there is reason to believe, in the light of the author's allegations, that Colombian military persons bear responsibility for the deaths of José Herrera and Emma Rubio de Herrera, no conclusive evidence has been produced to establish the identity of the murderers. In this connection the Committee refers to its general comment No. 6 (16) concerning article 6 of the Covenant, which provides, *inter alia*, that States parties should take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life. The Committee has duly noted the State party's submissions concerning the investigations carried out in this case, which, however, appear to have been inadequate in the light of the State party's obligations under article 2 of the Covenant.

10.4. With regard to the author's allegations of torture, the Committee notes that the author has given a very detailed description of the ill-treatment to which he was subjected and has provided the names of members of the armed forces allegedly responsible. In this connection, the Committee observes that the initial investigations conducted by the State party may have been concluded prematurely and that further investigations were called for in the light of the author's submission of 4 October 1986 and the Working Group's request of 18 December 1986 for more precise information.

10.5. With regard to the burden of proof, the Committee has already established in other cases (for example, Nos. 30/1978 and 85/1981) that this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. In the circumstances, due weight must be given to the author's allegations. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. In no circumstances should a State party fail to investigate fully allegations of ill-treatment when the person or persons allegedly responsible for the ill-treatment are identified by the author of a communication. The State party has in this matter provided no precise information and reports, *inter alia*, on the questioning of military officials accused of maltreatment of prisoners, or on the questioning of their superiors.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant of Civil and Political Rights, is of the view that the facts as found by the Committee disclose violations of the Covenant with respect to:

Article 6, because the State party failed to take appropriate measures to prevent the disappearance and subsequent killings of José Herrera and Emma Rubio de Herrera and to investigate effectively the responsibility for their murders; and

Article 7 and article 10, paragraph 1, because Joaquín Herrera Rubio was subjected to torture and ill-treatment during his detention.

12. The Committee, accordingly, is of the view that the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations that Mr. Herrera Rubio has suffered and further to investigate said violations, take action thereon as appropriate and to take steps to ensure that similar violations do not occur in the future.

Communication No. 172/1984

Submitted by: S. W. M. Broeks on 1 June 1984
Alleged victim: The author
State party: The Netherlands
Date of adoption of views: 9 April 1987 (twenty-ninth session)[1]

Subject matter: Cessation of payment of unemployment benefits

Procedural issues: Competence of HRC to examine communications concerning rights also set out in ICESCR—Relevance of travaux préparatoires *of Covenants—Examination of general issue under ICESCR not the same matter under article 5 (2)* (a) *Optional Protocol—Supplementary means of interpretation—Vienna Convention on the Law of Treaties, articles 31 and 32—Non-participation of Committee member in decision*

Substantive issues: Scope of application of article 26 of ICCPR—Discrimination based on sex—Unreasonable differentiation—Unemployment benefits—"Breadwinner" concept—Legislative remedies taken by State party—Marital status

Article of the Covenant: 26
Article of the Optional Protocol: 5 (2) (a)
Rule of Procedure: 85

1. The author of the communication (initial letter dated 1 June 1984 and subsequent letters dated 17 December 1984, 5 July 1985 and 20 June 1986) is Mrs. S. W. M. Broeks, a Netherlands citizen born on 14 March 1951 and residing in Arnben, the Netherlands. She is represented by legal counsel.

2.1. Mrs. Broeks, who was married at the time when the dispute in question arose (she has since divorced and not remarried), was employed as a nurse from 7 August 1972 to 1 February 1979, when she was dismissed for reasons of disability. She had become ill in 1975, and from that time she benefited from the Netherlands social security system until 1 June 1980 (as regards disability and as regards unemployment), when unemployment payments were terminated in accordance with Netherlands law.

2.2. Mrs. Broeks contested the decision of the relevant Netherlands authorities to discontinue unemployment payments to her and in the course of exhausting domestic remedies invoked article 26 of the International Covenant on Civil and Political Rights, claiming that the relevant Netherlands legal provisions were contrary to the right to equality before the law and equal protection of the law without discrimination guaranteed by article 26 of the International Covenant on Civil and Political Rights. Legal counsel submits that domestic remedies were exhausted on 26 November 1983, when the appropriate administrative authority, the Central Board of Appeal, confirmed a decision of a lower municipal authority not to continue unemployment payments to Mrs. Broeks.

2.3. Mrs. Broeks claims that, under existing law (Unemployment Benefits Act (WWV), sect. 13, subsect. 1 (1), and Decree No. 61 452/IIIa of 5 April 1976, to give effect to sect. 13, subsect. 1 (1), of the Unemployment Benefits Act) an unacceptable distinction has been made on the grounds of sex and status. She bases her claim on the following: if she were a man, married or unmarried, the law in question would not deprive her of unemployment benefits. Because she is a woman, and was married at the time in question, the law excludes her from continued unemployment benefits. This, she claims, makes her a victim of a violation of article 26 of the Covenant on the grounds of sex and status. She claims that article 26 of the International Covenant on Civil and Political Rights was meant to give protection to individuals beyond the specific civil and political rights enumerated in the Covenant.

2.4. The author states that she has not submitted the matter to other international procedures.

3. By its decision of 26 October 1984, 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.

4.1. In its submission dated 29 May 1985 the State party underlined, *inter alia*, that:

(*a*) The principle that elements of discrimination in the realization of the right to social security are to be eliminated is embodied in article 9 in conjunction with articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights;

(*b*) The Government of the Kingdom of the Netherlands has accepted to implement this principle under the terms of the International Covenant on Economic, Social and Cultural Rights. Under these terms, States parties have undertaken to take steps to the maximum of their available resources with a view to achieving progressively the full realization of the rights recognized in that Covenant (art. 2, para. 1);

(*c*) The process of gradual realization to the maximum of available resources is well on its way in the Netherlands. Remaining elements of discrimination in the realization of the rights are being and will be gradually eliminated;

(*d*) The International Covenant on Economic, Social and Cultural Rights has established its own system for international control of the way in which States parties are fulfilling their obligations. To this end States parties have undertaken to submit to the Economic and Social Council reports on the measures they have adopted and the progress they are making. The Government of the Kingdom of the Netherlands to this end submitted its first report in 1983.

4.2. The State party then posed the question whether the way in which the Netherlands was fulfilling its obligations under article 9 in conjunction with articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights could become, by way of article 26 of the International Covenant on Civil and Political Rights, the object of an examination by the Human Rights Committee. The State party submit-

[1] Pursuant to rule 85 of the provisional rules of procedure, Committee member Mr. Joseph Mommersteeg, although participating in the consideration of the communication, did not take part in the adoption of the views.

ted that the question was relevant for the decision whether the communication was admissible.

4.3. The State party stressed that it would greatly benefit from receiving an answer from the Human Rights Committee to the question mentioned in paragraph 4.2 above. "Since such an answer could hardly be given without going into one aspect of the merits of the case—i.e. the question of the scope of article 26 of the International Covenant on Civil and Political Rights—the Government would respectfully request the Committee to join the question of admissibility to an examination of the merits of the case."

4.4. In case the Committee did not grant that request and declared the communication admissible, the State party reserved the right to submit, in the course of the proceedings, observations which might have an effect on the question of admissibility.

4.5. The State party also indicated that a change of legislation had been adopted recently in the Netherlands, eliminating article 13, paragraph 1, of WWV, which was the subject of the author's claim. This is the Act of 29 April 1985, S 230, having a retroactive effect to 23 December 1984.

4.6. The State party confirmed that the author had exhausted domestic remedies.

5.1. In a memorandum dated 5 July 1985, the author commented on the State party's submission under rule 91. The main issues dealt with in the comments are set out in paragraphs 5.2 to 5.10 below.

5.2. First, the author stated that in the preambles to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights an explicit connection was made between an individual's exercise of his civil and political rights and his economic, social and cultural rights. The fact that those different kinds of rights had been incorporated into two different covenants did not detract from their interdependence. It was striking, the author submitted, that in the International Covenant on Civil and Political Rights, apart from in article 26, there were specific references on numerous occasions to the principle of equality or non-discrimination. She listed them as follows:

Article 2, paragraph 1: non-discrimination with reference to the rights recognized in the Covenant;

Article 3: non-discrimination on the grounds of sex with reference to the rights recognized in the Covenant;

Article 14: equality before the courts;

Article 23, paragraph 4: equal rights of spouses;

Article 24, paragraph 1: equal rights of children to protective measures;

Article 25, and under (c)*:* equal right to vote and equal access to government service.

5.3. Further, the author stated that article 26 of the Covenant was explicitly not confined to equal treatment with reference to certain rights, but stipulated a general principle of equality. It was even regarded as of such importance that under article 4, paragraph 1, of the Covenant, in a time of public emergency, the prohibition of discrimination on the grounds of race, colour, sex, religion or social origin must be observed. In other words, even in time of public emergency, the equal treatment of men and women should remain intact. In the procedure to approve the Covenant it had been assumed by the Netherlands legislative authority, as the Netherlands Government wrote in the explanatory memorandum to the Bill of Approval, that "the provision of article 26 is also applicable to areas otherwise not covered by the Covenant". That (undisputed) conclusion was based on the difference in formulation between article 2, paragraph 1, of the Covenant and of article 14 of the European Convention on Human Rights on the one hand and article 26 of the Covenant on the other.

5.4. The author recalled that, during the discussion by the Human Rights Committee, at its fourteenth session, of the Netherlands report submitted in compliance with article 40 of the Covenant (CCPR/C/10/Add.3, CCPR/C/SR.321, SR.322, SR.325, SR.326), it had been assumed by the Netherlands Government that article 26 of the Covenant also applied in the field of economic, social and cultural rights. Mr. Olde Kalter had stated, on behalf of the Netherlands Government, that by virtue of national, constitutional law "direct application of article 26 in the area of social, economic and cultural rights depended on the character of the regulations or policy for which that direct application was requested" (see CCPR/C/SR.325, para. 50). In other words, in his opinion, article 26 of the Covenant was applicable to those rights and the only relevant question in terms of internal, constitutional law in the Netherlands (sects. 93 and 94 of the Constitution) was whether in such instances article 26 was self-executing and could be applied by the courts. He had regarded it as self-evident that the Netherlands in its legislation, among other things, was bound by article 26 of the Covenant. "In that connection he [Mr. Olde Kalter] noted that the Government of the Netherlands was currently analysing national legislation concerning discrimination on grounds of sex or race". In the observations of the State party in the present case, the author adds, this last point is confirmed.

5.5. The author further stated that in various national constitutional systems of countries which have acceded to the Covenant, generally formulated principles of equality could be found which were also regarded as being applicable in the field of economic, social and cultural rights. Thus, in the Netherlands Constitution, partly inspired, the author submitted, by article 26 of the Covenant, a generally formulated prohibition of discrimination (sect. 1) was laid down which was irrefutably regarded in the Netherlands as being applicable to economic, social and cultural rights as well. The only reason, she submitted, why the present issue had not been settled at a national level by virtue of section 1 of the Constitution was because the courts were forbidden to test legislation, such as that being dealt with currently, against the Constitution (sect. 120 of the Constitution). The courts, she stated, were allowed to test legislation against self-executing provisions of international conventions.

5.6. The author submitted that judicial practice in the Netherlands had been consistent in applying article 26 of the Covenant also in cases where economic, social and cultural rights had been at stake, for example:

(*a*) Afdeling Rechtspraak van de Raad van State (Judicial Division of the Council of State), 29-1-1981

GS81 P441-442. This case involved discrimination on the grounds of sex with reference to housing. An appeal under article 26 of the Covenant in conjunction with article 11, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights was founded.

(*b*) Gerechtshof's Gravenhage (Court of Appeal at the Hague), 17 June 1982 NJ 1983, 345 appendix 3. Again with regard to housing, an appeal was made under article 26 of the Covenant and was granted.

(*c*) Centrale Raad van Beroep (Central Board of Appeal), 1 November 1983, NJCM-Bulletin.

(*d*) Centrale Raad van Beroep (Central Board of Appeal), 1 November 1983, NJCM-Bulletin 9-1 (1984) appendix 4. In this case, which constitutes the basis for the petition to the Human Rights Committee, the Central Board of Appeal considered "that article 26 is not applicable only to the civil and political rights which are recognized by the Covenant". The appeal under article 26 was subsequently rejected for other reasons.

(*e*) Board of Appeal, Groningen, 2 May 1985, reg. No. AAW 181-1095 appendix 5. On the basis of article 26 of the Covenant among other things a discriminatory provision in the General Disablement Benefits Act was declared null and void.

5.7. The author further submitted that the question of equal treatment in the field of economic, social and cultural rights was not fundamentally different from the problem of equality with regard to freedom to express one's opinion or the freedom of association, in other words with regard to civil and political rights. The fact was, she argued, that in both cases it was not a question of the level at which social security had been set or the degree to which freedom of opinion was guaranteed, but purely and simply whether equal treatment or the prohibition of discrimination was respected. The level of social security did not come within the scope of the International Covenant on Civil and Political Rights nor was it relevant in a case of unequal treatment. The only relevant question, she submitted, was whether unequal treatment was compatible with article 26 of the Covenant. A contrary interpretation of article 26, the author argued, would turn that article into a completely superfluous provision, for then it would not differ from article 2, paragraph 1, of the Covenant. Consequently, she submitted, such an interpretation would be incompatible with the text of article 26 of the Covenant and with the object and purpose of the Covenant as laid down in article 26 of the preamble.

5.8. The author recalled that in its observations the State party had put forward the question whether the way in which the Netherlands was meeting its commitments under the International Covenant on Economic, Social and Cultural Rights (via article 26 of the International Covenant on Civil and Political Rights), might be judged by the Human Rights Committee. The question, she submitted, was based on a wrong point of departure, and therefore required no answer. The fact was, the author argued, that the only question that the Human Rights Committee was required to answer in that case was whether, *ratione materiae*, the alleged violation came under article 26 of the International Covenant on Civil and Political Rights. The author submitted that that question must be answered in the affirmative.

5.9. The author further recalled that the State party was of the opinion that the alleged violation could also fall under article 9 of the International Covenant on Economic, Social and Cultural Rights in conjunction with articles 2 and 3 of the same Covenant. Although that question was not relevant in the case in point, the author submitted, it was obvious that certain issues were related to provisions in both Covenants. Although civil and political rights on the one hand and economic and social and cultural rights on the other had been incorporated for technical reasons into two different Covenants, it was a fact, the author submitted, that those rights were highly interdependent. That interdependence, she argued, had not only emerged in the preamble to both Covenants, but was also once again underlined in General Assembly resolution 543 (VI), in which it had been decided to draw up two covenants: "the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent". The State party, too, she submitted, had explicitly recognized that interdependence earlier in the Explanatory Memorandum to the Act of Approval, appendix 1, page 8: "the drafters of the two Covenants wanted to underline the parallel nature of the present international conventions by formulating the preambles in almost entirely identical words. The point is that they have expressed in the preambles that, although civil rights and political rights on the one hand and economic, social and cultural rights on the other, have been incoporated into two separate documents, the enjoyment of all these rights is essential". If the State party was intending to imply that the subject-matter covered by the one Covenant did not come under the other, that was demonstrably incorrect: even a summary comparison of the opening articles of the two Covenants bore witness to the contrary, the author argued.

5.10. In her opinion, the author added, the State party seemed to wish to say that the Human Rights Committee was not competent to take note of the present complaint because the matter could also be brought up as part of the supervisory procedure under the International Covenant on Economic, Social and Cultural Rights (see arts. 16-22). That assertion, the author contended, was not valid because the reporting procedure under the International Covenant on Economic, Social and Cultural Rights could not be regarded as "another procedure of international investigation or settlement" in the sense of article 5, paragraph 2 (*a*), of the Optional Protocol.

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

6.2. Article 5, paragraph 2 (*a*), of the Optional Protocol precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. In this connection the Committee observes that the examination of State reports, submitted under article 16 of the International Covenant on Economic, Social and Cultural Rights, does not, within the meaning of article 5, paragraph 2 (*a*), constitute an examination of the "same matter" as a claim by an individual

submitted to the Human Rights Committee under the Optional Protocol.

6.3. The Committee further observes that a claim submitted under the Optional Protocol concerning an alleged breach of a provision of the International Covenant on Civil and Political Rights, cannot be declared inadmissible solely because the facts also relate to a right protected by the International Covenant on Economic, Social and Cultural Rights or any other international instrument. The Committee need only test whether the allegation relates to a breach of a right protected by the International Covenant on Civil and Political Rights.

6.4. Article 5, paragraph 2 (*b*), of the Optional Protocol precludes the Committee from considering a communication unless domestic remedies have been exhausted. The parties to the present communication agree that domestic remedies have been exhausted.

6.5. With regard to the State party's inquiry concerning the scope of article 26 of the International Covenant on Civil and Political Rights, the Committee did not consider it necessary to pronounce on its scope prior to deciding on the admissibility of the communication. However, having regard to the State party's statement (para. 4.4 above) that it reserved the right to submit further observations which might have an effect on the question of the admissibility of the case, the Committee pointed out that it would take into account any further observations received on the matter.

7. On 25 October 1985, the Human Rights Committee therefore decided that the communication was admissible. In accordance with article 4, paragraph 2, of the Optional Protocol, the State party was requested to submit to the Committee, within six months of the date of transmittal to it of the decision on admissibility, written explanations or statements clarifying the matter and the measures, if any, that might have been taken by it.

8.1. In its submission under article 4, paragraph 2, of the Optional Protocol, dated 22 May 1986, the State party again objected to the admissibility of the communication, reiterating the arguments advanced in its submission of 29 May 1985.

8.2. In discussing the merits of the case, the State party first elucidates the factual background as follows:

When Mrs. Broeks applied for WWV benefits in February 1980, section 13, subsection 1 (1), was still applicable. This section laid down that WWV benefits could not be claimed by those married women who were neither breadwinners nor permanently separated from their husbands. The concept of "breadwinner" as referred to in section 13, subsection 1 (1), of WWV was of particular significance, and was further amplified in statutory instruments based on the Act (the last relevant instrument being the ministerial decree of 5 April 1976, Netherlands Government Gazette 1976, 72). Whether a married woman was deemed to be a breadwinner depended, *inter alia*, on the absolute amount of the family's total income and on what proportion of it was contributed by the wife. That the conditions for granting benefits laid down in section 13, subsection 1 (1), of WWV applied solely to married women and not to married men is due to the fact that the provision in question corresponded to the then prevailing views in society in general concerning the roles of men and women within marriage and society. Virtually all married men who had jobs could be regarded as their family's breadwinner, so that it was unnecessary to check whether they met this criterion for the granting of benefits upon becoming unemployed. These views have gradually changed in later years. This aspect will be further discussed below (see para. 8.4).

