B. Communication No. 213/1986, H. C. M. A. v. The Netherlands (Decision of 30 March 1989, adopted at the thirty-fifth session)

Submitted by: H. C. M. A. [name deleted]

Alleged victim: The author

State party concerned: The Netherlands

Date of communication: 31 October 1986 (date of initial letter)

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

Meeting on 30 March 1989,

Adopts the following:

Decision on admissibility

1. The author of the communication (initial letter dated 31 October 1986, and subsequent submissions of 6 April 1987, 20 June and 18 July 1988) is H. C. M. A., a citizen of the Netherlands residing in the Netherlands. He alleges to be a victim of violations of article 2, paragraphs 2 and 3, articles 7, 9, 10, paragraph 1, and 14, paragraph 1, 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 on Friday, 19 March 1982, he participated in a peaceful demonstration in Amsterdam to protest the murder of four Netherlands journalists in El Salvador. After leaving the site of the demonstration, he was assaulted by four unknown persons and sustained injuries. Subsequently, policemen in civilian clothes pushed him into a police car and he was detained in a police cell. After four witnesses testified at the police station that he had not disturbed the public order, he was released on Tuesday, 23 March 1982. He was tried for public disorder before the Amsterdam Criminal District Court and acquitted on 5 September 1984. On 1 April 1985 the Amsterdam District Court, Second Chamber, awarded him 400 Netherlands guilders for unlawful detention.

2.2 The author points out that on 22 April 1982 he complained to the court of first instance about maltreatment by a police officer. His complaint was transmitted by the court of first instance to the military prosecutor, as the rank to which the police officer belonged fell under military jurisdiction. The military prosecutor, however, dismissed the complaint. On appeal, the Military High Court stated that in cases of military procedural law only the Minister of Defence had authority to order prosecution. The Military High Court thus decided that it was not competent to rule on the case. Its president subsequently transmitted the file to the Ministers of Defence and Justice, considering that it would be an anomalous situation if persons falling under military jurisdiction could be immune from prosecution under certain circumstances, while persons falling under civilian jurisdiction could be prosecuted.

2.3 The author maintains, however, that the Government of the Netherlands has not taken any initiative to eradicate the alleged inequality before the law. The author claims that, as no adequate recourse procedure exists for civilians against cruel and inhuman treatment by the military and the police when such cases fall under the jurisdiction of the military, the State party has violated articles 2 and 7 of the Covenant. Concerning his detention, the author claims, without giving any details, that he was subjected to ill-treatment in violation of article 10 of the Covenant. He further claims that article 14 of the Covenant has been violated, because he has been unable to prosecute a police officer falling under exclusive military jurisdiction. Moreover, he maintains that the existing complaints procedure against members of the police is unjust, since police officers themselves investigate such complaints and exercise discretionary powers in their own favour. He alleges that an independent system of control does not exist in the Netherlands legal system.

3. By its decision of 9 December 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 admissibility of the communication, in particular details of the effective remedies available to the author in case domestic remedies had not been exhausted. It also requested the State party to provide the Committee with copies of any administrative or judicial decisions relevant to the communication.

4.1 In its submission under rule 91, dated 17 February 1987, the State party provides an outline of the factual situation and argues that the communication should be declared inadmissible on the grounds that the allegations put forward by the author do not disclose a violation of any of the rights enumerated in the Covenant and that, therefore, the author has no claim under article 2 of the Optional Protocol.

4.2 With regard to the factual situation, the State party states that the author was arrested in Amsterdam on 19 March 1982 "on the accusation of having committed violent acts (throwing stones at the consulate of the United States of America) during an anti-El Salvador demonstration". The author was arrested by a team consisting of an Amsterdam City Police officer and an officer belonging to the Royal Military Police (Koninklijke Marechaussee), which also has the task of providing military assistance to the Amsterdam City Police. The State party affirms that, since the author did not submit himself willingly to the authorities, a brief struggle ensued, in the course of which the author's jaw was injured. He received medical treatment for a bruise to his jaw; the surgeon on duty stated that the author did not sustain any permanent injury, and the latter did in fact not report for a scheduled medical examination two weeks later.

