R. Communications Nos. 343, 344 and 345/1988, R. A. V. N. et al. v. Argentina* (Decision of 26 March 1990, adopted at the thirty-eighth session)

Submitted by:	R. A. V. N. et al. [names deleted]
Alleged victims:	Relatives of the authors
State party concerned:	Argentina
Date of entry into force of the Covenant and Optional Protocol for Argentina:	8 November 1986
Date of communication:	22 November 1988

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

Meeting on 26 March 1990,

Adopts the following:

A. Decision to deal jointly with three communications

The Human Rights Committee,

Considering that communications Nos. 343, 344 and 345/1988 refer to closely related events said to have taken place in Argentina in 1976 and to the enactment of certain legislation in June 1987,

Considering further that the three communications can appropriately be dealt with together,

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

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

B. Decision on admissibility

1. The authors of the communications are Argentine citizens residing in Argentina, writing on behalf of their deceased and/or disappeared relatives, Argentine citizens formerly resident in the Province of Córdoba who died or disappeared in 1976, before the entry into force of the Covenant on Civil and Political Rights and the Optional Protocol for Argentina on 8 November 1986.

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* The text of an individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 92, paragraph 3, of the Committee's rules of procedure is appended.

2.1 The authors claim that the enactment of Law No. 23,521 of 8 June 1987 (known as the Due Obedience Law (Ley de Obediencia Debida)) and its application to the legal proceedings in the cases of their relatives constitute violations by Argentina of articles 2, 3, 4, 6, 9, 14 and 24 of the International Covenant on Civil and Political Rights. They are represented by counsel.

2.2 It is claimed that law No. 23,521 is incompatible with Argentina's obligations under the Covenant. The law presumes, without admitting proof to the contrary, that those persons who held lower military ranks at the time the crimes were committed were acting under superior orders; the law therefore exempts them from punishment. This immunity also covers senior military officers who did not act as commander-in-chief, chief-of-zone or chief-of-security police or penitentiary forces, provided that they did not themselves take decisions or that they did not participate in the elaboration of criminal orders.

2.3 With regard to the application of the Covenant to the facts of the cases, the authors acknowledge that their relatives were either killed or disappeared in 1976, under the prior Argentine Government, before the entry into force of the Covenant and of the Optional Protocol for Argentina. They challenge, however, the compatibility of the Due Obedience Law with article 2 of the Covenant, which provides, inter alia, that States parties should adopt the necessary legislative measures to give effect to the rights recognised in the Covenant. They claim that by adopting legislation which effectively guarantees the impunity of military officials responsible for disappearances, torture and murder, the Argentine Government has violated its obligations under the Covenant.

2.4 As to the requirement of exhaustion of domestic remedies, the authors point out that, with respect to the disappearance or death of the alleged victims, the matter was brought before the competent Argentine courts. However, by virtue of law No. 23,521, the pending criminal cases were shelved in June 1987 and May 1988, and the accused were accordingly set free. The authors conclude that domestic remedies have been exhausted.

2.5 It is stated that the same matter has not been and is not being examined under another procedure of international investigation or settlement. a/

2.6 Specifically, the authors request the Committee to find that Argentina violated its obligations under the Covenant, and to urge the Government of Argentina to abrogate law No. 23,521 so as to allow the criminal prosecution and punishment of the persons responsible for the disappearance and/or death of their relatives.

3. By decisions of 4 April 1989, the Working Group of the Human Rights Committee, without transmitting the communications to the State party, requested the authors, under rule 91 of the rules of procedure: (a) to clarify whether and, if so, to what extent the claims contained in their communication go beyond their desire to see those held to be responsible for the disappearance or death of their relatives criminally prosecuted; (b) to specify, bearing in mind that the Covenant and the Optional Protocol entered into force for Argentina on 8 November 1986, which violations they claim took place after that date; and (c) to indicate whether they have instituted legal proceedings before the competent courts with a view to obtaining compensation and, if so, with what result.

4.1 In their reply to the Working Group's questions, the authors state that besides punishing the guilty, the Government of Argentina should reopen the inquiry into the disappearance of one of the alleged victims, although following the investigations of the Comisión Nacional sobre Desaparición de Personas (CONADEP) (National Commission on the Disappearance of Persons), it was presumed, in view of the lapse of time since the disappearances, that the persons in question were dead. The authors stress, moreover, that laws of impunity should be repudiated, lest they be understood as encouraging the commission of similar crimes. In this connection they invoke the principles of the Nuremberg Trials, in particular the rejection of the defence of superior orders.

