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HUMAN RIGHTS COMMITTEE
Eighty-sixth session
13-31 March 2006

VIEWS

Communication No. 1010/2001

Submitted by:	Lassâad Aouf (not represented by counsel)
Alleged victim:	The author
State party:	Belgium
Date of communication:	22 May 2001 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 4 September 2002 (not issued in document form)
Date of adoption of Views:	17 March 2006
Subject matter:	Prosecution of complainant for fraud and embezzlement

* Made public by decision of the Human Rights Committee.

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Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Fairness of proceedings - minimum guarantees of defence
Articles of the Covenant:	14, paragraphs 1, 2, 3 (b), (c), (d) and (g)
Articles of the Optional Protocol:	2 and 5, paragraphs 2 (a) and (b)

On 17 March 2006, the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1010/2001.

[ANNEX]

Annex

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eighty-sixth session

concerning

Communication No. 1010/2001*

Submitted by: Lassâad Aouf (not represented by counsel)

Alleged victim: The author

State party: Belgium

Date of communication: 22 May 2001 (initial submission)

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

Meeting on 17 March 2006,

Having concluded its consideration of communication No. 1010/2001 submitted by Lassâad Aouf 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 the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Mr. Lassâad Aouf, who was born in Tunisia and lives in Belgium. He claims to be a victim of violations by Belgium of articles 14, paragraphs 1, 2 and 3 (b), (c), (e)

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

and (g), of the International Covenant on Civil and Political Rights. The author is not represented by counsel. The Covenant and its Optional Protocol came into force for Belgium on 17 August 1984.

Factual background

2.1 After working for S.A. Leisure Investments (subsequently S.A. Tiercé Franco-Belge), on 31 March 1991 the author concluded an agreement with the company to manage a betting shop in Brussels as a self-employed agent. This agreement took effect from 1 April 1991 and stipulated a six-month probationary period (ending 1 October 1991). The author's commission was fixed at 5 per cent of the taxable turnover. The author contracted to accept and record bets on televised races broadcast direct from the United Kingdom.

2.2 In September 1991, S.A. Leisure Investments noted an increase in the turnover of the betting shop managed by the author and a net increase in the number of winning bets registered by that concern. On 26 September 1991 the company's financial controller seized the contents of the cash register and ejected the author. On 3 October 1991 the company sent Mr. Aouf notice of dismissal for gross misconduct, first, for arranging for his own benefit illicit bets worth 2,867,000 Belgian francs (BF), and second, for refusing to reimburse the cash balance in the amount of BF 130,000 to the financial controller on 26 September 1991. The author claims that this was all a plot designed to terminate his contract without compensation for loss of employment.

2.3 On 15 October 1991, Tiercé Franco-Belge sued for damages in criminal proceedings. Pursuant to a complaint filed by the author with Liège Commercial Court, an expert was appointed to rule on the authenticity of the disputed betting slips.

2.4 On 25 June 1998 Brussels Criminal Court sentenced the author to one year's imprisonment suspended for five years, and a fine, and ordered him to pay BF 250,000 to the party claiming damages. The Court of Appeal, by judgement of 10 November 1999, reduced the sentence to six months and increased the amount payable to the party seeking damages to BF 450,000. On 15 March 2000, the Court of Cassation rejected the author's application for judicial review of the case.

The complaint

3.1 The author maintains his innocence and is of the view that the Belgian authorities committed violations during the investigation and the trial.

3.2 Concerning the preparation of the case on the two charges preferred - (a) illicit betting and (b) embezzlement of the cash balance - the author claims that the investigation was vitiated by a number of omissions, first and foremost the failure to examine key witnesses despite the requests of the investigating judge; the carrying out of investigative actions that were not asked for by the investigating judge; and the want of evidence. He believes that the inquiry led by the judicial police officer was a malicious prosecution. Despite petitions lodged by himself, the investigating judge and the public prosecutor's office, the judges who ruled on the case and the Minister of Justice failed to address these deficiencies, thereby demonstrating their lack of impartiality.