4.3 Inasmuch as the applicable procedures are concerned, the State party argues that in cases such as the one affecting the author, namely the filing of complaints about the acts of officers of the Royal Military Police, complaints have to be addressed to the prosecutor of the Royal Netherlands Army (the Auditeur-Militair), as civilian judicial authorities are not competent to prosecute military personnel. A decision whether or not to prosecute is taken by a military legal officer (verwijzingsofficier) who acts on behalf of the Commanding-General, upon advice of the Prosecutor of the Army. This was also the procedure applied to the case of the author. Against the decision not to prosecute the military police officer who allegedly maltreated the author, the author lodged a complaint with the

National Ombudsman, an independent body instituted by law that mediates in questions related to governmental acts against which no legal remedy is available. The Ombudsman is supposed to report his findings both to the administrative authority to which the disputed act is imputable and to the plaintiff, evaluating whether the governmental act was proper and, optionally, recommending possible remedies to the Administration. In the present case, the Ombudsman advised the author to appeal to the High Military Court (Hoog Militair Gerechtshof) against the decision communicated by the prosecutor of the Army.

4.4 On 13 June 1983, the High Military Court decided that it was not competent to decide on the case, as only the Minister of Defence can order the military legal officer or Commanding-General to prosecute a case. In this context, the State party points out that a provision analogous to article 12 of the civilian Code of Penal Procedure, under which a complaint with an appeal court can be filed if no prosecution is decided upon, does not exist. In the present case, the Minister of Defence held that, as formal notification of non-prosecution to the Royal Military Police had already been given, he could not oblige the military legal officer or the Commanding-General to prosecute the case. The author, subsequently, did not request further action by the Ombudsman, who therefore did not initiate an inquiry.

4.5 Finally, the State party observes that legislative proposals that would solve the discrepancy between the Code of Military Penal Procedure and its civilian counterpart have been introduced in the Netherlands Parliament and are awaiting approval. An interim solution has been ruled out, given the extensive legislative changes that it would require and the rare occurrence of the complaints in question.

4.6 With regard to the admissibility of the communication, the State party distinguishes between: (a) the actual treatment of the author upon his arrest; and (b) the alleged lack of an adequate legal procedure to see the arresting officer prosecuted.

4.7 With regard to the first issue, the State party recalls the requirement of article 2 of the Optional Protocol that only individuals who have exhausted all available domestic remedies may submit a communication to the Committee and submits that a tort action against the Government could not <u>a priori</u> be called futile. With regard to the alleged violations of articles 7 and 10 of the Covenant, it submits that the allegations of the author do not come within the scope of the concepts "torture" or "cruel, inhuman or degrading treatment" or the obligation to treat individuals "with humanity and with respect for the inherent dignity of the human person", nor indeed, within the scope of any other concept in the Covenant, and therefore cannot be regarded as constituting a violation of Covenant rights. Furthermore, in the State party's view, the author has not substantiated his allegations in such a way as to support his claim credibly.

4.8 Concerning the second issue, the State party submits: "that the allegations in the communication cannot be regarded as constituting a violation of any of the rights enumerated in the Covenant. More in particular, the Government is not aware of any right laid down in the Covenant to see someone else prosecuted. Furthermore, the allegations have not been substantiated in such a way as to credibly support a claim regarding such a violation ...".

5.1 In a submission dated 6 April 1987, the author comments on the State party's charge that he had been arrested because of throwing stones at the United States consulate during a demonstration. He affirms that he only demonstrated and that he

was caught violently by the neck by two men when he tried to leave the building where the demonstration was being held. One of the men, an officer of the Royal Military Police, hit him in the face several times. The policemen were dressed as civilians and did not identify themselves. The author claims that he did not resist, and that immediately after the arrest he was taken off in a police car by the two officers. He was released after being detained for four days, during which he was taken to the hospital every day.

5.2 The author states that, in the civil proceedings against the officer of the Royal Military Police which remain sub judice, five witnesses testified on his behalf, all of whom confirmed that he did not resort to violence during the demonstration in question. Although not currently experiencing any physical effects of the maltreatment suffered at the hands of the police officers, he still suffers from psychic trauma. He encloses the report from the psychiatrist who treated him, according to which there are unmistakable links between the way the author was treated during his arrest and detention and his subsequent psychological disturbances, e.g. the continuing fear of being attacked in the street.

