D. Communication No. 209/1986, F. G. G. v. the Netherlands (Decision of 25 March 1987, adopted at the twenty-ninth session)

Submitted by: F. G. G. [name deleted]

Alleged victim: the author

State party concerned: the Netherlands

Date of communication: 15 April 1986 (date of initial letter)

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

Meeting on 25 March 1987,

adopts the following:

Decision on admissibility

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 <u>sub judice</u>. 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 above-mentioned criteria were 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 inciples 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.