The Netherlands is a member State of the European Economic Community (EEC). On 19 December 1978 the Council of the European Communities issued a directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security (79/7/EEC), giving member States a period of six years, until 23 December 1984, within which to make any amendments to legislation which might be necessary in order to bring it into line with the directive. Pursuant to this directive the Netherlands Government examined the criteria for the granting of benefits laid down in section 13, subsection 1 (1), of WWV in the light of the principle of equal treatment of men and women and in the light of the changing role patterns of the sexes in the years since about 1960.

Since it could no longer be assumed as a matter of course in the early 1980s that married men with jobs should always be regarded as "breadwinners", the Netherlands amended section 13, subsection 1 (1), of WWV to meet its obligations under the EEC directive. The amendment consisted of the deletion of section 13, subsection 1 (1), with the result that it became possible for married women who were not breadwinners to claim WWV benefits, while the duration of the benefits was reduced for people aged under 35.

In view of changes in the status of women—and particularly married women—in recent decades, the failure to award Mrs. Broeks WWV benefits in 1979 is explicable in historical terms. If she were to apply for such benefits now, the result would be different.

8.3. With regard to the scope of article 26 of the Covenant, the State party argues, *inter alia*, as follows:

The Netherlands Government takes the view that article 26 of the Covenant does entail an obligation to avoid discrimination, but that this article can only be invoked under the Optional Protocol to the Covenant in the sphere of civil and political rights, not necessarily limited to those civil and political rights that are embodied in the Covenant. The Government could, for instance, envisage the admissibility under the Optional Protocol of a complaint concerning discrimination in the field of taxation. But it cannot accept the admissibility of a complaint concerning the enjoyment of economic, social and cultural rights. The latter category of rights is the object of a separate United Nations Covenant. Mrs. Broeks' complaint relates to rights in the sphere of social security, which fall under the International Covenant on Economic, Social and Cultural Rights. Articles 2, 3 and 9 of that Covenant are of particular relevance here. That Covenant has its own specific system and its own specific organ for international monitoring of how States parties meet their obligations and deliberately does not provide for an individual complaints procedure.

The Government considers it incompatible with the aims of both the Covenants and the Optional Protocol that an individual complaint with respect to the right of social security, as referred to in article 9 of the International Covenant on Economic, Social and Cultural Rights, could be dealt with by the Human Rights Committee by way of an individual complaint under the Optional Protocol based on article 26 of the International Covenant on Civil and Political Rights.

The Netherlands Government reports to the Economic and Social Council on matters concerning the way it is fulfilling its obligations with respect to the right to social security, in accordance with the relevant rules of the International Covenant on Economic, Social and Cultural Rights . . .

Should the Human Rights Committee take the view that article 26 of the International Covenant on Civil and Political Rights ought to be interpreted more broadly, thus that this article is applicable to complaints concerning discrimination in the field of social security, the Government would observe that in that case article 26 must also be interpreted in the light of other comparable United Nations conventions laying down obligations to combat and eliminate discrimination in the field of economic, social and cultural rights. The Government would particularly point to the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

If article 26 of the International Covenant on Civil and Political Rights were deemed applicable to complaints concerning discriminatory elements in national legislation in the field of those conventions, this could surely not be taken to mean that a State party would be required to have eliminated all possible discriminatory elements from its legislation in those fields at the time of ratification of the Covenant. Years of work are required in order to examine the whole complex of national legislation in search of discriminatory elements. The search can never be completed, either, as distinctions in legislation which are justifiable in the light of social views and conditions prevailing when they are first made may become disputable as changes occur in the views held in society. . . .

If the Human Rights Committee should decide that article 26 of the International Covenant on Civil and Political Rights entails obli-

gations with regard to legislation in the economic, social and cultural field, such obligations could, in the Government's view, not compromise more than an obligation of States to subject national legislation to periodic examination after ratification of the Covenant with a view to seeking out discriminatory elements and, if they are found, to progressively taking measures to eliminate them to the maximum of the State's available resources. Such examinations are under way in the Netherlands with regard to various aspects of discrimination, including discrimination between men and women.

8.4. With regard to the principle of equality laid down in article 26 of the Covenant in relation to section 13, subsection 1 (1), of WWV in its unamended form, the State party explains the legislative history of WWV and in particular the social justification of the "breadwinner" concept at the time the laws was drafted. The State party contends that, with the "breadwinner" concept, "a proper balance was achieved between the limited availability of public funds (which makes it necessary to put them to limited, well-considered and selective use) on the one hand and the Government's obligation to provide social security on the other. The Government does not accept that the 'breadwinner' concept as such was 'discriminatory' in the sense that equal cases were treated in an unequal way by law." Moreover, it is argued that the provisions of WWV "are based on reasonable social and economic considerations which are not discriminatory in origin. The restriction making the provision in question inapplicable to men was inspired not by any desire to discriminate in favour of men and against women but by the *de facto* social and economic situation which existed at the time when the Act was passed and which would have made it pointless to declare the provision applicable to men. At the time when Mrs. Broeks applied for unemployment benefits the *de facto* situation was not essentially different. There was therefore no violation of article 26 of the Covenant. This is not altered by the fact that a new social trend has been growing in recent years, which has made it undesirable for the provision to remain in force in the present social context."

8.5. With reference to the decision of the Central Board of Appeal of 26 November 1983, which the author criticizes, the State party contends that:

The observation of the Central Board of Appeal that the Covenants employ different international control systems is highly relevant. Not only do parties to the Covenants report to different United Nations bodies but, above all, there is a major difference between the Covenants as regards the possibility of complaints by States or individuals, which exists only under the International Covenant on Civil and Political Rights. The contracting parties deliberately chose to make this difference in international monitoring systems, because the nature and substance of social, economic and cultural rights make them unsuitable for judicial review of a complaint lodged by a State party or an individual.

9.1. In her comments, dated 19 June 1986, the author reiterates that "article 26 of the Covenant is explicitly not confined to equal treatment with reference to certain rights, but stipulates a general principle of equality."

9.2. With regard to the State party's argument, that it would be incompatible with the aims of both the Covenants and the Optional Protocol if an individual complaint with respect to the rights of social security, as referred to in article 9 of the International Covenant on Economic, Social and Cultural Rights, could be dealt with by the Human Rights Committee, the author contends that this argument is ill-founded, because she is not complaining about the level of social security or other issues relating to article 9 of the International Covenant on Economic, Social and Cultural Rights, but rather she claims to be a victim of unequal treatment prohibited by article 26 of the International Covenant on Civil and Political Rights.

9.3. The author further notes that the State party "seems to admit implicitly that the provisions of the Unemployment Benefits Act were contrary to article 26 at the time when [she] applied for unemployment benefits, by stating that the provisions in question in the meantime have been amended in a way compatible with article 26 of the International Covenant on Civil and Political Rights.

10. 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, paragraph 1, of the Optional Protocol. The facts of the case are not in dispute.

11. Article 26 of the Covenant on Civil and Political Rights provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

12.1. The State party contends that there is considerable overlapping of the provisions of article 26 with the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights. The Committee is of the view that the International Covenant on Civil and Political Rights would still apply even if a particular subject-matter is referred to or covered in other international instruments, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, or, as in the present case, the International Covenant on Economic, Social and Cultural Rights. Notwithstanding the interrelated drafting history of the two Covenants, it remains necessary for the Committee to apply fully the terms of the International Covenant on Civil and Political Rights. The Committee observes in this connection that the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights do not detract from the full application of article 26 of the International Covenant on Civil and Political Rights.

12.2. The Committee has also examined the contention of the State party that article 26 of the International Covenant on Civil and Political Rights cannot be invoked in respect of a right which is specifically provided for under article 9 of the International Covenant on Economic, Social and Cultural Rights (social security, including social insurance). In so doing, the Committee has perused the relevant *travaux préparatoires* of the International Covenant on Civil and Political Rights, namely, the summary records of the discussions that took place in the Commission on Human Rights in 1948, 1949, 1950 and 1952 and in the Third Committee of the General Assembly in 1961, which provide a "supplementary means of interpretation" (art. 32 of the

Vienna Convention on the Law of Treaties[2]). The discussions, at the time of drafting, concerning the question whether the scope of article 26 extended to rights not otherwise guaranteed by the Covenant, were inconclusive and cannot alter the conclusion arrived at by the ordinary means of interpretation referred to in paragraph 12.3 below.

12.3. For the purpose of determining the scope of article 26, the Committee has taken into account the "ordinary meaning" of each element of the article in its context and in the light of its object and purpose (art. 31 of the Vienna Convention on the Law of Treaties). The Committee begins by noting that article 26 does not merely duplicate the guarantees already provided for in article 2. It derives from the principle of equal protection of the law without discrimination, as contained in article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities. Article 26 is thus concerned with the obligations imposed on States in regard to their legislation and the application thereof.

12.4. Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.

12.5. The Committee observes in this connection that what is at issue is not whether or not social security should be progressively established in the Netherlands, but whether the legislation providing for social security violates the prohibition against discrimination contained in article 26 of the International Covenant on Civil and Political Rights and the guarantee given therein to all persons regarding equal and effective protection against discrimination.

13. The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.

14. It therefore remains for the Committee to determine whether the differentiation in Netherlands law at the time in question and as applied to Mrs. Broeks constituted discrimination within the meaning of article 26. The Committee notes that in Netherlands law the provisions of articles 84 and 85 of the Netherlands Civil Code impose equal rights and obligations on both spouses with regard to their joint income. Under section 13, subsection 1 (1), of the Unemployment Benefits Act (WWV), a married woman, in order to receive WWV benefits, had to prove that she was a "breadwinner"—a condition that did not apply to married men. Thus a differentiation which appears on one level to be one of status is in fact one of sex, placing married women at a disadvantage compared with married men. Such a differentiation is not reasonable; and this seems to have been effectively acknowledged even by the State party by the enactment of a change in the law on 29 April 1985, with retroactive effect to 23 December 1984 (see para. 4.5 above).

15. The circumstances in which Mrs. Broeks found herself at the material time and the application of the then valid Netherlands law made her a victim of a violation, based on sex, of article 26 of the International Covenant on Civil and Political Rights, because she was denied a social security benefit on an equal footing with men.

16. The Committee notes that the State party had not intended to discriminate against women and further notes with appreciation that the discriminatory provisions in the law applied to Mrs. Broeks have, subsequently, been eliminated. Although the State party has thus taken the necessary measures to put an end to the kind of discrimination suffered by Mrs. Broeks at the time complained of, the Committee is of the view that the State party should offer Mrs. Broeks an appropriate remedy.

[2] United Nations, *Juridical Yearbook 1969* (United Nations publication, Sales No. E.71.V.4), p. 140.

Communication No. 176/1984

Submitted by: Juana Peñarrieta, María Pura de Toro *et al.*, later joined by Walter Lafuente Peñarrieta on 2 April 1984
Alleged victims: Walter Lafuente Peñarrieta, Miguel Rodríguez Candia, Oscar Ruiz Cáceres and Julio César Toro Dorado
State party: Bolivia
Date of adoption of views: 2 November 1987 (thirty-first session)

Subject matter: Detention of Bolivian citizen by military authorities

Procedural issues: Standing of authors—Exhaustion of domestic remedies—Failure of investigation of allegations by State party—Confirmation of allegations by victim after release—Weight of evidence

Substantive issues: Access to counsel—Detention incommunicado—Detention after amnesty—Ill-treatment of detainees—Torture—Release of victim from imprisonment

Articles of the Covenant: 2, 7, 9 (3), 10 (1) and 14 (3) (b)
Articles of the Optional Protocol: 4 (2) and 5 (2) (b)

1.1. The authors of the communication (initial letter dated 2 April 1984 and subsequent letters dated 14 and 18 June 1985, 17 January 1986, 18 March and 19 July 1987) are Rose Mary García, a Bolivian citizen living in the United States of America, and Juana Peñarrieta, María Pura de Toro, Nelva B. de Toro, Etty Cáceres, María Luisa de Ruiz, Aurora de Lafuente and Sofía de Rodríguez, Bolivian citizens residing in Bolivia, on behalf of their relatives Walter Lafuente Peñarrieta, Oscar Ruiz Cáceres, Julio César Toro Dorado and Miguel Rodríguez Candia, all Bolivian citizens, and on behalf of three other persons, Simón Tapia Chacón, a Bolivian citizen (not related to the authors), René Patricio Lizama Lira and Pablo Manuel Zepeda Camillieri, both Chilean citizens (not related to the authors). The authors stated that the alleged victims were being held at the San Jorge Barracks in Bolivia and that they were not in a position to present their own case to the Human Rights Committee. The authors claimed to have authority to represent all seven alleged victims.

1.2. Miguel Rodríguez Candia, Oscar Ruiz Cáceres, Simón Tapia Chacón and Julio César Toro Dorado were released on 24 April 1986, Walter Lafuente Peñarrieta, Pablo Manuel Zepeda and René Patricio Lizama were released on 24 October 1986.

1.3. The authors stated that the alleged victims were arrested on 24 October 1983 in the neighbourhood of Luribay (approximately 70 kilometres from La Paz) by members of the armed forces on suspicion of being "*guerrilleros*". It is further alleged that during the first 15 days of detention they were subjected to severe torture, including physical beatings, electric shocks (*picana*) and immersion in water (*submarino*). They were allegedly kept incommunicado for 44 days. They were allegedly held under inhuman prison conditions, in solitary confinement in very small and humid cells (two meters by two meters), and were denied proper medical attention. Their state of health was very poor. It was not until 10 February 1984 that Pablo Manuel Zepeda Camillieri, who was suffering from a skull fracture, was attended to by a neurologist.

1.4. Concerning the right to legal counsel, guaranteed under article 16 (4) of the Bolivian Constitution, it is alleged that the detainees had no access to a defence lawyer until 44 days after their detention.

1.5. On 16 December 1983, the first public hearing took place. Defence counsel argued that his clients could not be subject to military jurisdiction, since the National Constitution itself clearly established that military jurisdiction could be applied only in times of war or when a criminal act had taken place in a territory under military jurisdiction, and that the case should therefore be transferred to the regular courts.

1.6. On 8 February 1984, defence counsel again requested a change of jurisdiction. He also pleaded that most of the provisions of the Military Penal Code were in fact unconstitutional. On 13 February 1984, the appeal for annulment was presented before the Supreme Tribunal of Military Justice without success. According to the authors, all legal remedies to obtain a change of jurisdiction were turned down by the military authorities.

1.7. The authors state that the relatives of the detainees tried in vain to secure their transfer to San Pedro Prison on the grounds that detention in military barracks was not lawful. They maintained that, owing to the political instability in Bolivia and the arbitrary acts committed by a number of officers, there were no guarantees of security for the seven detainees.

1.8. The indictment against the seven defendants was presented by the Military Prosecutor on 18 July 1984, nine months after their detention. The defendants submitted their plea on 10 August 1984. On 3 October 1984, they began a hunger-strike, which continued until 2 November 1984. On 12 October 1984, the Standing Court of Military Justice (*Tribunal Permanente de Justicia Militar*) convicted the accused of robbery and illegal possession of weapons and ammunition belonging to the Bolivian army and of the use of false documents.

1.9. The authors stated that Presidential Decree (*Decreto Supremo*) No. 20,565, of 25 October 1984, ordered unrestricted amnesty (*amnestía amplia e irrestricta*) for the seven Luribay detainees, but the armed forces refused to comply with the decree. On 30 October 1984, the Standing Court of Military Justice referred the case for *ex officio* review to the Supreme Court of Military Justice (*Tribunal Supremo de Justicia Militar*), which, on 1 November 1984, returned the case to the Standing Court for appropriate action, without itself issuing a release order. It is further reported that, on 15 November 1984, the Luribay detainees applied for *habeas corpus* to the District Court of La Paz (*Corte Distrital*), a civilian court, which found, on 16 November 1984, that the Presidential Decree of amnesty was constitutional and that the military court should implement it. This decision was reviewed by the highest judicial authority of Bolivia, the Supreme Court of Justice, which found that the amnesty decree was constitutional and that the competent organs of the armed forces were responsible for issuing the release order. Nevertheless, the Luribay detainees were not then released.

2.1. After ascertaining that the cases of the alleged victims had not been registered for examination by the Inter-American Commission on Human Rights, the Working Group of the Human Rights Committee, by its decision of 3 July 1985, transmitted the communication, under rule 91 of the Committee's provisional rules of procedure, to the State party concerned, requesting information and observations relevant to the question of the admissibility of the communication. The Working Group also requested the State party: (*a*) to provide the Committee with copies of any orders or decisions relevant to the case; and (*b*) to inform the Committee of the state of health of the alleged victims.

2.2. The Working Group found that the authors were justified in acting on behalf of Walter Lafuente Peñarrieta, Miguel Rodríguez Candia, Oscar Ruiz Cáceres and Julio César Toro Dorado. With regard to the other alleged victims, the Working Group requested the authors to provide written evidence of their authority to act on their behalf.

3.1. In its response, dated 22 October 1985, to the Working Group's decision, the State party said that, on 12 October 1984:

> The Standing Court of Military Justice of Bolivia, by virtue of its jurisdiction, handed down a verdict and sentence at first instance against the detainees, who had been charged with robbery and illegal

possession of weapons belonging to the Bolivian army, use of false documents and other offences. On 25 October 1984, the Constitutional President of the preceding Government, by Supreme Decree No. 20,565, granted a broad and unrestricted amnesty to the seven detainees, ordering them to be released and the record of the case to be filed.

On being informed of this Decree, the Standing Court of Military Justice transmitted the "record of the case to the Supreme Court of Military Justice in order that, through its Appeals and Review Section, by means of interpretation and review as referred to in article 38 (3) of the Military Judicial Organization Act, it may take a decision concerning priority in the application of article 228 of the Constitution, with reference to article 96 (13) of the Constitution, in respect of Supreme Decree No. 20,565 of 25 October 1984, so that as a result of this review the appropriate legal course may be determined".

3.2. The State party furnished the Committee with copies of Presidential Decree No. 20,565 of 25 October 1984 and of the decision of the Standing Court of Military Justice, dated 30 October 1984, to refer the case for *ex officio* review to the Supreme Court of Military Justice.

3.3. The State party further indicated that the detainees were in good health.

3.4. Lastly, the State party requested that the communication be declared inadmissible for non-exhaustion of domestic remedies, since the case was still pending before the Supreme Court of Military Justice.

4.1. In a further submission, dated 31 October 1985, the State party informed the Committee that the Supreme Court of Military Justice had, on 14 October 1985, handed down final sentence in the case:

amending a previous sentence by the Standing Court of Military Justice, which sentenced the seven detainees, who had been charged with a number of offences, to six, four or two years of imprisonment.

