



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Decision adopted by the Committee under the Optional Protocol, concerning communication No. 3004/2017\*, \*\*

<i>Communication submitted by:</i>	H.J.T. (represented by Willem Hendrik Jebbink)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Netherlands
<i>Date of communication:</i>	3 October 2016 (initial submission)
<i>Document reference:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 7 July 2017 (not issued in document form)
<i>Date of adoption of decision:</i>	5 November 2021
<i>Subject matter:</i>	Right to appeal a criminal conviction and sentence
<i>Procedural issues:</i>	Admissibility; exhaustion of domestic remedies
<i>Substantive issues:</i>	Effective remedy; right to appeal
<i>Articles of the Covenant:</i>	2 (3) and 14 (5)
<i>Article of the Optional Protocol:</i>	5 (2) (b)

1.1 The author of the communication is H.J.T., a national of the Netherlands born in 1966. He claims that the State party has violated his rights under articles 2 (3) and 14 (5) of the Covenant. The Optional Protocol to the Covenant entered into force for the State party on 11 March 1979. The author is represented by counsel.

1.2 On 23 May 2019, pursuant to rule 93 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to deny the State party's request to split the consideration of the admissibility and merits of the communication.

#### Facts as submitted by the author

2.1 On 23 July 2007, the author was summoned to appear before the District Court of Arnhem on 28 August 2007, on a suspicion of assaulting an on-duty police officer or

\* Adopted by the Committee at its 133rd session (11 October–5 November 2021).

\*\* The following members of the Committee participated in the examination of the present communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobayyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.



obstructing legitimate actions carried out by a police officer, and of failing to comply with an order to identify himself.

2.2 Under the State party's laws, assaulting an on-duty police officer is an indictable offence, while failing to comply with an order to identify oneself is a misdemeanor. On 28 August 2007, the author's hearing was delayed until 10 October 2007 in order to allow the author the opportunity to read the case file, which he had not received before the August hearing date.

2.3 The author was not represented by counsel during the hearings. Immediately after the case was heard on 10 October 2007, the police judge of the District Court rendered a verdict convicting the author of assaulting an on-duty police officer and failing to comply with an order to identify himself. The judge ordered the author to pay fines of 170 euros and 50 euros for the respective offences. In the oral judgment, the judge provided no evidentiary reasons for the author's conviction. The judgment was only recorded through a note of an oral judgment.

2.4 The judgment complied with sections 365 (a), 378 and 378 (a) of the Code of Criminal Procedure of the Netherlands, according to which a judge may issue an abridged judgment in a case such as the author's. An abridged judgment need not be supplemented with evidence or a statement listing the items of evidence, and a trial transcript need not be produced.<sup>1</sup>

2.5 Within the period prescribed by law, on 10 October 2007, the author requested leave to appeal the decision of the police judge of the District Court. On the same date, the author was summoned to an appeal hearing scheduled for 28 February 2008. The right to appeal in such cases is governed in relevant part by section 410 (a) of the Code of Criminal Procedure. In that article, it is noted that if it is possible to appeal and the appeal has been lodged against a judgment concerning exclusively one or more summary offences or indictable offences that are, according to the statutory description, punishable by a prison sentence not exceeding four years, and where no other punishment or order has been imposed other than a fine not exceeding 500 euros – or, when two or more fines have been imposed in the judgment, fines to a combined maximum of 500 euros – the appeal that has been lodged will only be heard in court if the presiding judge deems it to be necessary in the interests of the administration of justice.

2.6 The parliamentary history of the process of drafting section 410 (a) of the Code of Criminal Procedure expressly states that in cases such as the author's, the first instance decision will not be supplemented with evidence or a trial transcript, either at the time the judgment is pronounced or after an appeal is filed. That rule was motivated by an effort to save costs.<sup>2</sup>

2.7 On 8 January 2008, before the scheduled hearing, the President of the Court of Appeal of Arnhem denied the author's request for leave to appeal. The President considered that the reasons to appeal, brought forward by the appellant, even if they were correct, reasonably did not necessarily have to lead to other considerations in appeal. After consideration, it did not occur to the President that it was in the interests of a proper administration of justice to bring the case before the Court of Appeal, so that an examination of the case in appeal would not take place. The President based his decision on the court documents and on section 410 (a) of the Code of Criminal Procedure.