3.3 The author claims that he has been denied the guarantees to which any person accused of a criminal offence is entitled. First of all, his counsel's request for an adjournment of the trial date was not accepted by the judge's chambers of the trial court, and second, he was unable to file pleadings with Brussels Criminal Court owing to the court's refusal to consider requests to examine witnesses, thus contravening article 14, paragraph 3 (b), of the Covenant. The judges who ruled on the case, including the investigators and Brussels Criminal Court, resisted these requests to hear witnesses, and their refusal was upheld by the Court of Appeal and the Court of Cassation, thereby contravening article 14, paragraph 3 (e). As to the violation of article 14, paragraph 3 (g), the presiding criminal court judge rebuked him in an attempt to compel him to testify against himself. He is of the view that the courts were biased, that the charges against him were predetermined, and that the judges interpreted the facts in a manner unfavourable to his case, contrary to article 14, paragraphs 1 and 2, of the Covenant.

3.4 The author believes that, from the start of the investigation through to the trial, the judicial police officer, the expert appointed by the commercial court and the judges "acted exclusively in the interests of Tiercé Franco-Belge", in violation of article 14, paragraph 1, of the Covenant.

3.5 The author complains of the excessive delay in bringing his case to trial, i.e. between the bringing of criminal indemnification proceedings (3 October 1991) and the criminal court judgement (25 June 1998), which constitutes a violation of article 14, paragraph 3 (c).

State party's admissibility submission

4.1 In its submission of 5 November 2001, the State party disputes the admissibility of the communication, citing the following clarifications and corrections.

4.2 From 4 April 1991 onwards, S.A. Leisure Investments notified the author on several occasions of "shortfalls" in his cash register and drew his attention to various breaches of regulations. In September 1991, Leisure Investments noted an increase in the turnover of the betting shop managed by the author and a net increase in the number of winning bets registered by that concern. On 26 September 1991 it sent representatives to carry out an audit of the betting shop, in the course of which the author absconded. According to Leisure Investments it emerged that, pursuant to an audit of the bets registered, between 8 June and 26 September 1991, 167 betting slips had been accepted by the author after the deadline for placing bets and that many of these slips had been filled in by the author himself, thereby giving rise to fraudulent winnings. Leisure Investments filed a complaint and sued for damages in criminal proceedings on 15 October 1991.

4.3 As to the alleged delays and the failure to observe due process before the domestic courts, the following points should be noted:

Judge's chambers: By its order of 8 April 1997, the chamber held that the charges were sufficient to warrant the author's committal for trial before the criminal court on the count of fraud and embezzlement.

Criminal court: The criminal court sentenced the author on 25 June 1998 to one year's imprisonment, suspended, holding that, notwithstanding issues of reliability involving the system devised by S.A. Tiercé Franco-Belge, the case file clearly showed that the author had engaged in fraudulent practices to breach the trust of the party claiming damages.

Court of Appeal: On 10 November 1999 the Twelfth Division of the Brussels Court of Appeal upheld the judgement but reduced the term of imprisonment to six months and awarded the party claiming damages €11,155.21. The court held that the additional investigative measures requested of the court by the author were of no relevance in ascertaining the truth, and the measures taken during the preliminary investigation were sufficient to enlighten the court. It held, inter alia, that the investigations undertaken by the party claiming damages, the expert and the investigators were based on a sufficiently broad sample of similar concerns, and that the author's allegation that the party claiming damages had sought to avoid compensating him for loss of employment was unfounded.

Court of Cassation: By its judgement of 15 March 2000, the Court rejected the author's application for judicial review on the grounds that the appeal judges had noted the existence of serious, precise and corroborative circumstantial evidence that the author had knowingly accepted racing bets once the races were under way. Accordingly, the Court noted that the point raised was inadmissible insofar as, while not challenging the court's jurisdiction, the author was essentially criticizing the conduct of the preliminary investigation.

4.4 With regard to the complaint of the lack of impartiality of the investigating judge and the Brussels public prosecutor's office, the State party, taking an objective approach in line with the jurisprudence of the European Court of Human Rights, maintains that in the present case the investigating judge ordered the investigative actions that he thought necessary given the inconsistencies in the author's story. Therefore, the judge's objective impartiality cannot be questioned. Likewise, proceeding from subjective criteria, the State party believes it is obvious that the author's submissions are largely insufficient to challenge the presumption of impartiality.

4.5 In addition, the State party stresses that in the application for judicial review, the author failed to mention the alleged violation of article 14 of the Covenant that he had cited before the Brussels Court of Appeal, whence the inadmissibility of the present complaint on the grounds of failure to exhaust domestic remedies.