The decision of the Supreme Court of Military Justice, which is unappealable, amends the sentence through its Cassation and Single-Instance Section, reducing the sentence of imprisonment to three years for the detainees René Patricio Lizama Lira, Pablo Manuel Zepeda Camillieri and Walter Lafuente Peñarrieta, and to two years and six months for Simón Tapia Chacón, Julio César Toro Dorado, Oscar Ruiz Cáceres and Miguel Rodríguez Candia. The latter will have served their sentence on 24 April 1986 and the former on 24 October 1986, since the penalty runs from the first day of detention.

4.2. The State party furnished the Committee with the text of the judgement of the Supreme Court of Military Justice of 14 October 1985 and reiterated its request that the Committee declare the communication inadmissible, this time "on the grounds that the proceedings have been concluded" ("*ya que este proceso concluyó*").

5.1. In their comments, dated 17 January 1986, the authors noted that the State party in its two submissions made no mention whatever of the decision of the Supreme Court of Military Justice, dated 1 November 1984, which, according to the authors, provided for the implementation of the amnesty decree by the lower court. They further pointed out that the amnesty decree had not been abrogated and that the alleged victims were still in detention, 15 months after the issuance of the decree.

5.2. With respect to the state of health of the alleged victims, the authors noted that the State party had not submitted any medical certificates nor any information about their psychological state. Furthermore, they claimed that the alleged victims had been deprived of medical attention for the last 18 months.

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

6.2. Article 5, paragraph 2 (*a*), of the Optional Protocol precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. The Committee again ascertained that the case was not under examination elsewhere.

6.3. Article 5, paragraph 2 (*b*), of the Optional Protocol precludes the Committee from considering a communication unless domestic remedies have been exhausted. In that connection the Committee noted that in its submission of 31 October 1985 the State party had informed the Committee of the conclusion of proceedings against the Luribay detainees. The Committee thus concluded that domestic remedies had been exhausted and that it was not precluded by article 5, paragraph 2 (*b*), of the Optional Protocol from considering the case.

7. Although the authors did not specify which articles of the Covenant might have been violated, the Committee observed that the allegations raised issues relating to several of the rights guaranteed by the Covenant, including the rights protected by articles 7, 9, 10 and 14.

8. With respect to the standing of the authors, the Committee noted that they had not submitted evidence of their authority to act on behalf of Simón Tapia Chacón, René Patricio Lizama Lira and Pablo Manuel Zepeda Camillieri.

9. On 2 April 1986, the Human Rights Committee therefore decided:

(*a*) That the communication was admissible in so far as it related to Walter Lafuente Peñarrieta, Miguel Rodríguez Candia, Oscar Ruiz Cáceres and Julio César Toro Dorado;

(*b*) That, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of the current decision, written explanations or statements clarifying the matter and the remedy, if any, that might have been taken by it;

(*c*) That the State party should be requested (i) to provide the Committee with copies of such court orders or decisions relevant to the case that hitherto had not been furnished, including the judgement of the Standing Court of Military Justice dated 12 October 1984, and (ii) to inform the Committee of the current state of health of the alleged victims by furnishing relevant medical certificates concerning them.

10.1. In a further submission, dated 30 May 1986, the authors claim that the Bolivian Government has violated articles 3, 6, paragraph 4, 7, 9, 10, 14, 17, paragraph 1, 23 and 26 of the Covenant.

10.2. With regard to article 3, the authors contend:

In no case had there been equality of rights, on the contrary, rights have been restricted even to the extent of preventing the use of mechanisms recognized by Bolivian laws themselves (Political Constitution of the State).

10.3. With regard to article 6, paragraph 4, the authors repeat that:

on 25 October 1984, the Constitutional President of Bolivia, Mr. Hernán Siles Suazo, issued a Supreme Decree (No. 20,565) declaring an amnesty for the seven Luribay detainees. This Decree was issued under the authority provided for in article 96, paragraph 13, of the Bolivian Constitution and with the approval of the entire cabinet of President Siles.

In this case, because of unknown interests involving the administrators of military justice, the latter have not complied with a decree having the above-mentioned characteristics despite the fact that the relevant military legislation itself states in article 38, paragraph 4, that legal proceedings brought against any person shall cease when an amnesty is decreed.

10.4. With regard to article 7, the authors contend that the medical certificates of the detainees provide "evidence of the torture and degrading treatment to which our relatives were subjected".

10.5. With regard to article 9, the authors claim that:

All the paragraphs of this article have been violated in that our relatives were arbitrarily arrested; at the time of their arrest, they were in a civilian village and were in no way endangering the country's internal security, let alone external security, since Bolivia was not and is not at war.

Article 9 of the Bolivian Constitution stipulates that, for a person to be arrested, an order must be issued by a competent authority; in this case the military forces did not have the authority to deprive our relatives of their freedom. The same article 9 states that no one may be held incommunicado, even in obviously serious cases, for more that 24 hours; in violation of this constitutional provision, our relatives were held completely incommunicado without medical attention or proper food for 44 days, and no court was informed of their situation.

Furthermore, despite our demands and petitions, including those to human rights institutions, our relatives were not told of the reasons for their detention.

The right of recourse to the courts to redress the illegality of our relatives' arbitrary detention was not made effective, despite an application to have the jurisdiction of the military courts quashed and the case transferred to the ordinary courts.

10.6. With regard to article 10, the authors maintain that:

The provisions of this article have not been complied with since our relatives have been treated as dangerous criminals without even having been charged. Furthermore, they have been ferried about from one place to another with an escort of 100 or so soldiers, who were pointing their weapons not only at them, but also at us and their defenders.

10.7. With regard to article 14, the authors contend that:

Once the military trial began—despite everything stated about its lack of competence and jurisdiction—the court was in no way impartial and even disregarded its own regulations, for the sole purpose of securing maximum sentences against our relatives for non-existent offences.

Choice of defence counsel was also restricted since the Code of Military Justice (Judicial Organization Act, art. 75) stipulates that persons charged with an offence shall have as defence counsel court-appointed military attorneys in cases where the defence counsel freely chosen by the persons charged does not meet the requirements of the Standing Court of Military Justice.

10.8. With regard to article 17, the authors maintain that:

Our relatives' privacy, honour and reputation have been severely attacked. Our homes have been illegally searched at night (violation of article 21 of the Bolivian Constitution) in an atmosphere of violence and with an excessive display of repressive force, since defenceless women and children were confronted with a group of heavily-armed men.

10.9. With regard to article 23, the authors claim:

At no time has the State protected the detainees' families. On the contrary, we have been insulted and ill-treated, and in many cases thrown out of offices where we went to request information on the fate of our relatives. Thus, the provisions contained in articles 6 to 21 of the Constitution have also been violated.

10.10. With regard to article 26, the authors add:

At no time have the detainees been given equal treatment; this is simply because of their different political ideas, and despite the fact that article 6 of the Constitution guarantees all citizens equality before the law and provides for protection of their rights and guarantees in accordance with the Constitution.

11.1. In its submission under article 4, paragraph 2, of the Optional Protocol, dated 24 October 1986, the State party argues that the full judicial proceedings, which the State party encloses, establish that "the military laws and the Political Constitution of the State were applied correctly". Thus, the State party contends that there has been no violation of the Covenant by Bolivia and continues:

The fact is that the defendants were found guilty of various offences which led to sentences in first instance by the Standing Court of Military Justice of six, four and two years' imprisonment on the seven detainees.

Subsequently, the Appeals Division and Sole Instance of the Supreme Court of Military Justice of the Nation reduced the penalties to three years' imprisonment in the case of Walter Lafuente Peñarrieta, René Patricio Lizama Lira and Pablo Manuel Zepeda, and to two years and six months' imprisonment for the remaining detainees.

According to the report of Colonel René Pinilla Godoy Dema, Judge Rapporteur of the Standing Court of Military Justice, Mr. Miguel Rodríguez Candia, Mr. Oscar Ruiz Cáceres, Mr. Simón Tapia Chacón and Mr. Julio César Toro Dorado were unconditionally released and are now with their families and in good health, as the Centre for Human Rights may ascertain through the United Nations Resident Representative in Bolivia.

With regard to the last three detainees, Mr. Walter Lafuente Peñarrieta, Mr. Pablo Manuel Zepeda and Mr. René Patricio Lizama Lira, the last two of Chilean nationality, they were released on this very day, according to an official communication, in conformity with the judgement of the Appeals Division and Sole Instance of the Supreme Court of Military Justice, which forms part of the Bolivian judicial system and acts independently in accordance with the separation of powers provided for in article 2 of the Political Constitution of the State.

11.2. The State party then requests the Committee to reverse its decision on admissibility and to close the examination of the Luribay case, since "the seven detainees have been unconditionally released and since the legal proceedings have been concluded".

12. In their comments, dated 18 March 1987, the authors contend that the State party has not refuted "in any way the statements made by the relatives of the ex-detainees in our note of 30 May 1986, which deals with the problem of substance and not of form, that our children's detention was accompanied by torture, solitary confinement, harassment, partiality, denial of justice and a whole series of violations of the human rights set forth in the International Covenant on Civil and Political Rights".

13. By a letter dated 19 July 1987, one of the seven Luribay detainees, Walter Lafuente Peñarrieta, who was released on 24 October 1986, confirmed the description of the facts set out in paragraphs 1.1 to 1.9, 5.1 and 5.2, and 10.1 to 10.10. Mr. Lafuente also confirmed that it was his wish that the Committee continue consideration of his case.

14. 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, paragraph 1, of the Optional Protocol. Before

adopting its views, the Committee took into consideration the State party's objection to the admissibility of the communication, but the Committee can see no justification for reviewing its decision on admissibility on the basis of the State party's contention that, because the victims have been released, the case should be considered closed.

15.1. The Committee therefore decides to base its views on the following facts, which are either uncontested or are implicitly or explicitly contested by the State party only by denials of a general character offering no particular information or explanations.

15.2. Walter Lafuente Peñarrieta, Miguel Rodríguez Candia, Oscar Ruiz Cáceres and Julio César Toro Dorado were arrested on 24 October 1983 near Luribay by members of the Bolivian armed forces on suspicion of being "*guerrilleros*". During the first 15 days of detention they were subjected to torture and ill-treatment and kept incommunicado for 44 days. They were held under inhuman prison conditions, in solitary confinement in very small, humid cells, and were denied proper medical attention. They had no access to legal counsel until 44 days after their detention. On 16 December 1983 the first public hearing took place before a military court. The indictment was framed by the Military Prosecutor on 18 July 1984, charging the accused with robbery and illegal possession of weapons belonging to the Bolivian army and with the use of false documents. On 12 October 1984, they were convicted of those crimes by the Standing Court of Military Justice. On 25 October 1984, the Constitutional President of the Republic, Hernán Siles Suazo, granted a broad and unrestricted amnesty to the Luribay detainees, ordering that they be released and that the record of the case be filed. They were, however, not released. On 30 October 1984 the Standing Court of Military Justice referred the case to the Supreme Court of Military Justice, which did not order the release of the detainees, but handed down a final judgement on 14 October 1985, sentencing the detainees to three and two and a half years of imprisonment. The detainees were released on 24 April and 24 October 1986, respectively.

15.3. In formulating its views, the Human Rights Committee also takes into account the failure of the State party to furnish certain information and clarifications, in particular with regard to the allegations of torture and ill-treatment of which the authors have complained. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities, and to furnish to the Committee the relevant information where it contests the authors' allegations. In the circumstances, due weight must be given to the authors' allegations.

16. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee disclose violations of the Covenant with respect to:

Article 7, because Walter Lafuente Peñarrieta, Miguel Rodríguez Candia, Oscar Ruiz Cáceres and Julio César Toro Dorado were subjected to torture and inhuman treatment;

Article 9, paragraph 3, and 10, paragraph 1, because they were not brought promptly before a judge, but were kept incommunicado for 44 days following their arrest; and

Article 14, paragraph 3 (*b*), because during the initial 44 days of detention they had no access to legal counsel.

17. The Committee lacks sufficient evidence to make findings with regard to the other claims made by the authors.

18. The Committee, accordingly, is of the view that the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations suffered by the victims, to grant them compensation, to investigate said violations, to take action thereon as appropriate and to take steps to ensure that similar violations do not occur in the future.

Communication No. 180/1984

Submitted by: L. G. Danning on 19 July 1984
Alleged victim: The author
State party: The Netherlands
Date of adoption of views: 9 April 1987 (twenty-ninth session)[1]

Subject matter: Denial of insurance benefits on the ground of marital status—Disability pension

Procedural issues: Competence of the HRC to examine rights embodied in the ICESCR—Relevance of travaux préparatoires*—Supplementary means of interpretation—Vienna Convention on the Law of Treaties, articles 31 and 32—Examination of general issues of ICESCR not "same matter" under article 5 (2)* (a) *of the Optional Protocol—Non-participation of Committee member in decision*

Substantive issues: Scope of application of article 26—Discrimination based on other status—Cohabitation—Marital status—Differentiation based on objective and reasonable criteria—Right to social

[1] Pursuant to rule 85 of the provisional rules of procedure, Committee member Mr. Joseph Mommersteeg, although participating in the consideration of the communication, did not take part in the adoption of the views.

security—Unemployment benefits—Disability pension

Article of the Covenant: 26
Article of the Optional Protocol: 5 (2) (a)
Rule of Procedure: 85

1. The author of the communication (initial letter dated 19 July 1984 and subsequent letters dated 13 August 1984, 8 July 1985 and 25 June 1986) is Ludwig Gustaaf Danning, a Netherlands citizen born in 1960. He is represented by legal counsel.

2.1. The author claims to be a victim of a violation by the Government of the Netherlands of article 26 in conjunction with article 2, paragraph 1 of the International Covenant on Civil and Political Rights.

2.2. He states that, as a consequence of an automobile accident in 1979, he became disabled and confined to a wheelchair. During the first year after the accident he received payments from his employer's insurance; after the first year, payments were received under another insurance programme for employees who have been medically declared unfit to work. This programme provides for higher payments to married beneficiaries. The author claims that since 1977 he has been engaged to Miss Esther Verschuren and that they live together in common-law marriage. Therefore he maintains that he should be accorded insurance benefits as a married man and not as a single person. Such benefits, however, have been denied to him and he has taken the case to the competent instances in the Netherlands. The Raad van Beroep in Rotterdam (an organ dealing with administrative appeals in employment issues) held in 1981 that his claim was ill-founded; he subsequently appealed to the Centrale Raad van Beroep in Utrecht, which in 1983 confirmed the decision of the lower instance. He claims that this appeal exhausted domestic remedies.

2.3. The same matter has not been submitted for examination to any other procedure of international investigation or settlement.

3. By its decision of 16 October 1984, 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.

4.1. In its submission dated 29 May 1985 the State party underlined, *inter alia*, that:

(*a*) The principle that elements of discrimination in the realization of the right to social security are to be eliminated is embodied in article 9 in conjunction with articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights;

(*b*) The Government of the Kingdom of the Netherlands has accepted to implement this principle under the terms of the International Covenant on Economic, Social and Cultural Rights. Under these terms, States parties have undertaken to take steps to the maximum of their available resources with a view to achieving progressively the full realization of the rights recognized in that Covenant (art. 2, para. 1);

(*c*) The process of gradual realization to the maximum of available resources is well on its way in the Netherlands. Remaining elements of discrimination in the realization of the rights are being and will be gradually eliminated;

(*d*) The International Covenant on Economic, Social and Cultural Rights has established its own system for international control of the way in which States parties are fulfilling their obligations. To this end States parties have undertaken to submit to the Economic and Social Council reports on the measures they have adopted and the progress they are making. The Government of the Kingdom of the Netherlands to this end submitted its first report in 1983.

4.2. The State party then posed the question whether the way in which the Netherlands was fulfilling its obligations under article 9 in conjunction with articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights could become, by way of article 26 of the International Covenant on Civil and Political Rights, the object of an examination by the Human Rights Committee. The State party submitted that that question was relevant for the decision whether the communication was admissible.

4.3. The State party stressed that it would greatly benefit from receiving an answer from the Human Rights Committee to the question mentioned in paragraph 4.2 above. "Since such an answer could hardly be given without going into one aspect of the merits of the case—i.e., the question of the scope of article 26 of the International Covenant on Civil and Political Rights—the Government would respectfully request the Committee to join the question of admissibility to an examination of the merits of the case."

4.4. In case the Committee did not grant that request and declared the communication admissible, the State party reserved the right to submit, in the course of the proceedings, observations which might have an effect on the question of admissibility.

4.5. The State party confirmed that the author had exhausted domestic remedies.

5. Commenting on the State party's submission under rule 91, the author, in a letter dated 8 July 1985, contends that the fact that the International Covenant on Economic, Social and Cultural Rights obliges the Governments of the States parties to eliminate discrimination in their system of social security, does not mean that the individuals of the State parties which are also parties to the Optional Protocol to the International Covenant on Civil and Political Rights are precluded from having recourse to the Human Rights Committee in case of a violation of any right set forth in the latter Covenant that at the same time constitutes discrimination in the exercise of a social security right.

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

6.2. Article 5, paragraph 2 (*a*), of the Optional Protocol precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. In this connection the Committee observes that the examination of State reports, submitted under article 16 of the International Covenant on Economic, Social and Cultural Rights, does not, within the meaning of article 5 (2) (*a*), constitute an examination of the "same matter" as a claim by an individual submitted to the Human Rights Committee under the Optional Protocol.

6.3. The Committee further observes that a claim submitted under the Optional Protocol concerning an alleged breach of a provision of the International Cov-

enant on Civil and Political Rights is not necessarily incompatible with the provisions of that Covenant (see art. 3 of the Optional Protocol), because the facts also relate to a right protected by the International Covenant on Economic, Social and Cultural Rights or any other international instrument. It still had to be tested whether the alleged breach of a right protected by the International Covenant on Civil and Political Rights was borne out by the facts.

6.4. Article 5, paragraph 2 (*b*), of the Optional Protocol precludes the Committee from considering a communication unless domestic remedies have been exhausted. The parties to the present communication agree that domestic remedies have been exhausted.

6.5. With regard to the State party's inquiry concerning the scope of article 26 of the International Covenant on Civil and Political Rights, the Committee did not consider it necessary to pronounce on its scope prior to deciding on the admissibility of the communication. However, having regard to the State party's statement (para. 4.4 above) that it reserved the right to submit further observations which might have an effect on the question of the admissibility of the case, the Committee pointed out that it would take into account any further observations received on the matter.

7. On 25 October 1985 the Human Rights Committee therefore decided that the communication was admissible. In accordance with article 4, paragraph 2, of the Optional Protocol, the State party was requested to submit to the Committee, within six months of the date of transmittal to it of the decision on admissibility, written explanations or statements clarifying the matter and the measures, if any, that might have been taken by it.

