

ANNEX XI

Views of the Human Rights Committee under article 5 (4)
of the Optional Protocol to the International Covenant
on Civil and Political Rights

concerning

Communication No. 49/1979

Submitted by: Mr. and Mrs. Dave Marais, Sr., on behalf of their son,
Dave Marais, Jr., later represented by Maître Eric Hamel

Alleged victim: Dave Marais, Jr.

State party concerned: Madagascar

Date of communication: 19 April 1979 (date of initial letter)

Date of decision on admissibility: 28 October 1981

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

Meeting on 24 March 1983,

Having concluded its consideration of Communication No. 49/1979 submitted to the Committee by Dave Marais under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

adopts the following:

VIEWS UNDER ARTICLE 5 (4) OF THE OPTIONAL PROTOCOL

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 Hamel, who was an attorney at Antananarivo, Madagascar, until his expulsion by the Malagasy authorities on 11 February 1982, and is at present 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, on the route to Mauritius, was forced to make an emergency landing in Madagascar on 18 January 1977 because of lack of fuel. Dave Marais, 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 Hamel.

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 admissibility 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 provides 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 Procedure;

(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 Hamel, 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 The Human Rights Committee at the same time decided to make known to Maître Eric Hamel 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 Hamel;

(b) Requested the State party, should there hitherto have been any obstacles barring Maître Eric Hamel 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 Hamel, 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 Hamel 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 Hamel 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 (DGIB)

political police prison at Ambohibao near Antananarivo, in a cell measuring 2m by 1m and, apparently, without light.

8.3 Maître Hamel stated that at the time of writing (May 1981) his client had been held for over 18 months and was being held incommunicado; 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 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 Hamel'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 Hamel 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 Hamel 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 Hamel 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 Hamel 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 Hamel 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 Hamel 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 Hamel. 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 Hamel 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 Hamel 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 appears to be a citizen. In the same letter, Maître Hamel stated that Dave Marais was in good health. In a letter dated 22 May 1982, Maître Hamel 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; he was subsequently refused re-entry into Madagascar. Later Maître Eric Hamel became the defence attorney for Dave Marais. Although Maître Hamel 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 Hamel and to prepare his defence, except for two days during the trial itself. On 11 February 1982, Malagasy political police authorities arrested Maître Hamel, detained him in the basement of the Ambohibao political police prison and, subsequently, expelled him from Madagascar, thereby further impairing his ability effectively to represent Dave Marais.

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 with regard to Mr. Marais' access to his legal representative Maître Hamel, 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., R.7/30) 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 Hamel.

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;

of article 14 (3) (b) and (d), because he has been denied adequate opportunity to communicate with his counsel, Maître Hamel, 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.