2.8 The author has exhausted domestic remedies, since it is not possible to appeal in cassation against the decision of the Court of Appeal.<sup>3</sup> Nevertheless, the author submitted an extraordinary request to the Supreme Court to revise the lower court decisions.<sup>4</sup> On 19 March

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<sup>1</sup> The author cites sections 365 (a), 378 and 378 (a) of the Code of Criminal Procedure of the Netherlands.

<sup>2</sup> The author cites a transcript of the Lower House of the Netherlands Parliament (House of Representatives), session year 2005–2006, No. 3, pp. 46–47.

<sup>3</sup> The author cites Code of Criminal Procedure, section 410 (a), para. 7.

<sup>4</sup> According to the translation provided by the author, his request to the Supreme Court was dated 14 March 2012.

2013, the Supreme Court rejected the author's request for revision.<sup>5</sup> The author did not file a complaint or communication under any other procedure of international investigation or settlement.

### Complaint

3.1 The author asserts that the State party violated his rights under article 14 (5) of the Covenant. Under the Code of Criminal Procedure, the author is entitled to appeal, or apply for leave to appeal, before the Court of Appeal. However, domestic law did not require the police judge of the District Court to draft a reasoned written judgment, or to produce a trial transcript. The author was denied access to those documents both before the first and second instances, and was therefore unable to exercise his right to appeal in a meaningful way.

3.2 Moreover, the Court of Appeal of Arnhem, which denied the author's request for leave to appeal the decision of the police judge of the District Court, did not conduct a full review of the author's conviction and sentence.<sup>6</sup> The State party was required to ensure that the court deciding upon the request for leave to appeal substantively examined the conviction and sentence, both on a factual and a legal basis. In the author's case, such a substantive assessment did not take place, since the higher tribunal did not possess a properly reasoned judgment by the court of first instance. In particular, there was no statement of the evidence used. The higher tribunal also lacked a transcript of the first instance trial, and therefore could not re-evaluate the evidence on which the author's conviction was based. In order to meet the standard set by article 14 (5) of the Covenant, the higher court must examine in great detail both the evidence that led to the conviction, and the arguments set forth by the convicted person on appeal.<sup>7</sup> The author cites at length the Committee's jurisprudence in *Mennen v. Netherlands* and *Timmer v. Netherlands*,<sup>8</sup> the latter of which involved the author's brother. In those cases, the Committee found violations of article 14 (5) of the Covenant. The author's case involves analogous circumstances. The State party has not given effect to the Committee's Views in *Mennen v. Netherlands* and *Timmer v. Netherlands* to prevent similar violations in the future.

3.3 The author requests compensation for all material and immaterial damages, including reputational harm, that he has suffered owing to the violation of the Covenant.<sup>9</sup>

### State party's observations on admissibility

4.1 In its submission dated 4 September 2017, the State party considers that the communication is inadmissible because the author failed to exhaust domestic remedies. A legislative proposal to abolish the system of leave to appeal, as set out in section 410 (a) of the Code of Criminal Procedure, is under review as part of a broader exercise to modernize the Code. After broad consultations, concrete legislative proposals are being drafted on the basis of a final memorandum that was submitted to the House of Representatives. Those proposals are being presented to the House of Representatives in several parts. The last part will be presented in 2019, after which an Act will be adopted to implement the changes.

4.2 During the ongoing legislative process, it has become possible to initiate civil liability proceedings against the State party before the Council for the Judiciary. If, after assessing the merits of a case, the Council for the Judiciary considers that a settlement is called for, the

<sup>5</sup> According to the translation provided by the author, the Supreme Court determined that the author's request for revision of the decision of the Court of Appeal was inadmissible under various provisions of the Code of Criminal Procedure, because the decision was not a "judgment holding a conviction". The Supreme Court also denied the author's request for revision of the decision of the District Court on the grounds that the request was unsubstantiated.