8.1. In its submission under article 4, paragraph 2, of the Optional Protocol, dated 20 May 1986, the State party again objected to the admissibility of the communication, reiterating the arguments advanced in its submission of 29 May 1985.

8.2. In discussing the merits of the case, the State party elucidates first the factual background and the relevant legislation as follows:

Paragraph 2.2 of the Human Rights Committee's decision of 23 July 1985 sets forth the events prior to Mr. Danning's complaint. The facts of the case need to be stated more precisely. After the accident, Mr. Danning received benefit under the Sickness Benefits Act (ZW), which was supplemented by his employer. As from 14 July 1980 he received disablement benefit in accordance with the General Disablement Benefits Act (AAW) and the Disability Insurance Act (WAO). This benefit was supplemented by payments made in accordance with the General Assistance Act (ABW).

To obtain a clear picture of the present matter it is important to consider the regulations for disability for work in the Netherlands. Employed persons pay contributions, based on their income, towards various forms of social insurance. The most important of these in the present case are the Sickness Benefits Act (ZW), the Disability Insurance Act (WAO) and the General Disablement Benefits Act (AAW). If the employee falls ill, he can receive benefit equivalent to 70 per cent of his most recent income (up to a yearly income ± f. 60,000) for a period of up to one year under ZW. The employer will in most cases contribute the remaining 30 per cent of the employee's income. If the employee remains ill for more than one year, sickness benefit is replaced by payments made under the provisions of AAW and WAO.

AAW is a basic payment for (long-term) disability and is linked to the minimum subsistence income as defined in the Netherlands. Persons who were in full-time employment prior to becoming disabled qualify in the first instance for a standard payment, based on what is termed the "base figure".

In the case of total disability, the base figure will give a payment equivalent to 70 per cent of the current net statutory minimum wage. Only married people with a dependent spouse and unmarried people with one or more dependent children may qualify for an increase of the base figure by 15 to 30 per cent, depending on the amount of the insured person's own income (art. 10 AAW). "Married person" is defined in such a way as to exclude unmarried cohabitants.

This rather complicated system, involving two different Acts concerning disablement, can be explained in historical terms. WAO dates from 18 February 1967 and AAW from 11 December 1975. The introduction of AAW (which unlike WAO was not restricted to employees, but also included the self-employed) meant that WAO (which was usually higher than AAW) acquired the function of a supplementary payment.

In the case of partial disability or part-time employment, AAW and WAO payments are reduced proportionately. If the payment calculated in this way is less than the official subsistence level, it can be supplemented by a (partial) payment under the provisions of the General Assistance Act (ABW), which contains regulations on the minimum subsistence income. The size of payments made under the provisions of ABW is also linked to the net minimum wage. Unlike both AAW and WAO, ABW takes account of the financial position and income of the recipient's partner.

This complicated system will in fact probably be discontinued in the near future. For some time now, the Netherlands Government has been planning to simplify the social security system, partly with a view to eliminating complaints of unequal treatment of recipients. To this end the Government put a package of proposed reform legislation before the Lower House in 1985. The Bill is currently going through parliament. Important changes will be made to AAW and WAO. There will be a single Disablement Benefits Act, and the "base figure" system of AAW will disappear.

It will be replaced by a Supplementary Benefits Act, which will provide for supplementary payments in cases where the basic payment is less than the official minimal subsistence income. In the course of drafting this new legislation, the question whether married people and unmarried cohabitants will be accorded equal treatment, and if so to what extent, will be examined.

Mr. Danning submitted that he was in receipt of a supplementary payment under the provisions of ABW. This payment is apparently made because the AAW/WAO payment is below the official subsistence level.

The AAW payment made to Mr. Danning, who at the time of applying was cohabiting with his girl-friend, was based on the general base figure and not on the higher, married person's base figure. In fact it would make no difference to the total payment made to Mr. Danning if the AAW payment were to be calculated using the married person's base figure. This is because he lives with his girl-friend and therefore receives a supplementary family allowance under the provisions of ABW, which brings his total social security payment up to the same level (i.e., the net minimum wage) as an AAW payment based on the married person's base figure. Since Mr. Danning is in receipt of a supplementary allowance under ABW, the Netherlands Government is of the opinion that the difference between ABW and AAW in respect of the partner's financial position and income is not a factor in the present case. The conclusion is therefore that Mr. Danning's complaint is based purely on considerations of principle.

8.3. With regard to the scope of article 26 of the International Covenant on Civil and Political Rights, the State party argues, *inter alia*, as follows:

The Netherlands Government takes the view that article 26 of the Covenant does entail an obligation to avoid discrimination, but that this article can only be invoked under the Optional Protocol to the Covenant in the sphere of civil and political rights, not necessarily limited to those civil and political rights that are embodied in the Covenant. The Government could, for instance, envisage the admissibility under the Optional Protocol of a complaint concerning discrimination in the field of taxation. But the Government cannot accept the admissibility of a complaint concerning the enjoyment of economic, social and cultural rights. The latter category of rights is the object of a separate United Nations convention. Mr. Danning's complaint relates to rights in the sphere of social security, which fall under the International Covenant on Economic, Social and Cultural Rights. Articles 2, 3 and 9 of that Covenant are of particular relevance here. That Covenant has its own specific system and its own specific organ for international monitoring of how States parties meet their

obligations and deliberately does not provide for an individual complaints procedure.

The Government considers it incompatible with the aims of both the Covenants and the Optional Protocol that an individual complaint with respect to the right of social security, as referred to in article 9 of the International Covenant on Civil and Political Rights, could be dealt with by the Human Rights Committee by way of an individual complaint under the Optional Protocol based on article 26 of the International Covenant on Civil and Political Rights.

The Netherlands Government reports to the Economic and Social Council on matters concerning the way it is fulfilling its obligations with respect to the right to social security, in accordance with the relevant rules of the International Covenant on Economic, Social and Cultural Rights . . .

Should the Human Rights Committee take the view that article 26 of the International Covenant on Civil and Political Rights ought to be interpreted more broadly, thus that this article is applicable to complaints concerning discrimination in the field of social security, the Government would observe that in that case article 26 must also be interpreted in the light of other comparable United Nations Conventions laying down obligations to combat and eliminate discrimination in the field of economic, social and cultural rights. The Government would particularly point to the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

If article 26 of the International Covenant on Civil and Political Rights were deemed applicable to complaints concerning discriminatory elements in national legislation in the field of those conventions, this could surely not be taken to mean that a State party would be required to have eliminated all possible discriminatory elements from its legislation in those fields at the time of ratification of the Covenant. Years of work are required in order to examine the whole complex of national legislation in search of discriminatory elements. The search can never be completed, either, as distinctions in legislation which are justifiable in the light of social views and conditions prevailing when they are first made may become disputable as changes occur in the views held in society . . .

If the Human Rights Committee should decide that article 26 of the International Covenant on Civil and Political Rights entails obligations with regard to legislation in the economic, social and cultural field, such obligations could, in the Government's view, not comprise more than an obligation of States to subject national legislation to periodic examination after ratification of the Covenant with a view to seeking out discriminatory elements and, if they are found, to progressively taking measures to eliminate them to the maximum of the State's available resources. Such examinations are under way in the Netherlands with regard to various aspects of discrimination, including discrimination between men and women.

If the Human Rights Committee accepts the above considerations, Mr. Danning's claim that the Netherlands has violated article 26 of the Covenant seems to be ill-founded.

8.4. With regard to the concept of discrimination in article 26 of the Covenant, the State party explains the distinctions made in Dutch law as follows:

In the Netherlands, the fact that people live together as a married or unmarried couple has long been considered a relevant factor to which certain legal consequences may be attached. Persons living together as unmarried cohabitants have a free choice of whether or not to enter into marriage, thereby making themselves subject either to one set of laws or to another. The differences between the two are considerable; the cohabitation of married persons is subject to much greater legal regulation than is the cohabitation of unmarried persons. A married person is, for example, obliged to provide for his or her spouse's maintenance; the spouse is also jointly liable for debts incurred in respect of common property; a married person also requires the permission or co-operation of his or her spouse for certain undertakings, such as buying goods on hire purchase which would normally be considered a part of the household, transactions relating to the matrimonial home, etc. The Civil Code contains extensive regulations governing matrimonial law concerning property. The legal consequences of ending a marriage by divorce are also the subject of a large number of provisions in the Civil Code, including a provision allowing the imposition of a maintenance allowance payable to the former spouse. The law of inheritance, too, is totally geared to the individual's formal status. The Government cannot accept that the differences in treatment by the Netherlands law, described above, between married and unmarried cohabitants could be considered to be "discrimination" within the legal meaning of that term under article 26 of the Covenant. There is no question of "equal cases" being treated differently under the law. There is an objective justification for the differences in the legal position of married and unmarried cohabitants, provided for by the Netherlands legislation.

9. In his comments, dated 25 June 1986, the author welcomes the forthcoming changes in the General Disablement Benefits Act (AAW) and the Disability Insurance Act (WAO), mentioned in the State party's submission. However, he notes that while he understands that it is not possible for the Netherlands Government to bring into effect immediately all desired changes to the existing laws, "individuals should not suffer as a consquence of not being able to benefit from proposed changes in the legislation which are about to affect their situation." He claims that the existing law is "clearly discriminatory" and that article 26 of the Covenant applies because the differentiation between married and unmarried couples is discriminatory in itself.

10. 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, paragraph 1, of the Optional Protocol. The facts of the case are not in dispute.

11. Article 26 of the International Covenant on Civil and Political Rights provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

12.1. The State party contends that there is considerable overlapping of the provisions of article 26 with the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights. The Committee is of the view that the International Covenant on Civil and Political Rights would still apply even if a particular subject-matter is referred to or covered in international instruments, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, or, as in the present case, the International Covenant on Economic, Social and Cultural Rights. Notwithstanding the interrelated drafting history of the two Covenants, it remains necessary for the Committee to apply fully the terms of the International Covenant on Civil and Political Rights. The Committee observes in this connection that the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights do not detract from the full application of article 26 of the International Covenant on Civil and Political Rights.

12.2. The Committee has also examined the contention of the State party that article 26 of the International Covenant on Civil and Political Rights cannot be invoked in respect of a right which is specifically provided for under article 9 of the International Covenant on Economic, Social and Cultural Rights (social security, including social insurance). In so doing, the Committee has perused the relevant *travaux préparatoires* of the International Covenant on Civil and Political Rights,

namely the summary records of the discussions that took place in the Commission on Human Rights in 1948, 1949, 1950 and 1952 and in the Third Committee of the General Assembly in 1961, which provide a "supplementary means of interpretation" (art. 32 of the Vienna Convention on the Law of Treaties[2]). The discussions, at the time of drafting, concerning the question whether the scope of article 26 extended to rights not otherwise guaranteed by the Covenant, were inconclusive and cannot alter the conclusion arrived at by the ordinary means of interpretation referred to in paragraph 12.3 below.

12.3. For the purpose of determining the scope of article 26, the Committee has taken into account the "ordinary meaning" of each element of the article in its context and in the light of its object and purpose (art. 31 of the Vienna Convention on the Law of Treaties). The Committee begins by noting that article 26 does not merely duplicate the guarantees already provided for in article 2. It derives from the principle of equal protection of the law without discrimination, as contained in article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities. Article 26 is thus concerned with the obligations imposed on States in regard to their legislation and the application thereof.

12.4. Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.

12.5. The Committee observes in this connection that what is at issue is not whether or not social security should be progressively established in the Netherlands but whether the legislation providing for social security violates the prohibition against discrimination contained in article 26 of the International Covenant on Civil and Political Rights and the guarantee given therein to all persons regarding equal and effective protection against discrimination.

13. The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.

14. It therefore remains for the Committee to determine whether the differentiation in Netherlands law at the time in question and as applied to Mr. Danning constituted discrimination within the meaning of article 26. In the light of the explanations given by the State party with respect to the differences made by Netherlands legislation between married and unmarried couples (para. 8.4 above), the Committee is persuaded that the differentiation complained of by Mr. Danning is based on objective and reasonable criteria. The Committee observes, in this connection, that the decision to enter into a legal status by marriage, which provides, in Netherlands law, both for certain benefits and for certain duties and responsibilities, lies entirely with the cohabiting persons. By choosing not to enter into marriage, Mr. Danning and his cohabitant have not, in law, assumed the full extent of the duties and responsibilities incumbent on married couples. Consequently, Mr. Danning does not receive the full benefits provided for in Netherlands law for married couples. The Committee concludes that the differentiation complained of by Mr. Danning does not constitute discrimination in the sense of article 26 of the Covenant.

15. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as submitted do not disclose a violation of any article of the International Covenant on Civil and Political Rights.

[2] United Nations, *Juridical Yearbook 1969* (United Nations publication, Sales No. E.71.V.4), p. 140.

Communication No. 182/1984

Submitted by: F. H. Zwaan-de Vries on 28 September 1984
Alleged victim: The author
State party: The Netherlands
Date of adoption of views: 9 April 1987 (twenty-ninth session)[1]

Subject matter: Cessation of payment of unemployment benefits

Procedural issues: Competence of HRC to examine communications concerning rights also set out in ICESCR, via article 26 of ICCPR—Relevance of travaux préparatoires—Supplementary means of interpretation—Vienna Convention on the Law of Treaties, articles 31 and 32—Examination of general issues "not same matter" under article 5 (2) (a) *—Non-participation of Committee member in decision*

Substantive issues: Scope of application of article 26 of ICCPR—Discrimination based on sex—Unreasonable differentiation—Objective and reasonable cri-

[1] Pursuant to rule 85 of the provisional rules of procedure, Committee member Mr. Joseph Mommersteeg, although participating in the consideration of the communication, did not take part in the adoption of the views.

teria—Unemployment benefits—"Breadwinner" concept—Marital status—Right to social security—Legislative remedy taken by State party

Article of the Covenant: 26
Article of the Optional Protocol: 5 (2) (a)
Rule of Procedure: 85

1. The author of the communication (initial letter dated 28 September 1984 and subsequent letters of 2 July 1985, 4 and 23 April 1986) is Mrs. F. H. Zwaan-de Vries, a Netherlands national residing in Amsterdam, the Netherlands, who is represented before the Committee by Mr. D. J. van der Vos, head of the Legal Aid Department (Rechtskundige Dienst FNV), Amsterdam.

2.1. The author was born in 1943 and is married to Mr. C. Zwaan. She was employed from early 1977 to 9 February 1979 as a computer operator. Since then she has been unemployed. Under the Unemployment Act she was granted unemployment benefits until 10 October 1979. She subsequently applied for continued support on the basis of the Unemployment Benefits Act (WWV). The Municipality of Amsterdam rejected her application on the ground that she did not meet the requirements because she was a married woman; the refusal was based on section 13, subsection 1 (1), of WWV, which did not apply to married men.

2.2. Thus, the author claims to be a victim of a violation by the State party of article 26 of the International Covenant on Civil and Political Rights, which provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. The author claims that the only reasons she was denied unemployment benefits are her sex and marital status and contends that this constitutes discrimination within the scope of article 26 of the Covenant.

2.3. The author pursued the matter before the competent domestic instances. By decision of 9 May 1980 the Municipality of Amsterdam confirmed its earlier decision of 12 November 1979. The author appealed against the decision of 9 May 1980 to the Board of Appeal in Amsterdam, which, by an undated decision sent to her on 27 November 1981, declared her appeal to be unfounded. The author then appealed to the Central Board of Appeal, which confirmed the decision of the Board of Appeal on 1 November 1983. Thus, it is claimed that the author has exhausted all national legal remedies.

2.4. The same matter has not been submitted for examination to any other procedure of international investigation or settlement.

3. By its decision of 16 October 1984, 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 obervations relevant to the question of admissibility of the communication.

4.1. In its submission dated 29 May 1985, the State party underlined, *inter alia*, that:

(*a*) The principle that elements of discrimination in the realization of the right to social security are to be eliminated is embodied in article 9 in conjunction with articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights;

(*b*) The Government of the Kingdom of the Netherlands has accepted to implement this principle under the terms of the International Covenant on Economic, Social and Cultural Rights. Under these terms, States parties have undertaken to take steps to the maximum of their available resources with a view to achieving progressively the full realization of the rights recognized in that Covenant (art. 2, para. 1);

(*c*) The process of gradual realization to the maximum of available resources is well on its way in the Netherlands. Remaining elements of discrimination in the realization of the rights are being and will be gradually eliminated;

(*d*) The International Covenant on Economic, Social and Cultural Rights has established its own system for international control of the way in which States parties are fulfilling their obligations. To this end States parties have undertaken to submit to the Economic and Social Council reports on the measures they have adopted and the progress they are making. The Government of the Kingdom of the Netherlands to this end submitted its first report in 1983.

4.2. The State party then posed the question whether the way in which the Netherlands was fulfilling its obligations under article 9 in conjunction with articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights could become, by way of article 26 of the International Covenant on Civil and Political Rights, the object of an examination by the Human Rights Committee. The State party submitted that that question was relevant for the decision whether the communication was admissible.

4.3. The State party stressed that it would greatly benefit from receiving an answer from the Human Rights Committee to the question mentioned in paragraph 4.2 above. "Since such an answer could hardly be given without going into one aspect of the merits of the case—i.e. the question of the scope of article 26 of the International Covenant on Civil and Political Rights—the Government would respectfully request the Committee to join the question of admissibility to an examination of the merits of the case."

4.4. In case the Committee did not grant the request and declared the communication admissible, the State party reserved the right to submit, in the course of the proceedings, observations which might have an effect on the question of admissibility.

4.5. The State party also indicated that a change of legislation had been adopted recently in the Netherlands, eliminating section 13, subsection 1 (1), of the Unemployment Benefits Act (WWV), which was the subject of the author's claim. This is the Act of 29 April 1985, S 230, having a retroactive effect to 23 December 1984.

4.6. The State party confirmed that the author had exhausted domestic remedies.

5.1. Commenting on the State party's submission under rule 91, the author, in a letter dated 2 July 1985, contended that the State party's question to the Committee as well as the answer to it were completely irrelevant with regard to the admissibility of the communication, because the author's complaint "pertains to the failure of the Netherlands to respect article 26 of the International Covenant on Civil and Political Rights. As the Netherlands signed and ratified the Optional Protocol to that Covenant, the complainant is by virtue of articles 1 and 2 of the Optional Protocol, entitled to file a complaint with your Committee pertaining to the non-respect of article 26. Therefore her complaint is admissible.".

5.2. The author further pointed out that, although section 13, subsection 1 (1), of WWV had been eliminated, her complaint concerned legislation in force in 1979.[2]

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

6.2. Article 5, paragraph 2 (*a*), of the Optional Protocol precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. In this connection the Committee observes that the examination of State reports, submitted under article 16 of the International Covenant on Economic, Social and Cultural Rights, does not, within the meaning of article 5, paragraph 2 (*a*), constitute an examination of the "same matter" as a claim by an individual submitted to the Human Rights Committee under the Optional Protocol.