4.6 Moreover, the Court of Cassation noted that, in order to ascertain whether an individual has been given a fair hearing within the meaning of article 6.1 of the European Convention on Human Rights, it must be ascertained whether the case, considered as a whole, has been tried fairly, and that, since the author was given ample opportunity to refute the charges brought against him by the public prosecutor in the national courts, he cannot claim to have been denied a fair trial.

4.7 Lastly, the State party notes that the European Court of Human Rights had considered an application based on the same legal grounds, which it declared inadmissible on 12 January 2001, holding that it disclosed absolutely no violation of the rights and freedoms guaranteed by the Convention or its Protocols.

4.8 In conclusion, given the author's inability to demonstrate that alleged shortcomings in the investigation have seriously compromised the fairness of every aspect of the proceedings before the trial judge, the State party believes that there has been no violation of article 14.

Author's comments on State party submission

5. In his submission of 7 January 2002, the author restates the elements of his complaint. He dwells on the lack of impartiality of members of the Belgian legal service, who are appointed on the basis of political affiliation. He adds that he never had access to the disputed betting slips. He states that only the version of the facts as presented by the party claiming damages, indeed only that of the authorities acting on behalf of Tiercé Franco-Belge, was used in sentencing him. He confirms that the European Court of Human Rights ruled inadmissible a previous complaint submitted by him, but says that the earlier complaint did not include all the elements of his complaint to the Human Rights Committee.

State party's supplementary submission on admissibility and merits

6.1 In its submission of 11 April 2002, the State party continues to maintain that the complaints of violations of article 14, paragraphs 2 and 3 (b), (c) and (g), are inadmissible, and that there are no grounds for the author's petition. It takes the view that the author is basically complaining that he has been found guilty, since he believes that the case file does not contain sufficient evidence to prove his guilt. The State party recalls, with reference to the Committee's jurisprudence, that it is not for the Committee to rule on the author's guilt or innocence. Its role is to establish whether the evidence for or against the author was presented in such a way as to guarantee a fair trial and to ensure that the trial was conducted in such a way as to obtain this outcome. The weighing of evidence by a national judge can only be criticized in exceptional cases, when the national judge has deduced from the facts conclusions that are manifestly unjust and arbitrary. According to the State party, this is not so in the present case, and it cannot be concluded that the right to a fair trial has been violated.

6.2 As to the complaint that witnesses were not heard despite the request of the investigating judge, the State party maintains that, in order to determine whether a trial conforms to the provisions of article 14, it is necessary to consider the proceedings as a whole, not just isolated elements. The record shows that additional investigative actions were requested by the investigating judge, who requested the interrogation of various auditors and technical officers working for S.A. Tiercé Franco-Belge.

6.3 In his communication, the author states that the additional investigative measures concerned charge (b). However, according to the State party, the letter of the investigating judge dated 18 March 1992 is very clear. He requests the interrogation of the above-mentioned witnesses "in order to obtain full technical details of the inspections performed on machines for recording bets on greyhound races placed in various betting shops". The warrant therefore concerned charge (a), not charge (b). The fact that some of these interrogations did not take place therefore has absolutely no bearing on the procedure according to which the author was sentenced under charge (b).

6.4 With regard to the examination of witnesses relevant to charge (a), the State party explains that it should be determined whether the fact that some of these interrogations never

took place constitutes a violation of the right to a fair trial. It notes that the author was allowed to petition the trial judge to examine the witnesses. The trial judge took the view that this examination would serve no purpose, since the steps taken during the preliminary investigation were sufficient to enlighten him, namely comparative investigations undertaken by the party claiming damages, the expert and the investigators of a representative sample of betting shops similar to the one managed by the defendant. Moreover, the Court of Appeal proceeded to make exhaustive inquiries which, the State party believes, yielded sufficient proof of the author's guilt.

6.5 It appears from these observations that the investigative measure requested by the investigating judge, and subsequently by the author, namely the interrogation of witnesses in order to obtain full technical details of the inspections performed on machines for recording racing bets, was irrelevant. This is because the author's conviction rests on serious, precise and corroborative circumstantial evidence that he fraudulently accepted racing bets once the races were under way. As to the other investigative measures requested by the author, the Court of Appeal states that they were irrelevant and that the defendant had ample opportunity to refute the evidence before the trial judge and the court.