4.2 As to which violations of the Covenant are said to have taken place after its entry into force for Argentina on 8 November 1986, the authors claim that the enactment of the Due Obedience Law in June 1987 constitutes a violation of the State party's obligation to ensure the thorough investigation of crimes and the punishment of the guilty.

4.3 With regard to legal proceedings aimed at obtaining compensation, the authors indicate that they preferred to demand an investigation of the events, in particular of the whereabouts of disappeared persons, and the identification of the guilty parties. Although it appears that none of the authors ever initiated legal proceedings for compensation, they refer to other persons who have unsuccessfully sought compensation in civil proceedings.

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

5.2 With regard to the application ratione temporis of the International Covenant on Civil and Political Rights and of the Optional Protocol for Argentina, the Committee recalls that both instruments entered into force on 8 November 1986. It observes that the Covenant cannot be applied retroactively and that the Committee is precluded ratione temporis from examining alleged violations that occurred prior to the entry into force of the Covenant for the State party.

5.3 It remains for the Committee to determine whether violations of the Covenant have occurred subsequent to its entry into force. The authors have invoked article 2 of the Covenant and claim a violation of their right to a remedy. In this context the Committee recalls its prior jurisprudence that article 2 of the Covenant constitutes a general undertaking by States and cannot be invoked, in isolation, by individuals under the Optional Protocol (M. G. B. and S. P. v. Trinidad and Tobago, communication No. 268/1987, para. 6.2, declared inadmissible on 3 November 1989). To the extent that the authors invoke article 2 in conjunction with other articles of the Covenant, the Committee observes that article 2, paragraph 3 (a), of the Covenant stipulates that each State party undertakes "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy ..." (emphasis added). Thus, under article 2, the right to a remedy arises only after a violation of a Covenant right has been established. However, the events of disappearance and death, which could have constituted violations of several articles of the Covenant, and in respect of which remedies could have been invoked, occurred prior to the entry into force of the Covenant and of the Optional Protocol for Argentina. Therefore, the matter cannot be considered by the Committee, as this aspect of the communication is inadmissible ratione temporis.

8.4 The Committee finds it necessary to remind the State party that it is under an obligation, in respect of violations occurring or continuing after the entry into force of the Covenant, thoroughly to investigate alleged violations and to provide remedies where applicable, for victims or their dependants.

8.5 To the extent that the authors claim that the enactment of law No. 23,521 frustrated their right to see certain government officials prosecuted, the Committee refers to its prior jurisprudence that the Covenant does not provide a right for an individual to require that the State criminally prosecute another person (H. C. M. A. v. The Netherlands, communication No. 213/1986, para. 11.6, declared inadmissible on 30 March 1989). Accordingly, this part of the communication is inadmissible ratione materiae as incompatible with the provisions of the Covenant.

8.6 As to the question of compensation, the Committee notes that the authors, in reply to the Working Group's questions, explained that this was not the remedy that they sought.

9. The Human Rights Committee therefore decides:

(a) The communications are inadmissible;

(b) This decision shall be communicated to the authors through their counsel, and, for information, to the State party.

Notes

a/ The Secretariat has ascertained that one case was submitted to the Inter-American Commission on Human Rights, which registered it under No. 10288. However, it is not currently being examined by the Commission.

APPENDIX

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 92, paragraph 3, of the Committee's rules of procedure, concerning the Committee's decision to declare communications Nos. 343, 344 and 345/1988, R. A. V. N. et al. v. Argentina, inadmissible

I concur in the views expressed in the Committee's decision. However, in my opinion, the arguments in paragraph 5.4 of the decision need to be clarified and expanded. In this paragraph, the Committee reminds the State party that it is under an obligation, in respect of violations occurring or continuing after the entry into force of the Covenant, thoroughly to investigate alleged violations and to provide remedies, where applicable, for victims or their dependants.

According to article 28 of the 1969 Vienna Convention on the Law of Treaties (cited under paragraph 4.2 in the Committee's decision) a treaty's provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty in respect of that party; the Permanent Court of International Justice (PCIJ Series A/B, No. 74 (1938), p. 10-48 - Phosphates in Morocco case) has held in this context that both the terms concerning the limitation rationae temporis and the underlying intention are clear: This clause was inserted in order to deprive the acceptance of the compulsory jurisdiction of any retroactive effects. In this case the Court had to decide whether or not issues arose from factors subsequent to the acceptance of its jurisdiction (which the Court refers to as the "crucial date"), first because certain acts, which, if considered separately, were in themselves unlawful international acts, were actually accomplished after the "crucial date"; secondly, because these acts, if taken in conjunction with earlier acts to which they were closely linked, constituted as a whole a single, continuing and progressive illegal act which was not fully accomplished until after the "crucial date"; and lastly, because certain acts which were carried out prior to the "crucial date" nevertheless gave rise to a permanent situation which was inconsistent with international law and which existed after the said date. The question of whether a given situation or fact occurs prior to or subsequent to a particular date is, the Court explains, one to be decided in respect of each specific case, just as the question of the situations or facts with regard to which the issues arose must be decided in regard of each specific case. I note that the "crucial date" in this case is 8 November 1986.