5.3 He reiterates that the right to test the decision of whether or not to prosecute somebody by a competent, independent and impartial tribunal established by law is a right enshrined in article 14 of the Covenant, and that there is also a right, in a suit at law, to be safeguarded against military arbitrariness.

6.1 By further decision under rule 91, dated 6 April 1988, the Working Group of the Human Rights Committee requested the State party, inter alia, to clarify (a) why the author was subjected to detention for four days; (b) whether the author was brought before a judge or judicial officer during this period; (c) whether he could have invoked the principle of habeas corpus during this period; (d) the extent to which the competent military authorities investigated the author's complaint; and (e) whether any written decision was handed down by the Military Prosecutor, explaining why no criminal proceedings against Mr. O. were initiated; in the affirmative, to provide the Committee with the text; in the negative, to clarify the Military Prosecutor's reasons for not indicting Mr. O.

6.2 The Working Group also requested the author (a) to clarify his allegation that he was subjected to ill-treatment during detention in March 1982; (b) to forward to the Committee an English translation of (i) his complaint of 22 April 1982 to the Court of first instance; and (ii) his legal brief in the civil proceedings against Mr. O.; and (c) to indicate the current stage of the latter proceedings.

7.1 In its reply dated 17 June 1988, the State submits, with regard to the author's arrest and detention:

> "The plaintiff arrived at the police station at 2130 hours on Friday, 19 March 1982, and was immediately brought before an assistant public prosecutor. The plaintiff, who was suspected of assault, a criminal offence under article 141 of the Criminal Code, was questioned on the morning of Saturday, 20 March 1982, and a chief superintendent of the municipal police, acting as assistant public prosecutor, ordered him to be remanded in police custody as from 1230 hours for a maximum of two days. The interests of the investigation required that the suspect should remain in the hands of the judicial authorities to allow for further questioning and the examination of witnesses.

"After telephone consultations between the assistant public prosecutor and the public prosecutor, the public prosecutor extended the remand order for a maximum of two days from 1230 hours on Monday, 22 March 1982. The advocate on duty was immediately notified of the arrest and remand of the plaintiff. He provided legal assistance to the plaintiff when he was remanded in police custody. On Tuesday, 23 March 1982, the plaintiff was brought before the examining magistrate in connection with the application by the public prosecutor for him to be remanded in custody for a further period. After questioning the plaintiff, the examining magistrate refused the application. The plaintiff was then immediately released."

7.2 With respect to remedies available to the author, the State party submits that during the four days of detention the author could have applied to the civil courts for an injunction to secure his release if he believed he was being unlawfully detained. It explains that "[the author's] complaint was minutely examined by the competent military judicial authorities. A complaint can lead to three situations:

"1. If both the Auditeur-Militair and the Commanding-General/ Verwijzingsofficier find the complaint well-founded, prosecution will be effected (article 11 RLLu).

"2. If the Commanding-General and the Auditeur-Militair disagree, the Hoog Militair Gerechtshof (military court of appeal) can order prosecution (article 15 RLLu). Moreover, during the investigation the Minister of Defence can order the Commanding-General to prosecute (article 11 RLLu).

3. If both authorities find the complaint ill-founded, no prosecution will follow. In the instance of [A. v. O.], both the Auditeur-Militair and the Commanding-General/Verwijzingsofficier found the complaint ill-founded after thorough review. It was concluded that prosecution of [Mr. O.] should not be effected in view of the fact that the injuries sustained by [Mr. A.] were a consequence of his resistance to the arrest.

"One of the tasks entrusted to the police is the effective maintenance of law and order. This can, under certain circumstances, necessitate the use of force. At the time of the arrest, [Mr. O.] was seconded to the civilian police. Therefore civilian police regulations on the use of force were applicable. The police must act according to their standing instructions on the use of force, whereby the principles of last resort and proportionality must be observed, which is to say that a police officer may only use force if no other means is available to him, and that he must act in a reasonable and restrained manner. The Netherlands Government has no evidence to suggest that these rules were not observed during the applicant's arrest."

In the State party's opinion, the procedure concerning the decision not to prosecute Mr. O. described above did not diverge from the standard procedure in the author's case. It adds that the Auditeur-Militair notified the author's counsel of the decision not to prosecute Mr. O.