6.3. The Committee further observes that a claim submitted under the Optional Protocol concerning an alleged breach of a provision of the International Covenant on Civil and Political Rights is not necessarily incompatible with the provisions of that Covenant (see art. 3 of the Optional Protocol), because the facts also related to a right protected by the International Covenant on Economic, Social and Cultural Rights or any other international instrument. It still had to be tested whether the alleged breach of a right protected by the International Covenant on Civil and Political Rights was borne out by the facts.

6.4. Article 5, paragraph 2 (*b*), of the Optional Protocol precludes the Committee from considering a communication unless domestic remedies have been exhausted. The parties to the present communication agree that domestic remedies have been exhausted.

6.5. With regard to the State party's inquiry concerning the scope of article 26 of the International Covenant on Civil and Political Rights, the Committee did not consider it necessary to pronounce on its scope prior to deciding on the admissibility of the communication. However, having regard to the State party's statement (para. 4.4 above) that it reserved the right to submit further observations which might have an effect on the question of the admissibility of the case, the Committee pointed out that it would take into account any further observations received on the matter.

7. On 23 July 1985, the Human Rights Committee therefore decided that the communication was admissible. In accordance with article 4, paragraph 2, of the Optional Protocol, the State party was requested to submit to the Committee, within six months of the date of transmittal to it of the decision on admissibility, written explanations or statements clarifying the matter and the measures, if any, that might have been taken by it.

8.1. In its submission under article 4, paragraph 2, of the Optional Protocol, dated 14 January 1986, the State party again objected to the admissibility of the communication, reiterating the arguments advanced in its submission of 29 May 1985.

8.2. In discussing the merits of the case, the State party first elucidates the factual background as follows:

When Mrs. Zwaan applied for WWV benefits in October 1979, section 13, subsection 1 (1), was still applicable. This section laid down that WWV benefits could not be claimed by those married women who were neither breadwinners nor permanently separated from their husbands. The concept of "breadwinner" as referred to in section 13, subsection 1 (1), of WWV was of particular significance, and was further amplified in statutory instruments based on the Act (the last relevant instrument being the ministerial decree of 5 April 1976, Netherlands Government Gazette 1976, 72). Whether a married woman was deemed to be a breadwinner depended, *inter alia*, on the absolute amount of the family's total income and on what proportion of it was contributed by the wife. That the conditions for granting benefits laid down in section 13, subsection 1 (1), of WWV applied solely to married women and not to married men is due to the fact that the provision in question corresponded to the then prevailing views in society in general concerning the roles of men and women within marriage and society. Virtually all married men who had jobs could be regarded as their family's breadwinner, so that it was unnecessary to check whether they met this criterion for the granting of benefits upon becoming unemployed. These views have gradually changed in later years. This aspect will be further discussed below (see para. 8.4).

The Netherlands is a member State of the European Economic Community (EEC). On 19 December 1978 the Council of the European Communities issued a directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security (79/7/EEC), giving member States a period of six years, until 23 December 1984, within which to make any amendments to legislation which might be necessary in order to bring it into line with the directive. Pursuant to this directive the Netherlands Government examined the criteria for the granting of benefits laid down in section 13, subsection 1 (1), of WWV in the light of the principle of equal treatment of men and women and in the light of the changing role patterns of sexes in the years since about 1960.

Since it could no longer be assumed as a matter of course in the early 1980s that married men with jobs should always be regarded as "breadwinners", the Netherlands amended section 13, subsection 1 (1), of WWV to meet its obligations under the EEC directive. The amendment consisted of the deletion of section 13, subsection 1 (1), with the result that it became possible for married women who were not breadwinners to claim WWV benefits, while the duration of the benefits, which had previously been two years, was reduced for people aged under 35.

In view of changes in the status of women—and particularly married women—in recent decades, the failure to award Mrs. Zwaan WWV benefits in 1979 is explicable in historical terms. If she were to apply for such benefits now, the result would be different.

8.3. With regard to the scope of article 26 of the Covenant, the State party argues, *inter alia*, as follows:

The Netherlands Government takes the view that article 26 of the Covenant does entail an obligation to avoid discrimination, but that this article can only be invoked under the Optional Protocol to the Covenant in the sphere of civil and political rights. Civil and political rights are to be distinguished from economic, social and cultural rights, which are the object of a separate United Nations Covenant, the International Covenant on Economic, Social and Cultural Rights.

The complaint made in the present case relates to obligations in the sphere of social security, which fall under the International Covenant on Economic, Social and Cultural Rights. Articles 2, 3 and 9 of that Covenant are of particular relevance here. That Covenant has its own specific system and its own specific organ for international monitoring of how States parties meet their obligations and deliberately does not provide for an individual complaints procedure.

The Government considers it incompatible with the aims of both the Covenants and the Optional Protocol that an individual complaint with respect to the right of social security, as referred to in article 9 of the International Covenant on Economic, Social and Cultural Rights, could be dealt with by the Human Rights Committee by way of an individual complaint under the Optional Protocol based on article 26 of the International Covenant on Civil and Political Rights.

The Netherlands Government reports to the Economic and Social Council on matters concerning the way it is fulfilling its obligations

[2] The Covenant and the Optional Protocol entered into force on 11 March 1979 in respect of the Netherlands.

with respect to the right to social security, in accordance with the relevant rules of the International Covenant on Economic, Social and Cultural Rights . . .

Should the Human Rights Committee take the view that article 26 of the International Covenant on Civil and Political Rights ought to be interpreted more broadly, thus that this article is applicable to complaints concerning discrimination in the field of social security, the Government would observe that in that case article 26 must also be interpreted in the light of other comparable United Nations conventions laying down obligations to combat and eliminate discrimination in the field of economic, social and cultural rights. The Government would particularly point to the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

If article 26 of the International Covenant on Civil and Political Rights were deemed applicable to complaints concerning discriminatory elements in national legislation in the field of those conventions, this could surely not be taken to mean that a State party would be required to have eliminated all possible discriminatory elements from its legislation in those fields at the time of ratification of the Covenant. Years of work are required in order to examine the whole complex of national legislation in search of discriminatory elements. The search can never be completed, either, as distinctions in legislation which are justifiable in the light of social views and conditions prevailing when they are first made may become disputable as changes occur in the views held in society . . .

If the Human Rights Committee should decide that article 26 of the International Covenant on Civil and Political Rights entails obligations with regard to legislation in the economic, social and cultural field, such obligations could, in the Government's view, not comprise more than an obligation of States to subject national legislation to periodic examination after ratification of the Covenant with a view to seeking out discriminatory elements and, if they are found, to progressively taking measures to eliminate them to the maximum of the State's available resources. Such examinations are under way in the Netherlands with regard to various aspects of discrimination, including discrimination between men and women.

8.4. With regard to the principle of equality laid down in article 26 of the Covenant in relation to section 13, subsection 1 (1), of WWV in its unamended form, the State party explains the legislative history of WWV and in particular the social justification of the "breadwinner" concept at the time the law was drafted. The State party contends that with the "breadwinner" concept "a proper balance was achieved between the limited availability of public funds (which makes it necessary to put them to limited, well-considered and selective use) on the one hand and the Government's obligation to provide social security on the other. The Government does not accept that the 'breadwinner' concept as such was 'discriminatory' in the sense that equal cases were treated in an unequal way by law." Moreover, it is argued that the provisions of WWV "are based on reasonable social and economic considerations which are not discriminatory in origin. The restriction making the provision in question inapplicable to men was inspired not by any desire to discriminate in favour of men and against women but by the *de facto* social and economic situation which existed at the time when the Act was passed and which would have made it pointless to declare the provision applicable to men. At the time when Mrs. Zwaan applied for unemployment benefits the *de facto* situation was not essentially different. There was therefore no violation of article 26 of the Covenant. This is not altered by the fact that a new social trend has been growing in recent years, which has made it undesirable for the provision to remain in force in the present social context."

8.5. With reference to the decision of the Central Board of Appeal of 1 November 1983, which the author criticizes, the State party contends that "The observation of the Central Board of Appeal that the Covenants employ different international control systems is highly relevant. Not only do parties to the Covenants report to different United Nations agencies but, above all, there is a major difference between the Covenants as regards the possibility of complaints by States or individuals, which exists only under the International Covenant on Civil and Political Rights. The contracting parties deliberately chose to make this difference in international monitoring systems, because the nature and substance of social, economic and cultural rights make them unsuitable for judicial review of a complaint lodged by a State party or an individual."

9.1. In her comments, dated 4 and 23 April 1986, the author reiterates that "article 13, subsection 1 (1) contains the requirement of being breadwinner for married women only, and not for married men. This distinction runs counter to article 26 of the Covenant . . . The observations of the Netherlands Government on views in society concerning traditional roles of men and women are completely irrelevant to the present case. The question . . . is in fact not whether those roles could justify the existence of article 13, subsection 1 (1), of WWV, but . . . whether this article in 1979 constituted an infraction of article 26 of the Covenant . . . The State of the Netherlands is wrong when it takes the view that the complainant's view could imply that all discriminatory elements ought to have been eliminated from its national legislation at the time of ratification of the Covenant . . . The complainant's view does imply, however, that ratification enables all Netherlands citizens to invoke article 26 of the Covenant directly . . . if they believe that they are being discriminated against. This does not imply that the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women have become meaningless. Those treaties in fact compel the Netherlands to eliminate discriminatory provisions from more specific parts of national legislation."

9.2. With respect to the State party's contention that article 26 of the Covenant can only be invoked in the sphere of civil and political rights, the author claims that this view is not shared by Netherland courts and that it also "runs counter to the stand taken by the Government itself during parliamentary approval. It then stated that article 26—as opposed to article 2, paragraph 1—'also applied to areas otherwise not covered by the Covenant' ".

9.3. The author also disputes the State party's contention that applicability of article 26 with regard to the right of social security, as referred to in article 9 of the International Covenant on Economic, Social and Cultural Rights, would be incompatible with the aims of both Covenants. The author claims that article 26 would apply "to one well-defined aspect of article 9 only, which is equal treatment before the law, leaving other important aspects such as the level of social security aside".

9.4. With regard to the State party's argument that, even if article 26 were to be considered applicable, the State party would have a delay of several years from the time of ratification of the Covenant to adjust its legis-

lation, the author contends that this argument runs counter to the observations made by the Government at the time of [parliamentary] approval with regard to article 2, paragraph 2, of the International Covenant on Civil and Political Rights stating that such a *terme de grâce* would be applicable only with respect to provisions that are not self-executing, whereas article 26 is in fact recognized by the Government and court rulings as self-executing. The author adds that "it can, in fact, be concluded from the *travaux préparatoires* of the International Covenant on Civil and Political Rights that according to the majority of the delegates 'it was essential to permit a certain degree of elasticity to the obligations imposed on States by the Covenant, since all States would not be in a position immediately to take the necessary legislative or other measures for the implementation of its provisions' ".[3]

10. 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. The facts of the case are not in dispute.

11. Article 26 of the International Covenant on Civil and Political Rights provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

12.1. The State party contends that there is considerable overlapping of the provisions of article 26 with the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights. The Committee is of the view that the International Covenant on Civil and Political Rights would still apply even if a particular subject-matter is referred to or covered in other international instruments, for example the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, or, as in the present case, the International Covenant on Economic, Social and Cultural Rights. Notwithstanding the interrelated drafting history of the two Covenants, it remains necessary for the Committee to apply fully the terms of the International Covenant on Civil and Political Rights. The Committee observes in this connection that the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights do not detract from the full application of article 26 of the International Covenant on Civil and Political Rights.

12.2. The Committee has also examined the contention of the State party that article 26 of the International Covenant on Civil and Political Rights cannot be invoked in respect of a right which is specifically provided for under article 9 of the International Covenant on Economic, Social and Cultural Rights (social security, including social insurance). In so doing, the Committee has perused the relevant *travaux préparatoires* of the International Covenant on Civil and Political Rights, namely the summary records of the discussions that took place in the Commission on Human Rights in 1948, 1949, 1950 and 1952 and in the Third Committee of the General Assembly in 1961, which provide a "supplementary means of interpretation" (art. 32 of the Vienna Convention on the Law of Treaties[4]). The discussions, at the time of drafting, concerning the question whether the scope of article 26 extended to rights not otherwise guaranteed by the Covenant, were inconclusive and cannot alter the conclusion arrived at by the ordinary means of interpretation referred to in paragraph 12.3 below.

12.3. For the purpose of determining the scope of article 26, the Committee has taken into account the "ordinary meaning" of each element of the article in its context and in the light of its object and purpose (art. 31 of the Vienna Convention on the Law of Treaties). The Committee begins by noting that article 26 does not merely duplicate the guarantees already provided for in article 2. It derives from the principle of equal protection of the law without discrimination, as contained in article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities. Article 26 is thus concerned with the obligations imposed on States in regard to their legislation and the application thereof.

12.4. Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.

12.5. The Committee observes in this connection that what is at issue is not whether or not social security should be progressively established in the Netherlands but whether the legislation providing for social security violates the prohibition against discrimination contained in article 26 of the International Covenant on Civil and Political Rights and the guarantee given therein to all persons regarding equal and effective protection against discrimination.

13. The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.

14. It therefore remains for the Committee to determine whether the differentiation in Netherlands law at the time in question and as applied to Mrs. Zwaan-de Vries constituted discrimination within the meaning of article 26. The Committee notes that in Netherlands law the provisions of articles 84 and 85 of the Netherlands Civil Code imposes equal rights and obligations on both spouses with regard to their joint income. Under section 13, subsection 1 (1), of the Unemployment Benefits Act

[3] *Official Records of the General Assembly, Tenth Session, Annexes*, agenda item 28 (Part II), document A/2929, chap. V, para. 8.

[4] United Nations, *Juridical Yearbook 1969* (United Nations publication, Sales No. E.71.V.4), p. 140.

(WWV) a married woman, in order to receive WWV benefits, had to prove that she was a "breadwinner"—a condition that did not apply to married men. Thus a differentiation which appears on one level to be one of status is in fact one of sex, placing married women at a disadvantage compared with married men. Such a differentiation is not reasonable, and this seems to have been effectively acknowledged even by the State party by the enactment of a change in the law on 29 April 1985, with retroactive effect to 23 December 1984 (see para. 4.5 above).

15. The circumstances in which Mrs. Zwaan-de Vries found herself at the material time and the application of the then valid Netherlands law made her a victim of a violation, based on sex, of article 26 of the International Covenant on Civil and Political Rights, because she was denied a social security benefit on an equal footing with men.

16. The Committee notes that the State party had not intended to discriminate against women and further notes with appreciation that the discriminatory provisions in the law applied to Mrs. Zwaan-de Vries have, subsequently, been eliminated. Although the State party has thus taken the necessary measures to put an end to the kind of discrimination suffered by Mrs. Zwaan-de Vries at the time complained of, the Committee is of the view that the State party should offer Mrs. Zwaan-de Vries an appropriate remedy.

Communication No. 188/1984

Submitted by: Ramón B. Martínez Portorreal on 10 October 1984
Alleged victim: The author
State party: Dominican Republic
Date of adoption of views: 5 November 1987 (thirty-first session)

Subject matter: Arrest of leader of Human Rights Organization in Dominican Republic—Human Rights lawyer

Procedural issues: Exhaustion of domestic remedies —Failure of investigation of allegations by State party—State party's duty to investigate—Burden of proof—Adoption of views without submission on merits by State party

Substantive issues: Ill-treatment of detaines—Arbitrary arrest—Prison conditions—Habeas corpus—*Compensation under article 9 (5)*

Articles of the Covenant: 2, 7, 9 (1), (2) and (5) and 10 (1)
Articles of the Optional Protocol: 4 (2) and 5 (2) (b)

1. The author of the communication (initial letter dated 10 October 1984 and further letter dated 30 September 1985 is Ramón B. Martínez Portorreal, a national of the Dominican Republic born in 1943, at present a practising attorney, Law Professor and Executive Secretary of the Comité Dominicano de los Derechos Humanos (CDH). He claims to be the victim of violations by the Government of the Dominican Republic of article 9 paragraphs 1 to 5, and article 10, paragraphs 1 and 2 (*a*), of the International Covenant on Civil and Political Rights.

2.1. The author alleges that on 14 June 1984 at 6 a.m. six members of the National Police came to his home in Santo Domingo and told him that an assistant of the prosecutor was with them and had received an order to have him arrested. He was taken to the headquarters of the National Police, where he saw several political opposition leaders (four names are given) who had also been arrested in the early morning. They were taken to the Casa de Guardia of the Secret Service where they were put in a cell (known as the "cell of the drivers"), where approximately 50 individuals were being held. They learned that the Government had ordered a police raid that day against all leaders or personalities considered to be members of the leftist opposition.

2.2. Later the same day, the author was allegedly separated from the other political opposition leaders and transferred to another cell (known as the "Viet Nam cell"), measuring 20 by 5 metres, where approximately 125 persons accused of common crimes were being held. Conditions were allegedly inhuman in this overcrowded cell, the heat was unbearable, the cell extremely dirty and owing to lack of space some detainees had to sit on excrement. The author further states that he received no food or water until the following day.

2.3. On 16 June 1984, after 50 hours of detention, the author and the others were released. The author points out that at no time during his detention was he informed of the reasons for his arrest. He maintains that his detention was aimed at serving the following purposes:

To intimidate CDH because it had internationally criticized the Government's repression of a demonstration in April 1984 (no other details are given);

To prevent the Executive Secretary of CDH from denouncing the police raid against all individuals considered to be leftist leaders;

To damage the reputation of CDH. The fact that the Executive Secretary of CDH was arrested on the same day as leftist opponents of the Government was used by some media to affirm that CDH was an anti-governmental and subversive organization.

2.4. Concerning the exhaustion of domestic remedies, the author states that, although the Penal Code of the Dominican Republic provides that civil servants, agents or officials of the Government who have ordered or committed arbitrary acts or acts against the freedom and political rights of one or several individuals may be sentenced to civil demotion (*degradación cívica*), there is no recourse available in the national penal law that would enable him to present his accusations and to seek redress. The author does not indicate whether the same matter is being examined under another procedure of international investigation or settlement.

3. By its decision of 5 July 1985, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the Committee's provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication. The Working Group also requested the author to provide the Committee with more detailed information concerning the grounds for alleging that there was no recourse available in the national penal law that would enable him to present the accusations made in his communication and to seek redress.