The Committee has repeatedly indicated in prior decisions that it "can consider only an alleged violation of human rights occurring on or after (the date of entry into force of the Covenant and the Protocol for the State party) unless it is an alleged violation which, although occurring before that date, continues or has effects which themselves constitute a violation after that date". Disappearance cases that cannot be attributed to natural causes (accidents, voluntary escapes, suicides, etc.) but that give rise to reasonable assumptions and suspicions of illegal acts, such as killing, deprivation of liberty and inhuman treatment, may lead to claims not only under the respective material articles in the Covenant (articles 6, 7, 9 and 10) but in connection therewith also under article 2 of the Covenant, concerning a State party's obligation to adopt such measures as may be necessary to give effect to the rights recognised in the Covenant and to ensure that any person whose rights or freedoms are violated shall have an effective remedy. In an early decision involving a disappearance (30/1978

Bleier v. Uruguay) the Committee, after noting that according to unrefuted allegations "Eduardo Bleier's name was on a list of prisoners read out once a week at an army unit in Montevideo where his family delivered clothing for him and received his dirty clothing until the summer of 1976" (i.e. after the "crucial date"), urged the Uruguayan Government "to take effective steps ... to establish what has happened to Eduardo Bleier since October 1975 (i.e. before the crucial date but with continuation after that date), to bring to justice any person found to be responsible for his death, disappearance or ill-treatment, and to pay compensation to him or his family for any injury which he has suffered". In another case (107/1981 Quinteros v. Uruguay) the Committee was of the view that the information before it revealed breaches of articles 7, 9 and 10, paragraph 1, of the Covenant and concluded that the responsibility for the disappearance of Elena Quinteros fell on the authorities of Uruguay and that the State party should take immediate and effective steps (i) to establish what has happened to Elena Quinteros since 28 June 1976, and secure her release, (ii) to bring to justice any persons found to be responsible for her disappearance and ill-treatment, (iii) to pay compensation for the wrongs suffered, and (iv) to ensure that similar violations do not occur in the future. In the latter case, the author of the communication was the mother of the disappeared victim who had alleged that she, too, was a victim of a violation of article 7, (psychological torture because she did not know about the whereabouts of her daughter) and who had given ample description of her sufferings. The Committee expressed its understanding with the anguish and stress caused to the mother both by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. She had the right to know what had happened to her daughter. The Committee therefore found that in these respects she was also a victim of a violation of the Covenant.

I draw the following conclusions. A disappearance per se does not raise any issue under the Covenant. For it to do so, a link to some of the material articles of the Covenant is required. And it is solely with such a link that article 2 of the Covenant may become applicable and an issue may arise under that article too. Should it become clear that the cause of the disappearance is attributable to a killing for which the State party must be held responsible, but that the killing took place before the "crucial date", then this killing cannot be deemed to constitute a violation of article 6 of the Covenant, notwithstanding that it was a crime against the right to life under domestic penal law. Consequently, a claim regarding the non-fulfilment of a State party's obligations under article 2 of the Covenant also cannot arise. But, on the other hand, if a killing before the "crucial date" is merely one hypothesis among several others, the case law of the Committee clearly indicates that under article 2 of the Covenant the State party is under a duty to carry out a meaningful investigation. Only when it is unimaginable that any act, fact or situation which would constitute a violation of the Covenant may have continued to exist or have occurred subsequent to the "crucial date", such an obligation does not arise. It should be added that a declaration under domestic civil law in respect of a disappeared person's death does not set aside a State party's obligation under the Covenant. Domestic civil law provisions cannot be given precedence over international legal obligations. Whatever the length and thoroughness be deemed necessary for an investigation to satisfy the requirements under the Covenant is to be considered case by case, but an investigation must under all circumstances be conducted fairly, objectively and impartially. Any negligence, suppression of evidence or other irregularity jeopardizing the outcome must be regarded as a violation of the obligations under article 2 of the Covenant,

in conjunction with a relevant material article. And once an investigation has been closed due to lack of adequate results, it must be reopened if new and pertinent information comes to light.

Bertil WENNERGREN