8. The State party reiterates that it considers the communication to be inadmissible:

"The first complaint, contained in the communication, regarding the actual treatment of [Mr. A.] upon his arrest, is deemed inadmissible since the tort procedure against the Government is still sub judice (before the

subdistrict court in Haarlem); thus it cannot be maintained that all available domestic remedies have been exhausted. Furthermore the complaint is submitted to be neither compatible with the provisions of the Covenant nor sufficiently substantiated.

"The second complaint contained in the communication, regarding the lack of adequate legal procedure to see the arresting officer prosecuted, is in the view of the Government also to be declared inadmissible, as the allegations concerned cannot be regarded to constitute a violation of any of the rights enumerated in the Covenant. Nor have the allegations been sufficiently substantiated."

9.1 In his submission of 20 June 1988, author's counsel states, inter alia,

"I sent to you previously two medical records of the physical and psychical injuries sustained by my client. Dr. Baart investigated my client during his detention (report dated 16 June 1982). Dr. van Ewijk, the psychiatrist (report dated 19 December 1986), diagnosed my client's illness as a traumatic neurosis in connection with his arrest in March 1982."

9.2 In his comments of 18 July 1988 on the State party's submission, author's counsel argues:

"The Netherlands Code of Criminal Procedure is not in accordance with article 9 of the Covenant. ... In the Code of Criminal Procedure a suspect can be held in custody for 4 days and 15 hours before he shall be brought before a judge or officer authorized by law to exercise judicial power.

"[Mr. A.] has also not been held in custody in accordance with articles 52 to 62 of the Code of Criminal Procedure. Normally the suspect is held in custody for two days ... after questioning. In plaintiff's case the questioning was held on Monday, 22 March 1982. Before that [Mr. A.] had been questioned very shortly, so it is not true that [Mr. A.] was questioned on the morning of Saturday, 20 March 1982. Nor is it true that [Mr. A.] could apply to the civil court for an injunction to secure his release. [Mr. A.] was detained during the weekend, at which time the Court is not in session."

9.3 Counsel further claims the civil proceedings initiated against Mr. O. have nothing to do with the complaint, since the State party is not a party in it. It serves only the purpose of personal satisfaction and reparation. Counsel reiterates that the author's request for prosecution of the police officer is admissible and reaffirms that the right to demand prosecution of this officer is protected by article 14 of the Covenant.

10. On 13 September 1988, the State party submitted further comments on the author's submission:

"In accordance with article 57 of the Code of Criminal Procedure, the applicant was questioned before the decision to remand him in custody was taken. ... Questioning took place at 10 a.m. on Saturday, 20 March. The Government has already pointed out in its memorandum of 17 June 1988 that the procedures required under Netherlands law were followed. These procedures are also in accordance with article 9 of the Covenant on Civil and Political Rights.

"The president of the district court can be called upon at all times (i.e. also during the weekend) when an injunction is being sought (see article 289, para. 2, of the Code of Civil Procedure).

"The conclusion contained in the Public Prosecutor's letter ... that [Mr. A.] resisted arrest is based upon the official reports drawn up under oath of office."

11.1 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.

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

11.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes that in respect of the author's allegations of a violation of article 7 of the Covenant, the author instituted civil proceedings against the officer of the Royal Military Police who allegedly maltreated him, which remain pending. Furthermore, the State party has indicated the possibility of initiating tort proceedings against the Government. The author has not established that such proceedings would be a priori futile. Therefore, this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

11.4 With respect to the alleged violation of article 9, paragraph 4, the Committee has taken note of the State party's clarification that pursuant to article 289, paragraph 2, of the Code of Civil Procedure, the author could have called upon the president of the district court at any time after his arrest on 19 March 1982. Considering that the author has not contested the State party's clarification, and taking into account that he was released by order of a magistrate on 23 March 1982 (i.e. four days after his arrest), the Committee finds that the author has not substantiated his claim for purposes of admissibility.

11.5 With respect to the alleged violation of article 10, paragraph 1, the Committee notes that the author has not provided the relevant clarifications requested in the Working Group's decision of 6 April 1988 and has thus failed to adduce any facts to show that he was subjected to improper treatment during detention.

11.6 With respect to the author's allegation of a violation of article 14, paragraph 1, of the Covenant, the Committee observes that the Covenant does not provide for the right to see another person criminally prosecuted. Accordingly, it finds that this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

12. The Human Rights Committee therefore decides:

(a) The communication is inadmissible;

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