4. By letter dated 30 September 1985, the author indicates that chapter II, section 2, of the Penal Code of the Dominican Republic refers to infringements of liberty and that articles 114 to 122 deal with the penalties to be imposed on civil servants and agents or representatives of the Government ordering or committing an act that is arbitrary or constitutes an infringement of individual freedom or of the political rights of one or more citizens of the Republic. According to the article in question, the penalty is civil demotion (*degradación cívica*). The author alleges, however, that the articles in question are a dead letter in the Dominican Republic, since in the 141 years of the Republic's existence, no civil servant has been brought to trial for an offence against this provision. He further alleges that the Dominican Code of Criminal Procedure lays down no procedure for the enforcement of the above-mentioned articles of the Penal Code. There is no court to deal with applications of this kind. Thus, the author concludes, it is quite inconceivable that any attempt to make use of the procedures established by the present Code of Criminal Procedure will prove successful.

5. The time-limit for the observations requested from the State party under rule 91 of the Committee's provisional rules of procedure expired on 1 October 1985. No submissions were received from the State party.

6.1. With regard to article 5, paragraph 2 (*a*), of the Optional Protocol, the Committee ascertained that the case was not being examined under another procedure of international investigation or settlement.

6.2. With regard to article 5, paragraph 2 (*b*), of the Optional Protocol, the Committee could not conclude, on the basis of the information before it, and in the absence of a submission from the State party, that there were available remedies in the circumstances of the present case which could or should have been pursued.

7. On 2 April 1986, the Human Rights Committee therefore decided that the communication was admissible, and in accordance with article 4, paragraph 2, of the Optional Protocol, requested the State party to submit to the Committee, within six months of the date of the transmittal to it of the Committee's decision, written explanations or statements clarifying the matter and the remedy, if any, that might have been taken by it.

8. The time-limit for the State party's submission under article 4, paragraph 2, of the Optional Protocol expired on 6 November 1986. No submission has been received from the State party, apart from a note, dated 22 July 1987, stating that the Government of the Dominican Republic intended "to submit its explanations concerning communication No. 188/1984 . . . and the admissibility decision adopted by the Human Rights Committee on 2 April 1986, during the forthcoming General Assembly". The Committee informed the State party that any submission should be addressed to the Committee, care of the Centre for Human Rights. No further submission has been received.

9.1. The Human Rights Committee, having considered the present communication in the light of all the information made available to it, as provided in article 5, paragraph 1, of the Optional Protocol, hereby decides to base its views on the following facts and uncontested allegations.

9.2. Mr. Ramón B. Martínez Portorreal is a national of the Dominican Republic, a lawyer and Executive Secretary of the Comité Dominicano de los Derechos Humanos. On 14 June 1984 at 6 a.m., he was arrested at his home, according to the author, because of his activities as a leader of a human rights association, and taken to a cell at the secret service police headquarters, from where he was transferred to another cell measuring 20 by 5 metres, where approximately 125 persons accused of common crimes were being held, and where, owing to lack of space, some detainees had to sit on excrement. He received no food or water until the following day. On 16 June 1984, after 50 hours of detention, he was released. At no time during his detention was he informed of the reasons for his arrest.

10.1. In formulating its views, the Human Rights Committee also takes into account the failure of the State party to furnish any information or clarifications. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. The Committee notes with concern that, despite its repeated requests and reminders and despite the State party's obligation under article 4, paragraph 2, of the Optional Protocol, no explanations or statements clarifying the matter have been received from the State party in the present case. In the circumstances, due weight must be given to the author's allegations.

10.2. The Committee observes that the information before it does not justify a finding as to the alleged violation of articles 9, paragraphs 3 and 4, and 10, paragraph 2, of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts of the case disclose violations of the Covenant, with respect to:

Articles 7 and 10, paragraph 1, because Ramón Martínez Portorreal was subjected to inhuman and degrading treatment and to lack of respect for his inherent human dignity during his detention;

Article 9, paragraph 1, because he was arbitrarily arrested; and

Article 9, paragraph 2, because he was not informed of the reasons for his arrest.

12. The Committee, accordingly, is of the view that the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to provide Mr. Martínez Portorreal with effective remedies, including compensation under article 9, paragraph 5, of the Covenant, for the violations that he has suffered, and to take steps to ensure that similar violations do not occur in the future.

Communication No. 191/1985

Submitted by: Carl Henrik Blom on 5 July 1985
Alleged victim: The author
State party: Sweden
Date of adoption of views: 4 April 1988 (thirty-second session)

Subject matter: Subsidies for public and private education establishments

Procedural issues: Compatibility of communication with Covenant—Examination of "same matter" by European Commission on Human Rights—Accelerated procedure under article 4 (2)

Substantive issues: Discrimination based on "other status"—Denial of award of education subsidies for private schools—Unreasonable differentiation—Retroactive award of education subsidy—"Effective remedy" within the meaning of article 2 (3) (a)

Articles of the Covenant: 2 (3) and 26
Articles of the Optional Protocol: 3 and 5 (2) (a) *and* (b)

1. The author of the communication (initial letter dated 5 July 1985 and further letters dated 24 February 1986 and 19 January 1988) is Carl Henrik Blom, a Swedish citizen, born in 1964. He is represented by legal counsel. He claims to be a victim of violations by the Swedish authorities of article 2, paragraph 3, and article 26 of the International Covenant on Civil and Political Rights in conjunction with article 3, paragraph (*c*) and article 5, paragraph (*b*), of the UNESCO Convention against Discrimination in Education of 1960. Article 13 of the International Covenant on Economic, Social and Cultural Rights is also invoked.

2.1. During the school year 1981/82, the author attended grade 10 at the Rudolf Steiner School in Göteborg, which is a private school. According to Decree No. 418 on Study Aid, issued by the Swedish Government in 1973, a pupil of an independent private school can only be entitled to public assistance if he attends a programme of courses which is placed under State supervision by virtue of a governmental decision under the Ordinance. The governmental decision is taken after consultation with the National Board of Education and the local school authorities.

2.2. The author states that the Rudolf Steiner School submitted an application on 15 October 1981 to be placed under State supervision with respect to grade 10 and above (the lower grades were already in that category). After the local school authorities and the National Board gave a favourable opinion, the decision to place grade 10 and above under State supervision was taken on 17 June 1982, effective as of 1 July 1982, that is for the school year 1982/83 onwards, and not from autumn 1981, as the school had requested.

2.3. On 6 June 1984, the author applied for public financial aid in the amount of SKr 2,250, in respect of the school year 1981/82. By a decision of 5 November 1984, his application was rejected by the National Board for Educational Assistance on the grounds that the school had not been under State supervision during the school year in question. The author alleges that this decision was in violation of the provisions of the international treaties invoked by him. He states that an appeal against the decision "was not allowed". Believing, however, that the decision of the National Board for Educational Assistance violated his rights under the 1960 UNESCO Convention, the author submitted, at the beginning of 1985, a claim for compensation to the Chancellor of Justice (*Justiekanslern*). By a decision of 14 February 1985 the Chancellor of Justice declared that the decision of the National Board for Educational Assistance was in accordance with domestic law in force and could not give rise to State liability. It was also pointed out that the Decree on Study Aid was a governmental decision, in respect of which an action for compensation could not be permitted under the relevant provisions of the Damages Act. The Chancellor finally mentioned that Mr. Blom would be free to pursue the matter before the courts. The Chancellor pointed out, however, that the courts would be duty bound, *ex officio*, to apply Swedish law, including the relevant provisions of the Damages Act to which he had referred.

2.4. From the decision of the Chancellor of Justice, the author draws the conclusion that it would be of no

avail to initiate court proceedings against the State. Consequently, he maintains, there are no further domestic remedies to exhaust. This situation, he claims, constitutes, in itself, a violation of article 2, paragraph 3, of the Covenant.

2.5. The author's allegation, that the decision not to grant him public assistance was in violation of article 26 of the Covenant, is based on the argument that he was subjected to discrimination as a pupil of a private school. Pupils of public schools are said to have received public assistance for the school year 1981/82. This discriminatory treatment allegedly contravenes the basic idea of equality for all in education and it also allegedly interferes with the parents' right to choose independent private schools provided for in article 13 of the International Covenant on Economic, Social and Cultural Rights and article 5, paragraph 1 (*b*), of the UNESCO Convention against Discrimination in Education of 1960 to which Sweden is a State party. The author also claims to be a victim of a violation of article 3 (*c*) of that same Convention.

2.6. The author requests the Committee to condemn the alleged violations of article 2, paragraph 3, and article 26 of the Covenant, to invite the State party to take the necessary steps to give effect to its obligations under article 2, paragraph 3, and to urge the State party to discontinue the alleged discriminatory practices based on the 1973 Study Aid Act. Furthermore, he asks the Committee to urge the Swedish Government to pay him and his class-mates the amount of public assistance due for the school year 1981/82 with accrued interest according to Swedish law as well as his expenses for legal advice.

3. By its decision of 15 October 1985, 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 the admissibility of the communication. The Working Group also requested the State party to explain, in so far as such explanation might be relevant to the question of admissibility, why grade 10 of the Rudolf Steiner School in Göteborg was placed under State supervision only as of 1 July 1982 but not for the preceding school year, as requested.

4.1. In its submission dated 8 January 1986, the State party indicates that the 1962 Act on Schools recognizes the existence of private schools independent of the public sector school system. The private schools are, in principle, financially self-sufficient, and there is no legal obligation for the State or local government to provide any financial contribution. However, there are no legal impediments excluding various forms of public support, and in practice most of the private schools are in one way or another supported by local government and, in addition, approximately half of them, including the Rudolf Steiner School, receive State contributions.

4.2. The State party indicates further that, in accordance with regulations set forth in the 1973 Act on Study Aid (*studiestödslag* 1973:349) and the 1973 Decree on Study Aid (*studiestödskungörelse* 1973:418), pupils attending schools, whether public or private, may be eligible for various forms of public financial support. As far as is relevant for the consideration of the present case, chapter 1, section 1, of the Decree provides that financial support may be granted to pupils attending public schools or schools subject to State supervision. Consequently, for pupils attending a private school to be eligible for public financial support, the school has to be placed under State supervision. Decision on such supervision is taken by the Government upon application submitted by the school. In the present case, the Rudolf Steiner School applied in October 1981 to have the part of its educational programme corresponding to the *gymnasium*, that is grades 10 to 12, placed under State supervision. Education on this higher level had not previously been offered by the school. After having considered the application, as well as observations on the application submitted by the Municipal School Administration, the Education Committee of the County of Göteborg and Bohus, and the National Board of Education, the Government on 17 June 1982 granted the application as of 1 July 1982.

4.3. On 5 November 1984, the National Board for Educational Assistance informed the author that financial support for his studies could not be granted on the ground that the school was not at that time subject to State supervision with respect to the educational programme of grade 10.

5.1. As to the alleged violations of the International Covenant on Civil and Political Rights, the State party submits the following:

Blom contends that the refusal to grant him public financial support for the school year 1981/82 amounts to a violation of article 26. In the Government's view, however, the notion of discrimination implies a comparison between two or more different groups or categories of individuals and a finding, first, that one group or category is being treated differently from another group or category and, secondly, that this different treatment is based on arbitrary and unjustified grounds, such as those enumerated in article 26. Accordingly, different treatment does not constitute discrimination when the distinction is based on objective and reasonable criteria. There is no obligation under article 26, or under any other provision of the Covenant, to provide public financial support to pupils. Therefore, the State is at liberty to decide whether to give such support and, if financial support is provided, to set the conditions under which it should be granted, provided only that the State's considerations are not based on unjustified grounds, such as those enumerated in article 26.

5.2. The State party further argues that:

As regards schools, like any other institution or activity in society, it is naturally legitimate for the State, before granting public financial support to the school or its pupils, to consider whether the school meets reasonable standards of quality and whether it fulfils a need of society or the presumptive pupils. It is equally justified if financial support is provided, that the State take the necessary measures in order to assure itself that the facts and circumstances underlying the decision are not subsequently changed. These are—and on this point no other view has been expressed by Blom—the motives for the requirement that a private school be State-supervised in order for its pupils to be eligible for public financial support. The Government submits that this does not constitute discrimination within the meaning of article 26.

5.3. The State party adds:

In view of the aforesaid, and for the following reasons, the Government further maintains that Blom's communication as regards this point should be declared inadmissible in accordance with the provisions of article 3 of the Optional Protocol. Blom contends, as the sole "discriminatory basis" for the alleged violation of article 26, that he chose to attend the Rudolf Steiner School because of his, and his parents', "religion, political or other opinion", and that the different treatment regarding public financial support was a direct result of this choice. In the opinion of the Government, this obviously does not amount to saying that the State's policy of different treatment of public and private schools is based on such grounds as religion or

political or other opinion . . . What Blom appears to be arguing is that, because he chose the school for religious and political reasons, and because the State, although not for religious or political reasons, treated this private school differently from public schools, he has been treated in a dicriminatory way on the ground of his religion and his political opinion. The lack of merits in this line of arguing must in the Government's opinion be considered so obvious as to make the communication inadmissible under article 3 of the Optional Protocol.

5.4. The State party further submits:

Blom further alleges that article 2, paragraph 3, has been violated since the decision not to grant him public financial support could not be appealed. This provision guarantees an effective remedy only when the rights and freedoms, as recognized in the Covenant, have been violated. In the present case, the only such violation that has been contended is the one under article 26. Therefore, the obvious lack of merit in the arguments put forward by Blom regarding the alleged violation of article 26 is equally relevant here. Consequently, the communication as regards this point as well should be declared inadmissible.

5.5. As regards the question posed in the decision of the Committee's Working Group as to the reasons why the school was placed under State supervision only as of 1 July 1982, the State party explains

that the application for State supervision was made very late—three and a half months from the outset of the fiscal year 1981/82 and a long time after the education of that school year had begun—and that the decision, which depended on various opinions from other authorities, could not be made until a couple of weeks before the end of the said fiscal year. It seems as if the sole reason for the present case is that those responsible for the Rudolf Steiner School did not act with sufficient promptness in applying for State supervision.

5.6. Finally, the State party mentions that two other applications concerning related issues with respect to pupils of the Rudolf Steiner School of Norrköping have been declared inadmissible by the European Commission of Human Rights in Strasbourg (applications 10476/83 and 10542/83).

6.1. In his comments, dated 24 February 1986, the author stresses that the refusal to grant him financial support "was in fact directed against him as belonging to a distinct group", this group being composed of himself and his class-mates, as compared with pupils attending public schools or private schools already subject to State supervision. He further states that at the time of application in October 1981 the Rudolf Steiner School was already complying with the five administrative requirements imposed on private schools subject to State supervision.

6.2. The author challenges the State party's arguments for considering the communication inadmissible under article 3 of the Optional Protocol by stressing that he was invoking "the grounds enumerated in article 26 of the Covenant referring to the passage 'discrimination on any ground', which includes a reference to 'other status'. Accordingly, for whatever reasons [he] and his class-mates chose to attend the Rudolf Steiner School, they all belong, because of this choice, to the distinct group . . . [and] this 'other status' . . . is obviously the ground for the different treatment imposed on him resulting from the State's deliberate policy."

6.3. With respect to the State party's statement that two other applications by other authors have been declared inadmissible by the European Commission of Human Rights, the author explains that the applicants there had complained of discrimination based upon the fact that some municipalities in Sweden do not grant free textbooks to pupils attending private schools, as do most other municipalities. According to the author, these decisions have no relevancy whatever to the question of financial support under the Act on Study Aid.

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

7.2. With regard to article 5, paragraph 2 (*a*), of the Optional Protocol, the Committee observed that the matter complained of by Carl Henrik Blom was not being examined and had not been examined under another procedure of international investigation or settlement. The Committee noted that consideration by the European Commission of Human Rights of applications submitted by other students at the same school relating to other or similar facts did not, within the meaning of article 5, paragraph 2 (*a*), of the Optional Protocol, constitute an examination of the same matter. As set forth in the Committee's prior decisions, the concept of the "same matter" within the meaning of article 5, paragraph 2 (*a*), of the Optional Protocol must be understood as including "the same claim concerning the same individual, submitted by him or someone else who has the standing to act on his behalf before the other international body". The reservation of the State party in respect of matters already examined under another procedure of international investigation or settlement, therefore, did not apply.

7.3. With regard to article 5, paragraph 2 (*b*), of the Optional Protocol, the Committee was unable to conclude, on the basis of the information before it, that there were available remedies in the circumstances of the case which could or should have been pursued. The Committee noted in that connection that the State party did not contest the author's claim that domestic remedies had been exhausted.

7.4. With regard to the State party's submission that the "lack of merit" in the author's arguments should render the communication "inadmissible under article 3 of the Optional Protocol", the Committee noted that article 3 of the Optional Protocol provided that communications should be declared inadmissible if they were (*a*) anonymous, (*b*) constituted an abuse of the right of submission or (*c*) were incompatible with the provisions of the Covenant. The Committee observed that the author had made a reasonable effort to substantiate his allegations and that he had invoked specific provisions of the Covenant. Therefore, the Committee decided that the issues before it, in particular the scope of article 26 of the International Covenant on Civil and Political Rights, should be examined with the merits of the case.

7.5. The Human Rights Committee noted that it could only consider a communication in so far as it concerned an alleged breach of the provisions of the International Covenant on Civil and Political Rights.

7.6. The Committee observed that both the author and the State party had already made extensive submissions with regard to the merits of the case. However, the Committee deemed it appropriate at that juncture to limit itself to the procedural requirement of deciding on the admissibility of the communication. It noted that, if the State party should wish to add to its earlier submis-

sion within six months of the transmittal to it of the decision on admissibility, the author of the communication would be given the opportunity to comment thereon. If no futher submissions were received from the State party under article 4, paragraph 2, of the Optional Protocol, the Committee would proceed to adopt its final views in the light of the written information already submitted by the parties.

8. On 9 April 1987, the Committee therefore decided that the communication was admissible in so far as it related to alleged violations of the International Covenant on Civil and Political Rights and requested the State party, should it not intend to make a further submission in the case under article 4, paragraph 2, of the Optional Protocol, so to inform the Committee, so as to permit an early decision on the merits.

9. The State party, on 23 October 1987, and the author, on 19 January 1988, informed the Committee that they were prepared to let the Committee consider the case on the merits as it then stood.

10.1. The Human Rights Committee has considered the merits of the communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol. The facts of the case are not in dispute.

10.2. The main issue before the Committee is whether the author of the communication is a victim of a violation of article 26 of the Covenant because of the alleged incompatibility of the Swedish regulations on education allowances with that provision. In deciding whether or not the State party violated article 26 by refusing to grant the author, as a pupil of a private school, an education allowance for the school year 1981/82, whereas pupils of public schools were entitled to education allowances for that period, the Committee bases its findings on the following observations.