6.6 The national courts thus acted within their rights in deciding to reject the request to hear witnesses. Article 14, paragraph 3 (e), of the Covenant does not compel the summoning of witnesses; it simply aims to ensure equality of arms. Accordingly, the State party notes that the author was given the opportunity to submit arguments to the trial court, the Court of Appeal and the Court of Cassation regarding the appropriateness of calling witnesses. The fairness of the proceedings was not compromised by the decision not to call witnesses and the State party concludes that no due process violations occurred.

6.7 The State party maintains that this allegation was not raised before the Court of Cassation, so domestic remedies have not been exhausted. Nor, according to the State party, is the complaint well-founded. The author states that, as far as charge (b) is concerned, there is no evidence of his guilt. Yet according to the State party, the Court of Appeal declared charge (b) valid after making exhaustive inquiries.

6.8 The author claims that his prosecution is based on the letters sent to him by the financial and audit director. According to the author, these letters do not prove his guilt. Since the Court of Appeal did not deduce manifestly unjust or arbitrary conclusions from the facts, it cannot be concluded that the presumption of innocence was violated.

6.9 As to the complaint that the author's guilt on charge (a) was not legally established, the State party retorts that the conviction was amply substantiated. The Court of Appeal held that the charge was proven by serious, precise and corroborative circumstantial evidence; considering that article 14 does not prohibit circumstantial evidence, the type of evidence used in the case does not violate the Covenant.

6.10 As to the alleged violation of article 14, paragraph 3 (b), the State party recalls that the author complains that the Brussels judge's chambers refused to adjourn the case, even though the parties had allegedly asked for a postponement. Judge's chambers do not rule on the merits of the charges in a case. It is the responsibility of the trial judge to determine whether the charges are manifested in evidence. For the State party, article 14, paragraph 3 (b), does not apply to proceedings in judge's chambers, which function merely as a committal court.

Additionally, the State party recalls that a refusal to adjourn proceedings does not constitute a violation per se of article 14, paragraph 3 (b). In this case, judge's chambers stated that there was no need to defer the case given that the statutory time limits had been respected as regards the timing of proceedings. Moreover, the author had failed to demonstrate in what way his right to adequate time for the preparation of his defence had allegedly been violated.

6.11 The author claims, moreover, that he was not allowed to file pleadings with Brussels Criminal Court. According to the State party, it appears from the author's application that he himself refused to file pleadings, even though he had the opportunity to do so. In these circumstances, a violation of article 14, paragraph 3 (b), cannot be said to have occurred.

6.12 The State party maintains that the alleged violation of article 14, paragraph 3 (c), was not raised before the Court of Cassation, so domestic remedies have not been exhausted, whence the inadmissibility of the complaint. The State party also takes issue with the merits of the complaint. The reasonable period of time begins from the moment charges are laid. In this case, the author was charged in an indictment dated 18 December 1996. The decision to refer the case to judge's chambers was taken on 8 April 1997 and the Court of Appeal judgement dates from 10 November 1999. The Court of Cassation dismissed the application for judicial review on 15 March 2000. Proceedings therefore took place over three years and three months, which is a reasonable period of time according to the State party.

6.13 The State party recalls that the author complains about the comments made by the criminal court in its judgement of 25 June 1998, which apparently disclose a violation of article 14, paragraph 3 (g), but maintains that this complaint was not raised before the Court of Cassation and that domestic remedies have therefore not been exhausted. The State party is also of the view that the complaint is without merit. It notes that the comments in question refer to the sentence handed down by the trial judge. This judgement was set aside by the Court of Appeal, which, in pronouncing sentence, substituted its own reasons. Any violation of article 14, paragraph 3 (g), was therefore rectified at a later stage in proceedings.

Comments by the author

7. In a letter dated 26 June 2002, the author takes issue with the State party's submission. He does admit, however, erroneously stating that the additional investigative measures referred to charge (b), whereas, as the State party points out, they actually referred to charge (a). He believes, moreover, that the Committee should "review the facts", specifically the lack of evidence in the present case. Finally, with regard to the State party's argument that he has not exhausted domestic remedies in connection with the alleged violations of article 14, paragraphs 2 and 3 (b) and (c), the author is of the view that the Court of Cassation should not have restricted itself to the content of his pleading, but had a responsibility to adjudicate on the case as a whole. Regarding the argument that he had failed to exhaust domestic remedies in the matter of his complaint under article 14, paragraph 3 (g), he claims that he did in fact state, in his application to the Court of Cassation, that the presiding judge of Brussels Criminal Court had asked him "to testify against himself".