<sup>6</sup> The author cites, for example, Human Rights Committee, general comment No. 32 (2007), paras. 48–49; and *Lumley v. Jamaica* (CCPR/C/65/D/662/1995), para. 7.5.

<sup>7</sup> The author cites, for example, *Carvallo Villar v. Spain* (CCPR/C/85/D/1059/2002), para. 9.5.

<sup>8</sup> *Mennen v. Netherlands* (CCPR/C/99/D/1797/2008); and *Timmer v. Netherlands* (CCPR/C/111/D/2097/2011).

<sup>9</sup> The author does not elaborate on his claim under article 2 (3) of the Covenant. He requests that the Committee grant him an effective remedy as referred to in article 14 (5), read in conjunction with article 2 (3), of the Covenant.

settlement will include: reimbursement of the fine imposed and paid by the individual in question; reimbursement of legal costs and expenses relating to the procedure for leave to appeal; and removal of the relevant offence from the individual's criminal record. The author of the present communication was made aware of this procedure on 7 November 2016, but has not availed himself of the procedure.

4.3 In its jurisprudence in *Timmer v. Netherlands*, the Committee stated that an effective remedy in that case would allow a review of the author's conviction and sentence by a higher tribunal or implementation of other appropriate measures capable of removing the adverse effects caused to the author, together with adequate compensation. In the present case, there were appropriate measures that may be considered domestic legal remedies. Given that the author did not avail himself of those measures, he failed to exhaust all available domestic remedies.

#### **Author's comments on the State party's observations on admissibility**

5.1 In his comments dated 19 April 2019, the author maintains that the procedure before the Council of the Judiciary is not an appropriate measure capable of removing the adverse effects caused to him, for the following reasons: the procedure does not allow for a full review of the author's conviction; the procedure is administrative rather than civil in nature, as it does not involve an independent civil judge; the procedure depends on an individual assessment of the merits of the case and thus cannot be considered adequate; and in other cases involving the same matter, the State party spontaneously offered a concrete settlement.

5.2 In his comments dated 21 November 2019, the author cites several sources to support his argument that the procedure before the Council of the Judiciary cannot be considered an effective remedy. The author cites the text of article 2 (2) and (3) of the Covenant. He also notes that in paragraph 15 of its general comment No. 31 (2004), the Committee stated that it attached importance to States parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. It also noted that the enjoyment of the rights recognized under the Covenant could be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. The author also refers to the explanatory memorandum to the approval of the International Covenant on Civil and Political Rights, which is a historical Dutch legislative document that states that article 2 (3) of the Covenant instructs States parties to develop legal protection through the intervention of judicial bodies.

5.3 In *Mennen v. Netherlands*, the Committee requested the State party to provide the author with an effective remedy that would allow a review of his conviction and sentence by a higher tribunal, and adequate compensation. In *Timmer v. Netherlands*, the Committee stated that, in accordance with article 2 (3) (a) of the Covenant, the State party was under an obligation to provide the author with an effective remedy. It further stated that it took note of the author's assertion that the financial compensation of 1,000 euros proposed by the State party did not constitute an effective remedy because it did not provide for a review of the criminal sentence and conviction adopted against the author, and it did not remedy the harm to his reputation. The Committee considered that, in that case, an effective remedy would allow a review of the author's conviction and sentence by a higher tribunal, or implementation of other appropriate measures capable of removing the adverse effects caused to the author, together with adequate compensation. The author also refers to the Committee's jurisprudence in *Sabirova et al. v. Uzbekistan*<sup>10</sup> and *S.Y. v. Netherlands*.<sup>11</sup>

5.4 Regarding the State party's assertions that the system of leave to appeal is being abolished, the author notes that in its observations submitted in *Timmer v. Netherlands*, the State party maintained that those legislative proposals would be presented to the House of Parliament in 2018, that did not happen in 2018 or 2019. More than nine years have passed since the Committee's decision in *Mennen v. Netherlands*, in which it requested the State party to align its legislation with article 14 (5) of the Covenant. Since then, the

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<sup>10</sup> *Sabirova et al. v. Uzbekistan* (CCPR/C/125/D/2331/2014).