10.3. The State party's educational system provides for both private and public education. The State party cannot be deemed to act in a discriminatory fashion if it does not provide the same level of subsidy for the two types of establishment, when the private system is not subject to State supervision. As to the author's claim that the failure of the State party to grant an education allowance for the school year 1981/82 constituted discriminatory treatment, because the State party did not apply retroactively its decision of 17 June 1982 to place grades 10 and above under State supervision, the Committee notes that the granting of an allowance depended on actual exercise of State supervision since State supervision could not be exercised prior to 1 July 1982 (see para. 2.2 above), the Committee finds that consequently it could not be expected that the State party would grant an allowance for any prior period and that the question of discrimination does not arise. On the other hand, the question does arise whether the processing of the application of the Rudolf Steiner School to be placed under State supervision was unduly prolonged and whether this violated any of the author's rights under the Covenant. In this connection, the Committee notes that the evaluation of a school's curricula necessarily entails a certain period of time, as a result of a host of factors and imponderables, including the necessity of seeking advice from various governmental agencies. In the instant case the school's application was made in October 1981 and the decision was rendered eight months later, in June 1982. This lapse of time cannot be deemed to be discriminatory, as such. Nor has the author claimed that this lapse of time was attributable to discrimination.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as submitted do not sustain the author's claim that he is a victim of a violation of article 26 of the International Covenant on Civil and Political Rights. In the light of the above, the Committee does not have to make a finding in respect of the author's claim of a violation of article 2, paragraph 3, of the Covenant.

Communication No. 194/1985

Submitted by: Lilo Miango on 5 August 1985
Alleged victim: Jean Miango Muiyo (author's brother)
State party: Zaire
Date of adoption of views: 27 October 1987 (thirty-first session)

Subject matter: Death of Zairian citizen during detention by military authorities

Procedural issues: Failure of investigation of allegations by State party—Adoption of views without submission on merits by State party—State party's duty to investigate—Burden of proof—Exhaustion of domestic remedies

Substantive issues: Ill-treatment of detainee—Torture—Death of victim—Right to life

Articles of the Covenant: 6 (1) and 7

Articles of the Optional Protocol: 4 (2) and 5 (2) (b)

1. The author of the communication (initial letter dated 5 August 1985) is Lilo Miango, a Zairian national residing in France, writing on behalf of his brother, Jean Miango Muiyo, who died in dubious circumstances on 23 June 1985 at the age of 44 years at the Mama Yemo Hospital at Kinshasa, Zaire.

2.1. The author states that, according to the information that his family has been able to obtain, his brother was kidnapped and taken to the military camp at Kokolo, Kinshasa, on 20 or 21 June 1985 and that, inside the camp, he was kept in the residence of Lieutenant Kalonga. The author believes that his brother was subjected to torture in the camp by members of the armed forces (Forces armées zaïroises (FAZ)), since he was seen later, in terrible condition, by a friend of the family at the Mama Yemo Hospital. The friend informed the author's family and they went twice to the hospital. On the first occasion, they were unable to find his brother since his name had not been entered in the hospital register and, on the second occasion, they were taken directly to the morgue to identify his body.

2.2. In the report of the traffic police (Second Detachment), the alleged victim is said to have entered the hospital on 18 June 1985 as a result of a road traffic accident, which was not, however, recorded by the police. The author states that, according to neighbours, his brother was at home on 18 and 19 June 1985 and that the allegation of a road accident is questionable, because his family knew that he had been taken to the camp at Kokolo and, moreover, they had also learned that he had been brought to the hospital by a military ambulance, driven by Sergeant Radjabo from the camp at Kokolo.

2.3. The author enclosed a copy of a report dated 11 July 1985 by the forensic physican, Doctor Nzuzi Ntula, stating that the alleged victim died as a result of traumatic wounds probably caused by a blunt instrument and that his death seemed to have been the result of the use of violence and not a road accident as stated in the report of the traffic police.

2.4. The author states that his family in Zaire requested the Office of the Prosecutor to carry out an inquiry regarding the death of Jean Miango Muiyo. In particular, the family requested that Sergeant Radjabo be summoned to the prosecutor's office for questioning. With the consent of his superiors, he allegedly refused to be questioned and left for his home province. In this connection, the author states that cases involving members of the armed forces in Zaire can only be dealt with by a military tribunal (*auditorat militaire*). He alleges that ordinary tribunals are not permitted to try members of the armed forces unless they have been discharged from their military functions. A case is allegedly dealt with by a military tribunal only when the authorities (*pouvoir établi*) decide to do so.

2.5. The author alleges that his entire family in Zaire has been subjected to discrimination and harassment because of its relationship with Daniel Monguya Mbenge, the leader of an opposition party, the Mouvement d'action pour la résurrection du Congo (MARC).[1] The author mentions that several members of his family have been subjected to arbitrary arrest, threats and other forms of harassment. He fears that, in the circumstances, there is no hope that the case of his brother's death will be properly investigated. He therefore requests the Human Rights Committee to prevail upon the State party to fulfil its obligations under the Covenant.

2.6. The author claims that article 2, paragraph 3, articles 5, 6, paragraph 1, articles 7, 14 and 16 of the International Covenant on Civil and Political Rights have been violated in the case of Jean Miango Muiyo. He indicates that his brother's case has not been submitted to another procedure of international investigation or settlement.

3. Having concluded that the author of the communication was justified in acting on behalf of the alleged victim, the Working Group of the Human Rights Committee decided on 15 October 1985 to transmit 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. The deadline for the State party's submission under rule 91 of the Committee's provisional rules of procedure expired on 14 January 1986. No rule 91 submission was received from the State party.

5.1. With regard to article 5, paragraph 2 (*a*), of the Optional Protocol, the Committee noted that the author's statement that his brother's case was not being examined under another procedure of international investigation or settlement was uncontested.

5.2. With regard to article 5, paragraph 2 (*b*), of the Optional Protocol, the Committee was unable to conclude, on the basis of the information before it, that there were available remedies in the circumstances of the case which could or should have been pursued.

5.3. Accordingly, the Committee found that the communication was not inadmissible under article 5, paragraph 2 (*a*) or (*b*), of the Optional Protocol.

6. On 28 March 1985, the Human Rights Committee therefore decided that the communication was admissible and in accordance with article 4, paragraph 2, of the Optional Protocol, requested the State party to submit to the Committee, within six months of the date of the transmittal to it of the Committee's decision, written explanations or statements clarifying the matter and the remedy, if any, that might have been taken by it.

7. The time-limit for the State party's submission under article 4, paragraph 2, of the Optional Protocol expired on 1 November 1986. No submission has been received from the State party, despite a reminder sent on 19 June 1987.

8.1. The Human Rights Committee, having considered the present communication in the light of all the information made available to it, as provided in article 5, paragraph 1, of the Optional Protocol, hereby decides to base its views on the following facts, which have not been contested by the State party.

8.2. Mr. Jean Miango Muiyo, a Zairian citizen, was kidnapped and taken to the military camp at Kokolo, Kinshasa, on 20 or 21 June 1985. There, he was subjected to torture my members of the armed forces (Forces armées zaïroises (FAZ)). Later, he was seen in a precarious physical condition by a friend of the family at Mama Yemo Hospital in Kinshasa. The author's relatives were unable to locate the victim alive; they

[1] Mr. Mbenge, first cousin of the author, co-signed the author's submissions to the Committee. Mr. Mbenge's own case (No. 16/1977) was concluded with views adopted on 23 March 1983 (eighteenth session). See above, p. 76.

were, however, taken to the hospital morgue to identify the victim's body. Contrary to the report of the traffic police, the victim did not succumb to the consequences of a road accident he allegedly suffered on 18 June 1985, but died as the result of traumatic wounds probably caused a blunt instrument. This conclusion is buttressed by a report from a forensic physician dated 11 July 1985, which states that the victim's death seems to have been the result of the use of violence and not of a road accident. The author's family has requested the Office of the Public Prosecutor to conduct an inquiry into the death of Mr. Miango Muiyo, in particular asking that the military officer who delivered the victim to the hospital be summoned for questioning. This officer, however, with the consent of his superiors, has refused to be questioned.

9. In formulating its views, the Human Rights Committee also takes into account the failure of the State party to furnish any information and clarifications. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. The Committee notes with concern that, despite its repeated requests and reminders and despite the State party's obligation under article 4, paragraph 2, of the Optional Protocol, no explanations or statements clarifying the matter have been received from the State party in the present case. In the circumstances, due weight must be given to the author's allegations.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that these facts disclose a violation of articles 6 and 7, paragraph 1, of the Covenant. Bearing in mind the gravity of these violations the Committee does not find it necessary to consider whether other provisions of the Covenant have been violated.

11. The Committee therefore urges the State party to take effective steps: (*a*) to investigate the circumstances of the death of Jean Miango Muiyo, (*b*) to bring to justice any person found to be responsible for his death, and (*c*) to pay compensation to his family.

Communication No. 198/1985

Submitted by: Rubén D. Stalla Costa on 11 December 1985
Alleged victim: The author
State party: Uruguay
Date of adoption of views: 9 July 1987 (thirtieth session)

Subject matter: Candidate to post in civil service —Reinstatement of former civil servants

Procedural issues: Exhaustion of domestic remedies —Accelerated procedure under article 4 (2) of the Optional Protocol

Substantive issues: Access to public service—Discrimination in recruitment of civil service—Effective remedy—Discrimination based on other status—Differentiation on objective and reasonable criteria

Articles of the Covenant: 2 (1) and (3) (a), *25* (c) *and* 26
Articles of the Optional Protocol: 4 (2) and 5 (2) (b)

1. The author of the communication (initial letter dated 11 December 1985 and three subsequent letters) is Ruben Stalla Costa, a Uruguayan lawyer, residing in Montevideo, who claims to be a victim of violations of articles 2, 25 (*c*) and 26 of the International Covenant on Civil and Political Rights.

2.1. The author states that he has submitted job applications to various governmental agencies in order to have access to and obtain a job in the public service in his country. He has allegedly been told that only former public employees who were dismissed as a result of the application of Institutional Act No. 7 of June 1977 are currently admitted to the public service. He refers in this connection to article 25 of Law No. 15.737 of 22 March 1985, which provides that all public employees who were dismissed as a result of the application of Institutional Act No. 7 have the right to be reinstated in their respective posts.

2.2. The author claims that article 25 of Law No. 15.737 gives more rights to former public employees than to other individuals, such as the author himself, and that it is therefore discriminatory and in violation of articles 2, 25 (*c*) and 26 of the International Covenant on Civil and Political Rights.

2.3. The author claims to have exhausted all internal remedies. He submitted an action for *amparo* on grounds of violation of his constitutional rights, in particular his right not to be discriminated against, before the Supreme Court of Justice in June 1985. The Supreme Court dismissed the case.

3. By its decision of 26 March 1986, the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party, requesting information and observations relevant to the question of admissibility of the communication.

4. In its submission under rule 91, dated 24 July 1986, the State party requested that the communication be declared inadmissible, explaining, *inter alia*, that Law No. 15.737 of 22 March 1985, which the author claimed was discriminatory, had been passed with the unanimous support of all Uruguayan political parties as an instrument of national reconstruction:

This Act . . . seeks to restore the rights of those citizens who were wrongfully treated by the *de facto* Government. In addition to proclaiming a broad-ranging and generous amnesty, it provides under article 25, that all public officials dismissed on ideological, political or trade-union grounds or for purely arbitrary reasons shall have the right to be reinstated in their jobs, to resume their career in the public service and to receive a pension.

The right of any citizen to have access, on an equal footing, to public employment cannot be deemed to be impaired by virtue of this Act, the purpose of which is to provide redress.

Lastly, so far as exhaustion of remedies is concerned, there is an irrefutable presumption that a right has been violated or claimed beforehand. This is not the case here, as the complainant does not have any such right but only the legitimate expectation, common to all Uruguayan citizens, of being recruited to the public service.

5. In his comments on the State party's submission, the author argues, *inter alia*, that "the enactment of Law No. 15.737 did not have the support of all the political parties . . . It is also asserted that article 25 seeks to provide redress and does not infringe the right to access on an equal footing to posts in the public service. I join in this spirit of reconciliation, like all people in my country, but redress will have to take the form of money."

6.1. In further observations, dated 10 February 1987, the State party elucidates Uruguayan legislation and practice regarding access to public service:

Mr. Stalla regards himself as having a subjective right to demand that a given course of action be followed, namely, his admission to the public service. The Government of Uruguay reiterates that Mr. Stalla, like any other citizen of the Republic, may legitimately aspire to enter the public service, but by no means has a subjective right to do so.

For a subjective right to exist, it must be founded on an objective legal norm. Accordingly, any subjective right presumes the existence of a possession [*bien*] or legal asset [*valor juridico*] attached to the subject by a bond of ownership established in objective law, so that the person in question may demand that right or asset as his own. In the case in question, Mr. Stalla has no such subjective right, since the filling of public posts is the prerogative of the executive organs of the State, of State enterprises or of municipal authorities. Any inhabitant of the Republic meeting the requirements laid down in the legal norms (age requirement, physical and moral suitability, technical qualifications for the post in question) may be appointed to a public post and may have a legitimate aspiration to be vested with the status of public servant, should the competent bodies so decide.

6.2. With regard to article 8 of the Uruguayan Constitution, which provides that "all persons are equal before the law, no other distinctions being recognized among them save those of talent and virtue", the State party comments:

This provision of the Constitution embodies the principle of the equality of all persons before the law. The Government of Uruguay wishes to state in this respect that to uphold Mr. Stalla's petition would unquestionably violate this principle by according him preference over other university graduates who, like Mr. Stalla, have a legitimate aspiration to secure such posts, without any distinction being made between them, other than on the basis of talent and virtue.

6.3. With regard to article 55 of the Uruguayan Constitution, which provides that "the law shall regulate the impartial and equitable distribution of labour", the State party comments:

This provision is one of the "framework rules", under which legal measures will be enacted developing the established right to work (art. 53) and combining the existence of this right with good administration.

It will not have escaped the Committee that it is obviously impossible for the Government of Uruguay, or of any other State with a similar system, to absorb all university graduates into the public service.

6.4. The State party further emphasizes the necessity of "provision for redress made in the legislation enacted by the first elected Parliament after more than 12 years of military authoritarianism, legislation which has made it possible to restore the rights of those public and private officials who were removed from their posts as a result of ideological persecution".

7.1. Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules of procedure, decide whether the communication is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

7.2. The Human Rights Committee therefore ascertained, as required under article 5, paragraph 2 (*a*), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement. Regarding the requirement of prior exhaustion of domestic remedies, the Committee concluded, based on the information before it, that there were no further domestic remedies which the author could resort to in the particular circumstances of his case. The Committee noted in that connection the author's statement that his action for *amparo* had been dismissed by the Supreme Court (see para. 2.3 above), as well as the State party's observation to the effect that there could be no remedy in the case as there had been no breach of a right under domestic law (see para. 4 above).

7.3. With regard to the State party's submission that the communication should have been declared inadmissible on the ground that the author had no subjective right in law to be appointed to a public post, but only the legitimate aspiration to be so employed (see para. 4 and the State party's further elaboration in para. 6.1 above), the Committee observed that the author had made a reasonable effort to substantiate his claim and that he had invoked specific provisions of the Covenant in that respect. The question whether the author's claim was well-founded should, therefore, be examined on the merits.

7.4. The Committee noted that the facts of the case, as set out by the author and the State party, were already sufficiently clear to permit an examination on the merits. However, the Committee deemed it appropriate at that juncture to limit itself to the procedural requirement of deciding on the admissibility of the communication. It noted that, if the State party should wish to add to its earlier submissions within six months of the transmittal to it of the decision on admissibility, the author of the communication would be given an apportunity to comment thereon. If no further explanations or statements were received from the State party under article 4, paragraph 2, of the Optional Protocol, the Committee would then proceed to adopt its final views in the light of the written information already submitted by the parties.

7.5. On 8 April 1987 the Human Rights Committee therefore decided that the communication was admissible and requested the State party, if it did not intend to make a further submission in the case under article 4, paragraph 2, of the Optional Protocol, so to inform the Committee, to permit an early decision on the merits.

8. By note dated 26 May 1987, the State party informed the Committee that, in the light of its prior submission, it would not make a further submission in the case.

9. The Human Rights Committee has considered the merits of the present communication in the light of all information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol. The facts of the case are not in dispute.

10. The main question before the Committee is whether the author of the communication is a victim of a violation of article 25 (*c*) of the Covenant because, as he alleges, he has not been permitted to have access to public service on general terms of equality. Taking into account the social and political situation in Uruguay during the years of military rule, in particular the dismissal of many public servants pursuant to Institutional Act No. 7, the Committee understands the enactment of Law No. 15.737 of 22 March 1985 by the new democratic Government of Uruguay as a measure of redress. Indeed, the Committee observes that Uruguayan public officials dismissed on ideological, political or trade union grounds were victims of violations of article 25 of the Covenant and as such are entitled to have an effective remedy under article 2, paragraph 3 (*a*), of the Covenant. The Act should be looked upon as such a remedy. The implementation of the Act, therefore, cannot be regarded as incompatible with the reference to "general terms of equality" in article 25 (*c*) of the Covenant. Neither can the implementation of the Act be regarded as an invidious distinction under article 2, paragraph 1, or as prohibited discrimination within the terms of article 26 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as submitted do not sustain the author's claim that he has been denied access to public service in violation of article 25 (*c*) or that he is a victim of an invidious distinction, that is, of discrimination within the meaning of articles 2 and 26 of the Covenant.

Annex I

RESPONSES RECEIVED FROM STATES PARTIES AFTER THE ADOPTION OF VIEWS BY THE HUMAN RIGHTS COMMITTEE

Communication No. 24/1977

Submitted by: Sandra Lovelace on 29 December 1977
Alleged victim: The author
State party: Canada
Date of adoption of views: 30 July 1981 (thirteenth session)

Response, dated 6 June 1983, of the Government of Canada to the Committee's views*

1. On 19 November 1982, the Secretary-General of the United Nations, in accordance with the request of the Human Rights Committee, at its seventeenth session, informed Canada of the Committee's wish to receive any pertinent information on measures taken by Canada in respect of the views adopted by the Human Rights Committee on 30 July 1981, in regard to communication No. 24/1977. In response to this request, Canada provides the following information:

Information on measures taken with respect to communication No. 24/1977

Introduction

2. In her communication to the Human Rights Committee on 29 December 1977, pursuant to the Optional Protocol to the International Covenant on Civil and Political Rights, Sandra Lovelace indicated that on 23 May 1970 she lost her Indian status upon marrying a non-Indian, as a result of the operation of s.12 (1) (*b*) of the Indian Act, R.S.C. 1970 c. I-6. Section 12 (1) (*b*) reads as follows:

> "12.(1) The following persons are not entitled to be registered [as Indians], namely . . .
>
> "(*b*) a woman who has married a person who is not an Indian . . ."