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

8.2 The Committee noted that a similar complaint submitted by the author was declared inadmissible by the European Court of Human Rights on 12 January 2001. However, the provisions of article 5, paragraph 2 (a), of the Optional Protocol did not preclude the Committee from declaring the present communication admissible, since the matter was no longer being examined under another procedure of international investigation or settlement and the State party had entered no reservation in respect of article 5, paragraph 2 (a), of the Optional Protocol.

8.3 With regard to the exhaustion of domestic remedies, the Committee has taken note of the State party's arguments stressing the inadmissibility of the complaints of violations of article 14, paragraphs 2 and 3 (c) and (g), which the author failed to raise before the Court of Cassation, and the violation of article 14, paragraph 3 (b), of which the judges of the Court of Cassation were not apprised. The Committee notes the author's argument, first, that the Court of Cassation should not have limited itself to considering his statement of claim, and second, that his pleading did contain a complaint of a violation of article 14, paragraph 3 (g). Having examined the author's statement of claim to the Court of Cassation, the Committee notes that at no time did the author mention that the presiding judge of Brussels Criminal Court had asked him to testify against himself. Moreover, leaving aside the Court of Cassation, the author's pleadings show that the trial judges were never apprised of an alleged violation of article 14, paragraph 3 (b). Finally, the Committee recalls that while complainants are not required to invoke specifically the provisions of the Covenant which they believe have been violated, they must set out in substance before the national courts the claim which they later bring before the Committee. Since the author did not raise the aforementioned complaints before the Court of Cassation, nor the alleged violation of article 14, paragraph 3 (b), before the trial judges, these parts of the communication are inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8.4 Regarding the complaints of violations of article 14, paragraphs 1 and 3 (e), the Committee notes that the State party does not dispute, in its submission of 11 April 2002, the admissibility of these allegations. The Committee therefore declares that this part of the communication is admissible and proceeds with its examination of the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5 of the Optional Protocol.

9.2 Regarding the complaints of violations of article 14, paragraphs 1 and 3 (e), the Committee has noted the author's arguments stating that several witnesses were not heard contrary to requests made by the investigating judge and/or the author himself. According to the author, the members of the national legal service, specifically the public prosecutor, were biased,

as indicated by the fact that investigative measures ordered by the investigating judge were not included in the case file whereas other measures, which he did not request, were included. Insofar as the courts did not sanction these shortcomings or allow the examination of witnesses requested by the author, he is of the view that his case could not be properly defended before an independent tribunal and he was thus convicted on insufficient evidence.

9.3 The Committee has also taken note of the State party's detailed arguments that no violations of the Covenant have occurred. The Committee recalls its jurisprudence under which it is generally a matter for domestic courts to examine the facts and evidence in a particular case. In considering allegations of violations of article 14 in this regard, the Committee may only establish whether the conviction was arbitrary or amounted to a denial of justice. Thus, first of all, regarding the examination of witnesses as part of the consideration of the facts and the gathering of evidence by the national courts, the Committee notes that, in this case, the Court of Appeal, as borne out by its judgement, examined in depth the author's complaints about the hearing of witnesses and explained why it held the complaints to be groundless, considering that such hearings would be of little value in ascertaining the truth. Furthermore, recalling that article 14, paragraph 3 (e), does not provide an unlimited right to call any witness requested by the accused or his counsel, the Committee is of the view that the material before it does not disclose that the judgement of the Court of Appeal, subsequently upheld by the Court of Cassation, was of a nature to compromise the application of the principle of the equality of arms of the prosecution and the defence. Second, the Committee notes no arbitrary conduct or denial of justice. The Committee cannot therefore conclude that members of the national legal service were biased; the refusal to hear witnesses and the charges against the author as a result of an assessment of the facts and the evidence do not bear out this conclusion. The Committee also notes that the author fails to substantiate his assertion that his ethnic origin went against him, and that at no time did he raise this issue in the domestic courts. The Committee therefore concludes that there has been no violation of article 14, paragraphs 1 and 3 (e).

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts such as they have been presented do not disclose any violation of the Covenant.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
