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CONDITIONS OF ADMISSIBILITY: EXHAUSTION OF DOMESTIC REMEDIES - EXERCISE (1/1 point)

3. In the *Sayadi and Vinck* case, Belgium argued that the authors had not exhausted local remedies available to them, as required by Article § 2, b) of the First Optional Protocol to the ICCPR. Indeed, it stated, the authors could have applied on the basis of a "humanitarian clause", included both in Resolution 1452 (2002) of the UN Security Council and in the EU Regulation No. 561/2003 implementing it, for the release at least of the funds required for them to meet their basis expenses. This, the authors had neglected to do: therefore, the fact that they were unable to meet their living expenses because of the sanctions imposed on them was a problem entirely of their making. They should have taken the trouble of at least using the remedies open to them. What is the view of the Human Rights Committee on this argument?

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- ☐ The Committee rejects this argument because the domestic remedies that must be exhausted before an international claim is filed refers only to legal remedies (i.e., filed before a judicial body), and not to administrative remedies;
- ☒ The Committee rejects this argument, noting that even if the authors had relied on this "humanitarian clause", this still would have addressed only a small part of the prejudice they were inflicted, and would not have answered their concerns that, in particular, they were imposed sanctions in violation of the rights of defence; ✓
- ☐ The Committee notes that applying for the benefit of a humanitarian exemption would have been very time-consuming, and therefore could not be required from the authors: although the individual filing a communication should have exhausted all available domestic remedies, Article 5, para. 2(b), of the Optional Protocol to the ICCPR adds that 'This shall not be the rule where the application of the remedies is unreasonably prolonged.'

EXPLANATION

It is the second argument that the Human Rights Committee relies on to declare the communication admissible. The first argument is legally incorrect: in fact, the remedies that are to be exhausted need not necessarily be judicial in nature, they can be administrative, provided of course that they are "effective" and can be filed before independent authorities having the power to order a cessation of the violation or full compensation. The third argument does not lack plausibility, but it is unclear how many delays would result from the authors' reliance on the "humanitarian clause". In order to see an illustration of the rule according to which the requirement of prior exhaustion of domestic remedies may be set aside 'where the application of the remedies is unreasonably prolonged', consider the case of *Hendriks v. Netherlands*, decided in 1988:

Supp. No. 40 (A/43/40) at 230 (1988):

'(Article 23, para. 4 ICCPR provides that 'States Parties ... shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage ... and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.' Mr Hendriks claims that this article has been violated by the courts of the Netherlands which granted exclusive custody of his son, Wim Hendriks, Jr., born in 1971, to the mother without ensuring the father's right of access to the child. The author claims that his son's rights have been and are being violated by his subjection to one-sided custody; moreover, the author maintains that his rights as a father have been and are being violated and that he has been deprived of his responsibilities vis-à-vis his son without any reason other than the unilateral opposition of the mother. The marriage was dissolved in September 1974 by decision of the Amsterdam District Court, without settling the questions of guardianship and visiting rights. After six years of procedures, the arrangement according to which Wim Hendriks, Jr. would remain with his mother was confirmed. The Dutch courts considered that 'a number of years have passed since the parents were divorced, both have remarried, but there is still serious conflict between the parents', and that 'in such a case, it is likely that an access order will lead to tension in the family of the parent who has custody of the child and that the child can easily develop a conflict of loyalties', so that it would not be in the best interests of the child to grant access rights to his father. Challenging the admissibility of the Communication for failure to exhaust local remedies, the Netherlands submitted that 'there is nothing to prevent the author from once again requesting the Netherlands courts to issue an access order, basing his request on "changed circumstances", since Wim Hendriks, Jr. is now over 12 years old, and, in accordance with the new article 902(b) of the Code of Civil Procedure which came into force on 5 July 1982, Wim Hendriks, Jr. would have to be heard by the Court in person before a judgement could be made'. The Committee rejected this argument:)

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 9 July 1986, the State party had informed the Committee that nothing would prevent Mr Hendriks from once again requesting the Netherlands courts to issue an access order. The Committee observed, however, that Mr Hendriks' claim, initiated before the Netherlands courts 12 years earlier, had been adjudicated by the Supreme Court in 1980. Taking into account the provision of article 5, paragraph 2(b), *in fine* of the Optional Protocol regarding unreasonably prolonged remedies, the author could not be expected to continue to request the same courts to issue an access order on the basis of 'changed circumstances', notwithstanding the procedural change in domestic law (enacted in 1982) which would now require Hendriks, Jr. to be heard. The Committee observed that, although in family law disputes, such as custody cases of that nature, changed circumstances might often justify new proceedings, it was satisfied that the requirement of exhaustion of domestic remedies had been met in the case before it.

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