Sandra Lovelace therefore claimed to be a victim of a violation of the rights set forth in articles 2 (1), 23 (1) and (4), 26 and 27 of the International Covenant on Civil and Political Rights.

3. However, because she had lost her Indian status before the Covenant and Optional Protocol came into effect in Canada on 19 August 1976, the Committee declined to consider whether article 26 of the Covenant, which guarantees the right to equality before the law and the equal protection of the law, had been violated (see para. 18 of the views it adopted in regard to communication No. 24/1977). Also, it held that the rights aimed at protecting family life and children were only indirectly at stake and, therefore, it did not find there to have been a contravention of article 23 (*idem*). However, it concluded that the effects of her loss of status occurring after the Covenant came into force on her right to live on the reserve, a right which she desired to exercise because of the dissolution of her marriage, resulted in the particular circumstances of her case in a contravention of article 27 of the Covenant (see para. 17 of its views). In particular, it held that the author of the communication had been denied the right, guaranteed by article 27, to persons belonging to minorities to enjoy her own culture and to use her own language in community with other members of her group.

* For the Committee's views, see *Selected Decisions . . .*, vol. 1, p. 83.

Response of Canada to the views of the Human Rights Committee

(a) *Amendment of the Indian Act*

4. Although Canada was not found to be in contravention of article 26 of the Covenant by the Human Rights Committee, it nevertheless appreciates the concern of Indian women, and, indeed, of many other persons in Canada and elsewhere in the international community, that s.12 (1) (*b*) of the Indian Act may constitute discrimination on the basis of sex. It notes that, in a recent communication to the Human Rights Committee brought by P. S. S., the issue has again been raised of whether s.12 (1) (*b*) of the Indian Act contravenes article 26 of the Covenant, in this case by a woman who married a non-Indian after the coming into force of the Covenant. Also, as a result of the decision of the Human Rights Committee in regard to communication No. 24/1977 brought by Sandra Lovelace, Canada is anxious to amend the Indian Act so as to render itself in fuller compliance with its international obligations pursuant to article 27 of the International Covenant on Civil and Political Rights.

5. Canada is committed to the removal from the Indian Act of any provisions which discriminate on the basis of sex or in some other way offend against human rights; it is also desirous that the Indian community have a significant role to play in determining what new provisions on Indian status the Indian Act should contain.

6. The issue of how Indian status should be defined in the Indian Act is, however, a matter of considerable controversy amongst Indian people. In order to expedite the amendment of the Indian Act, a Parliamentary Sub-Committee on Indian Women and the Indian Act was formed on 4 August 1982. This Sub-Committee conducted five days of hearings, in which it heard the testimony of 41 witnesses, most of whom were Indian persons. The Sub-Committee was addressed on 8 September 1982 by the Honourable John C. Munro, Minister of Indian Affairs and Northern Development, who made at that time the following statement:

> "The Federal Government's position on the issue is perfectly clear. We are committed to bring in amendments to the [Indian] Act that will end discrimination based on sex. An integral part of that commitment is to proceed to the drafting of amendments only after full and open consultation with the Indian people."

7. On 21 September 1982, the Sub-Committee tabled its report, a copy of which is appended to the present document for the consideration of the Human Rights Committee. It recommended among other things that the Indian Act should be amended, so that Indian women no longer lose their Indian status upon marrying non-Indians (p. 39 of the report), and that Indian women who had previously lost their status should, upon application, be entitled to regain it (pp. 40-41 of the report). Moreover, it recommended that persons who regain their Indian status also be entitled to regain their band membership (pp. 40-41 of the report), in which case they will be entitled to live on the reserve and participate in the life of the Indian community. The Sub-Committee also recommended that Parliament provide sufficient

funds to make these measures of reinstatement feasible (pp. 41-42 of the report).

8. The report was greeted favourably by the Minister of Indian Affairs and Northern Development, although he expressed some concern that many interested Indian people had not had a chance to appear before the Sub-Committee. He reiterated, however, the view of Canada that the amendment of the Indian Act so as to remove any provisions discriminating on the basis of sex is a matter of urgency. The necessary steps are now being taken to develop legislation to amend the Indian Act.

(b) *Enactment of the Canadian Charter of Rights and Freedoms*

9. In April 1982, the Canadian Charter of Rights and Freedoms came into effect as part of the constitution of Canada. A copy of the Charter is appended to this document for the consideration of the Human Rights Committee. Section 15 (1) of the Charter, which comes into effect in April 1985, reads as follows:

"15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Thus, as of April 1985, there will be an available domestic remedy in Canada for persons who feel they have been discriminated against on the basis of sex by federal laws. The enactment of the Charter is an indication of the reality of Canada's respect for human rights, and provides an additional reason for Canada to be anxious to amend any laws which offend against human rights. The Federal Government is at present undertaking a review of all its legislation to ensure that any laws which are inconsistent with the Charter are amended or repealed.

10. Sections 27 and 28 of the Charter, already in effect, are also of relevance to any claim by an Indian woman that her human rights have been violated by s.12 (1) (b) of the Indian Act. Section 27 is a constitutional recognition of the value of the diverse cultural heritages of Canadians, and s.28 espouses the principle of equality between men and women. These sections read as follows:

"27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

"28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

11. There are also provisions of the Constitution Act, 1982 (of which the Charter comprises Part I), which indicate Canada's respect for the integrity of its native peoples. Thus, s.25 of the Charter reads as follows:

"25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

"(*a*) Any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763;

"(*b*) Any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claim settlement."

Part II of the Constitution Act, 1982, is entitled "Rights of the Aboriginal Peoples of Canada", and is comprised by s.35, which reads as follows:

"35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

"(2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada."

And Part IV of the Act, entitled "Constitutional Conference", requires Canada to convene a constitutional conference on matters affecting native peoples. This conference was held on 15 and 16 March 1983. At this conference, the Minister of Indian and Northern Affairs confirmed his intention to move forward as quickly as possible with the process to amend the Indian Act and eliminate offensive sections. Furthermore, a Constitutional Accord on Aboriginal Rights was signed by the federal and provincial governments with the participation of aboriginal groups. In the Accord it was agreed to hold a further conference on aboriginal matters within the year. It was also agreed to take the necessary steps to amend section 35 of the Constitution Act, 1982, set out above, so as to include the principle of equality between men and women in regard to aboriginal and treaty matters in the following terms:

"35.(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

12. Article 2 (3) (*a*) of the Covenant requires that States parties ensure that there are effective remedies for any persons whose rights or freedoms, as recognized in the Covenant, have been violated, notwithstanding that the violation has been committed by persons acting in an official capacity. Sections 24 (1) and 32 (1) of the Canadian Charter of Rights and Freedoms bring Canada into compliance with this aspect of the Covenant. They read as follows:

"24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

"32.(1) This Charter applies

"(*a*) To the Parliament and Government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories;

"(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

13. Thus, the Constitutional Act, 1982, is a legal expression, in an effective manner, of the aims of Canada to end discrimination and to respect aboriginal rights and freedoms. These are the same aims expressed by the Minister of Indian Affairs and Northern Development in the passage quoted above in regard to the amendment of the Indian Act.

Conclusion

14. Canada has responded, in a constructive and responsible manner, to the views communicated to it by the Human Rights Committee in regard to communication No. 24/1977. It has taken substantial steps towards amending s.12 (1) (*b*) of the Indian Act and, indeed, other sections of the Indian Act which may discriminate on the basis of sex or otherwise offend against human rights, and remains committed to the amendment of these sections in the near future.

15. Also, in April 1982, the Canadian Charter of Rights and Freedoms came into effect and it contains important guarantees of fundamental rights and freedoms in Canada. In particular, s.15, when it comes into effect in April 1985, will provide an effective remedy for anyone who alleges that his or her rights to equality before the law and the equal protection of the law have been violated by federal legislation, and other sections of the charter reflect Canada's respect for ethnic and aboriginal rights.

Communication No. 35/1978

Submitted by: Shirin Aumeeruddy-Cziffra and 19 other Mauritian women on 2 May 1978
Alleged victims: The author and other Mauritian women
State party: Mauritius
Date of adoption of views: 9 April 1981 (twelfth session)

Response, dated 15 June 1983, of the Government of Mauritius to the Committee's views*

1. The Ministry of External Affairs, Tourism and Emigration . . . has the honour to refer to the views expressed by the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the Covenant on Civil and Political Rights with regard to communication No. 35/1978.

2. It will be recalled that, in the light of the facts found by the Human Rights Committee as a result of communication No. 35/1978, the Committee held the view that the Immigration (Amendment) Act of 1977 and the Deportation (Amendment) Act of 1977 were discriminatory in their effects against those three of the nineteen co-authors of the communication who were married to foreign nationals and that the provisions of the two Acts consequently resulted in violations of articles 2, paragraph 1, 3 and 26 of the Covenant in relation to its articles 17, paragraph 1, and 23, paragraph 1.

3. It will also be recalled that the Committee expressed the view that Mauritius, as a State party to the Covenant, should adjust the provisions of those laws so as to remedy the situation.

4. The Ministry of External Affairs, Tourism and Emigration has the honour to request the Secretary-General to inform the Human Rights Committee that the two impugned Acts have now been amended by the Immigration (Amendment) Act of 1983 (Act. No. 5 of 1983) and the Deportation (Amendment) Act of 1983 (Act. No. 6 of 1983) which were passed by Parliament on Women's Day, 8 March 1983, so as to remove the discriminatory effects of those laws on grounds of sex.

* For the Committee's views, see *Selected Decisions . . .*, vol. 1, p. 67.

Communication No. 40/1978

Submitted by: Erkki Hartikainen on 30 September 1978
Alleged victims: The author and other members of the Union of Free Thinkers
State party: Finland
Date of adoption of views: 9 April 1981 (twelfth session)

Response, dated 20 June 1983, of the Government of Finland to the Committee's views*

1. With regard to questions relevant to the views of the Human Rights Committee concerning communication No. 40/1978, the Ministry of Education has given the following report.

2. On the basis of the report of the working group established by the National Board of Education mentioned in paragraph 9.3 of the decision of the Committee, the Board confirmed on 17 June 1981 the contents of the instruction of ethics and the history of religions for comprehensive schools. The working group had consulted the Union of Free Thinkers in Finland in a letter on 27 October 1980.

3. Paragraph 16 (3) of the Comprehensive School Statute (No. 443 of 26 June 1970) to which reference was made in paragraph 10.4 of the decision of the Committee, was revised on 16 April 1982 (No. 296, see annex) to correspond to the formulation of paragraph 6 of the School System Act (No. 467 of 26 July 1968). The amended text is as follows:

> "Instruction on ethics and the history of religions referred to in paragraph 6 (2) of the School System Act shall be given for a period equivalent of at least one weekly lesson to five or more pupils who have been exempted from the general instruction of religion in the school and who are unable to show that they are receiving comparable instruction outside the school."

4. The National Board of Education has taken the following further measures to solve the problems cited in paragraph 10.5 of the decision of the Committee:

(1) The Board of Education has made an allocation as of 3 March 1981 allowing a senior official to be specially employed for 40 days a year to inspect the instruction of ethics and the history of religions.

(2) On 4 March 1981, the Board of Education charged the working group on ethics and the history of religions, established on 16 January 1979, with a further assignment to draw up a teachers' guide and to present proposals and make studies with a view to develop the instruction of ethics and the history of religions.

(3) In an effort to intensify the training of teachers of the subject, the Board of Education organized in November-December 1982 a workshop on how to improve teaching of ethics and the history of religions.

* For the Committee's views, see *Selected Decisions . . .*, vol. 1, p. 74.

Annex II

STATES PARTIES TO THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

(As at 30 September 1988)

State party	*Date of entry into force*
Argentina	8 November 1986
Austria	10 March 1988
Barbados	23 March 1976
Bolivia	12 November 1982
Cameroon	27 September 1984
Canada	19 August 1976
Central African Republic	8 August 1981
Colombia	23 March 1976
Congo	5 January 1984
Costa Rica	23 March 1976
Denmark	23 March 1976
Dominican Republic	4 April 1978
Ecuador	23 March 1976
Equatorial Guinea	25 December 1987
Finland	23 March 1976
France	17 May 1984
Gambia	9 September 1988
Iceland	22 November 1979
Italy	15 December 1978
Jamaica	23 March 1976
Luxembourg	18 November 1983
Madagascar	23 March 1976
Mauritius	23 March 1976
Netherlands	11 March 1979
Nicaragua	12 June 1980
Niger	7 June 1986
Norway	23 March 1976
Panama	8 June 1977
Peru	3 January 1981
Portugal	3 August 1981
Saint-Vincent and the Grenadines	9 February 1982
San Marino	18 January 1986
Senegal	13 May 1978
Spain	25 April 1985
Suriname	28 March 1977
Sweden	23 March 1976
Togo	30 June 1988
Trinidad and Tobago	14 February 1981
Uruguay	23 March 1976
Venezuela	10 August 1978
Zaire	1 February 1977
Zambia	10 July 1984

Annex III

LIST OF MEMBERS OF THE HUMAN RIGHTS COMMITTEE 1976-1988

Member	*Country of nationality*	*Session*	*Tenure*
Mr. Andrés Aguilar	Venezuela	From 12th to 34th sessions	1981-1988
Mr. Mohammed Al Douri	Iraq	From 9th to 23rd sessions	1980-1984
Mr. Nisuke Ando	Japan	Since 29th session	1987-
Mr. Mohamed Ben-Fadhel	Tunisia	From 1st to 5th sessions	1976-1978
Mr. Nejib Bouziri	Tunisia	From 6th to 28th sessions	1979-1986
Ms. Christine Chanet	France	Since 29th session	1987-
Mr. Joseph A. L. Cooray	Sri Lanka	Since 18th session	1983-
Ms. Gisèle Côté-Harper	Canada	From 20th to 23rd sessions	1983-1984
Mr. Abdulaye Dieye[1]	Senegal	From 6th to 17th sessions	1979-1982
Mr. Vojin Dimitrijević	Yugoslavia	Since 18th session	1983-
Mr. Roger Errera	France	From 18th to 28th sessions	1983-1986
Mr. Oman El-Shafei	Egypt	Since 29th session	1987-
Mr. Felix Ermacora	Austria	From 12th to 20th sessions	1981-1984
Mr. Ole Mogens Espersen	Denmark	From 1st to 5th sessions	1976-1978
Sir Vincent Evans	United Kingdom	From 1st to 23rd sessions	1976-1984
Mr. Manouchehr Ganji	Iran	From 1st to 11th sessions	1976-1980
Mr. Bernhard Graefrath	German Democratic Republic	From 1st to 28th sessions	1976-1984
Mr. Vladimir Hanga	Romania	From 1st to 23rd sessions	1976-1984
Mr. Leonte Herdocia Ortega[2]	Nicaragua	From 12th to 20th sessions	1981-1983
Ms. Rosalyn Higgins	United Kingdom	Since 24th session	1985-
Mr. Dejan Janča	Yugoslavia	From 6th to 17th sessions	1979-1982
Mr. Haissam Kelani	Syrian Arab Republic	From 1st to 11th sessions	1976-1980
Mr. Luben G. Koulishev	Bulgaria	From 1st to 11th sessions	1976-1980
Mr. Rajsoomer Lallah	Mauritius	From 1st to 17th sessions and since 24th session	1976-1982, 1985-
Mr. Andreas V. Mavrommatis	Cyprus	Since 1st session	1976-
Mr. Joseph A. Mommersteeg	The Netherlands	Since 29th session	1987-
Mr. Fernando Mora Rojas	Costa Rica	From 1st to 5th sessions	1976-1978
Mr. Anatoly Petrovich Movchan	Union of Soviet Socialist Republics	From 1st to 34th sessions	1976-1988
Mr. Birame Ndiaye	Senegal	Since 20th session	1983-
Mr. Torkel Opsahl	Norway	From 1st to 28th sessions	1976-1986
Mr. Fausto Pocar	Italy	Since 24th session	1985-
Mr. Julio Prado Vallejo	Ecuador	Since 1st session	1976-
Mr. Waleed Sadi	Jordan	From 6th to 17th sessions	1978-1982
Mr. Fulgence Seminega	Rwanda	From 1st to 5th sessions	1976-1978
Mr. Alejandro Serrano Caldera	Nicaragua	Since 21st session	1984-
Mr. Walter Surma Tarnopolsky[3]	Canada	From 1st to 19th sessions	1976-1983
Mr. Christian Tomuschat	Federal Republic of Germany	From 1st to 28th sessions	1976-1986
Mr. Diego Uribe Vargas	Colombia	From 1st to 11th sessions	1976-1980
Mr. S. Amos Wako	Kenya	Since 21st session	1984-
Mr. Bertil Wennergren	Sweden	Since 29th session	1987-
Mr. Adam Zielinski	Poland	From 24th to 34th sessions	1985-1988

[1] Mr. Dieye passed away after the 17th session. New elections were held after the 18th session and Mr. Ndiaye (Senegal) was elected to fill the vacancy created by Mr. Dieye's untimely death.

[2] Mr. Herdocia Ortega passed away during the Committee's twentieth session. New elections were held before the Committee's 21st session and Mr. Alejandro Serrano Caldera (Nicaragua) was elected to fill the vacancy left by Mr. Herdocia Ortega's untimely death.

[3] Mr. Tarnopolsky, upon becoming a judge in the Ontario Court of Appeal (Canada), resigned from the Committee after its 19th session. New elections were held after the 19th session and Ms. Gisèle Côté-Harper (Canada) was elected to fill the vacancy created by Mr. Tarnopolsky's resignation.

Annex IV

STATISTICAL SURVEY OF STATUS OF COMMUNICATIONS REGISTERED AS AT 30 JUNE 1988

(End of 32nd session)

States parties (26)	*Awaiting decision on admissibility*	*Declared inadmissible*	*Discontinued prior to decision on admissibility or withdrawn by author*	*Declared admissible*			*Total*
				Discontinued after being declared admissible	*Awaiting consideration on merits*	*Views adopted*	
Argentina	1						1
Bolivia						1	1
Canada	4	24	12		1	4	45
Colombia	4		2		2	4	12
Costa Rica					1		1
Denmark		6	1				7
Dominican Republic	1					1	2
Ecuador	2				1		3
Finland	2	4				3	9
France	6	2			2		10
Iceland			1				1
Italy	1	4	3			1	9
Jamaica	36	1			5		42
Madagascar						4	4
Mauritius						1	1
Netherlands	3	7			3	3	16
Nicaragua	1	1	2				4
Norway	1	6					7
Peru	3		1		2		6
Spain	1						1
Suriname						8	8
Sweden		2			1	2	5
Trinidad and Tobago	3						3
Uruguay		4	19	9	1	44	77
Venezuela						1	1
Zaire		2	2		2	6	12
TOTAL	69	63	43	9	21	83	288

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