<sup>11</sup> *S.Y. v. Netherlands* (CCPR/C/123/D/2392/2014).

introduction of a revised Code of Criminal Procedure has been delayed many times; it is highly unlikely to occur in 2020. Even then, the new legislation could take years to come into effect. A simple legislative measure is the only thing that would be needed to abolish section 410 (a) of the Code of Criminal Procedure.

### **State party's additional observations on admissibility**

6.1 In its additional observations dated 19 September 2019, the State party maintains its position that the communication is inadmissible because the author has failed to exhaust domestic remedies. According to the jurisprudence of the Committee, authors must avail themselves of all domestic remedies, insofar as such remedies appear to be effective and are de facto available to the author.<sup>12</sup> Indeed, authors must make use of all judicial or administrative avenues that offer a reasonable prospect of redress.<sup>13</sup> The State party reiterates the various forms of redress offered through the procedure before the Council of the Judiciary. It is the practice of the Council of the Judiciary to honour substantiated claims, including claims for immaterial damages.

6.2 In the present case, the State party did not see fit to offer a friendly settlement proposal to the author, because the State party had expressly informed the author of the opportunity to submit a claim before the Council of the Judiciary. He has not made use of the procedure.

6.3 In addition, the State party recalls that it has initiated a proposal to abolish the system of leave to appeal, as part of the redrafting of the Code of Criminal Procedure. A draft new Code of Criminal Procedure will be sent for advice to the Council of State in 2020, and will likely be submitted to Parliament at the end of 2020 or early 2021. The procedure before the Council for the Judiciary was introduced pending the outcome of the legislative process, and taking into account the Committee's Views in, inter alia, *Timmer v. Netherlands*.

6.4 In its additional observations dated 26 February 2021, the State party maintains its position that the civil liability procedure before the Council for the Judiciary is an effective remedy. In *Timmer v. Netherlands*, which is similar to the author's case, the Committee expressly stated that an effective remedy would allow a review of the author's conviction and sentence by a higher tribunal *or implementation of other appropriate measures capable of removing the adverse effects caused to the author, together with adequate compensation* [emphasis added by the State party]. In its previous observations, the State party had already indicated that the civil liability procedure was precisely capable of removing the adverse effects caused to the author. The State party reiterates that claimants before the Council for the Judiciary may obtain reimbursement of the fine imposed and paid; reimbursement of legal costs for the leave to appeal; removal of the offence from the claimant's criminal record; and immaterial damages. This represents an effective remedy in conformity with the Committee's jurisprudence.

6.5 The Committee's jurisprudence in *Sabirova et al. v. Uzbekistan* and *S.Y. v. Netherlands* is not relevant because those cases are not comparable to the present matter. The individual measures taken by the State party in the case of *Timmer v. Netherlands*, which were similar to those available through the civil liability procedure described above, resulted in the closure by the Committee of its follow-up dialogue with the State party in 2016, with a finding of satisfactory implementation of the Committee's recommendation.

6.6 The State party acknowledges that in cases such as the author's, there is currently no right to an appeal within the meaning of article 14 (5) of the Covenant. As the State party has already stated, it is in the process of remedying that situation by abolishing the system of leave to appeal, which will occur once the new Code of Criminal Procedure has taken effect. Because the introduction of the new Code is a time-consuming process, the State party has introduced the civil liability procedure as an interim measure to remedy the shortcoming. This is in line with paragraph 19 of the Committee's general comment No. 31 (2004), in which it stated that the right to an effective remedy might in certain circumstances require States parties to provide for and implement provisional or interim measures to avoid

<sup>12</sup> The State party cites, for example, *P.L. et al. v. Germany* (CCPR/C/79/D/1003/2001), para. 6.5.

<sup>13</sup> The State party cites, for example, *Patiño v. Panama* (CCPR/C/52/D/437/1990), para. 5.2.

continuing violations, and to endeavour to repair at the earliest possible opportunity any harm that might have been caused by such violations.

6.7 The draft new Code of Criminal Procedure was finalized in July 2020 and was published on the website of the State party. In the explanatory memorandum to the draft bill, under the heading “Title 4.1 – Appeal against final judgments”, the abolition of the leave system is explained at length, with reference to the Covenant, the Committee’s Views both in *Mennen v. Netherlands* and in *Timmer v. Netherlands*, and the jurisprudence of the European Court of Human Rights.

6.8 Preparations for the implementation of the new Code of Criminal Procedure are currently progressing well. Proposals for the Act implementing the changes are being drafted. The Act will regulate the entry into force of the new Code and consists of several parts, such as transitional law and amendment of other laws. The creation of a new Code of Criminal Procedure is a major legislative project, and it is precisely for that reason that careful implementation is of the utmost importance. To that end, an external independent committee on the implementation of the new Code has been established. The external committee’s tasks include the development of a broadly supported implementation strategy for the new Code. The external committee delivered its report in December 2020. On 11 February 2021, the cabinet sent its policy response to the report to the House of Representatives of Parliament.

6.9 The aforementioned legislative activities and the report of the external committee should enable the new Cabinet, which will take office after elections scheduled for March 2021, to immediately decide on the timing of the submission of the new Code of Criminal Procedure to the House of Representatives, the manner of implementation of the Code and other proposals made by the external committee.

## **Issues and proceedings before the Committee**

### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not currently being examined under another procedure of international investigation or settlement. Nonetheless, the Committee notes that while the author stated that he had not submitted a complaint to another international body of investigation or settlement, the European Court of Human Rights issued a decision of inadmissibility in October 2009 relating to the author’s application dated 3 June 2008. In that application, the author raised various claims relating to the conviction and fine that are the subject matter of the present communication, including allegations that his right to a fair hearing had been breached and that due process always requires the admission of an appeal. The Committee therefore regrets that the statement by the author, represented by counsel, indicating that the author had not submitted a complaint to another international body of investigation or settlement, proved to be inaccurate.

7.3 The Committee recalls that a communication may constitute an abuse of the right of submission when it is submitted more than five years from the date on which the author of the communication exhausted domestic remedies, or, where applicable, more than three years from the date of the conclusion of another procedure of international investigation or settlement. In accordance with rule 99 (c) of the Committee’s rules of procedure, an exception may apply where there are reasons justifying the delay, taking into account all the circumstances of the communication.<sup>14</sup> The author submitted the present communication on 3 October 2016, nearly seven years after the European Court of Human Rights issued its decision of inadmissibility on 13 October 2009. The Committee further notes the author’s statement that he exhausted domestic remedies on 8 January 2008, when the President of the Court of Appeal of Arnhem denied his request for leave to appeal the decision of the police judge of the District Court of Arnhem (paras. 2.7–2.8). Thus, the author claims to have

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<sup>14</sup> See, for example, *I.D.M. v. Colombia* (CCPR/C/123/D/2414/2014), para. 9.4.

exhausted domestic remedies more than eight years before he submitted the present communication. The Committee is aware of the fact that the author filed on 14 March 2012 an extraordinary appeal to the Supreme Court in which he sought to overturn the lower court decisions, and that the appeal was denied on 19 March 2013. However, the Committee observes that the extraordinary appeal, filed more than four years after the issuance of the decision of the Court of Appeal of Arnhem, was a discretionary measure that was not within the normal chain of domestic remedies, and the author well knew it was not possible to appeal against the decision of the Court of Appeal (para. 2.8). The Committee therefore considers the author was not required to exhaust that remedy for the purpose of article 5 (2) (b) of the Optional Protocol. Thus, because the author submitted the communication more than five years after the date on which he exhausted domestic remedies and more than three years after the issuance of the decision of the European Court of Human Rights, and has not provided an explanation for the delay in submission, the Committee considers that the communication constitutes an abuse of the right to submission. Accordingly, the Committee declares the communication inadmissible under article 3 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 3 of the Optional Protocol;
  - (b) That the present decision shall be transmitted to the State party and to the author.
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