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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2392/2014*, **

Communication submitted by:	S.Y. (represented by counsel, Willem H. Jebbink)
Alleged victim:	The author
State party:	Netherlands
Date of communication:	15 January 2014 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 19 May 2014 (not issued in document form)
Date of adoption of Views:	17 July 2018
Subject matter:	Conduct of criminal proceedings
Procedural issues:	Examination of the same matter by another procedure of international settlement; exhaustion of domestic remedies
Substantive issues:	Right to appeal a criminal conviction and sentence; right to adequate facilities for the preparation of a defence in appellate proceedings; right to an effective remedy
Articles of the Covenant:	2 (3) (a) and 14 (5)
Article of the Optional Protocol:	5 (2) (a) and (b)

1. The author of the communication is S.Y., a national of the Netherlands born in 1971. She claims that the State party has violated her rights under articles 2 (3) (a) and 14 (5) of the Covenant. The Optional Protocol entered into force for the Netherlands on 11 March 1979. The author is represented by counsel.

The facts as submitted by the author

2.1 On 7 July 2008, the author was summoned to appear before Utrecht District Court on 2 September 2008 for assaulting C.A. Assault is a criminal offence under article 300 of

* Adopted by the Committee at its 123rd session (2–27 July 2018).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.

the Criminal Code of the Netherlands. On 2 September 2008, the hearing of the author's criminal case was adjourned to 5 December 2008, at the request of the author's counsel.[1]

2.2 On 5 December 2008, the author appeared in person at the court hearing. She claimed to be innocent and to be herself the victim of an assault by C.A. Immediately after the case was tried, an oral judgment was rendered by Utrecht District Court, convicting the author of assault, and sentencing her to a fine of €250, and damages of €200 to be paid to C.A. In accordance with article 365 (a) of the Code of Criminal Procedure,[2] the judge pronounced an "abridged" oral judgment, which did not need to be supplemented with evidence. Given that under articles 365 (a), 378 and 378 (a) of the Code of Criminal Procedure[3] it is not necessary to produce a trial transcript, none was produced in the present case.

2.3 On 18 December 2008, pursuant to article 410 (a) of the Code of Criminal Procedure,[4] the author applied for leave to appeal against the judgment of Utrecht District Court to the Court of Appeal in Arnhem. On 2 January 2009, the author's counsel submitted a statement listing the grounds for the appeal, but he had no reasoned written judgment, trial transcript or list of the evidence used by Utrecht District Court upon which he could base the statement. In the statement, the author's counsel requested the Court of Appeal to, inter alia, hear two witnesses in court. In a decision dated 23 April 2010, the Court of Appeal determined that the author's appeal would not be considered, as the interests of the proper administration of justice did not require the case to be heard on appeal.

2.4 According to article 410 (a) (7) of the Code of Criminal Procedure, it is not possible to lodge a cassation appeal against a decision of the Court of Appeal.[5] The author submits that she has therefore exhausted all available and effective domestic remedies.

[1] In the course of the domestic proceedings, the author was represented by a counsel different from the one representing her before the Committee.

[2] Article 365 (a) of the Code of Criminal Procedure reads as follows:

1. As long as an ordinary remedy has not been sought, it will be sufficient to pronounce an abridged judgment.

2. An abridged judgment against which an ordinary remedy has been sought shall be supplemented with the evidence … or … a statement listing the items of evidence, unless it concerns … a judgment as referred to in the first paragraph of article 410 (a).

[3] Article 378 of the Code of Criminal Procedure reads as follows:

2. The judgment will be noted in the trial transcript … in the event that an ordinary remedy has been sought against the judgment, unless the legal remedy is exercised more than three months after the judgment or in the case of a judgment as referred to in the first paragraph of article 410 (a).

Article 378 (a) of the Code of Criminal Procedure reads as follows:

1. Subject to the provisions of the second paragraph of article 378 … drawing up a trial transcript will be dispensed with and the judgment will be noted on a document to be attached to the duplicate of the summons within two times twenty-four hours …

2. … The annotation shall state, in any case: (a) the name of the police court judge, the date of the judgment and whether it was a judgment in default of appearance or a judgment in a defended action; (b) if a conviction has been pronounced, the offence constituted by the facts found; and (c) the punishment or order imposed, and the statutory provisions on which that punishment or order is based.

[4] Article 410 (a) of the Code of Criminal Procedure reads as follows:

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 which 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 than a fine not exceeding — or, when two or more fines have been imposed in the judgment, fines to a combined maximum of — €500, the appeal that has been lodged will only be heard in court if the President deems this to be necessary in the interests of the administration of justice.

[5] Article 410 (a) (7) of the Code of Criminal Procedure reads as follows:

In the case referred to in the fourth paragraph, it is not possible to lodge a cassation appeal against the judgment to which the decision of the President pertains.

2.5 The author states that the subject matter of the communication is not being examined under another procedure of international investigation or settlement. On 5 July 2010, the author submitted an application to the European Court of Human Rights, claiming a violation of her rights to fair trial, to respect for family and private life and to an effective remedy, and of the prohibition on discrimination and the prohibition on abuse of rights. On 4 October 2012, the Court (sitting in single-judge formation) declared the author's application inadmissible.[6]

The complaint

3. The author claims that her right to have her criminal case heard at two instances, as set forth in article 14 (5) of the Covenant, was violated in that she was not able to exercise her right to appeal in an effective and meaningful way. In particular, at the time when a statement listing the grounds for the appeal needed to be submitted by her counsel, she did not have a duly reasoned written judgment, a trial transcript or a list of the evidence used by Utrecht District Court. As a result, she did not know why she had been found guilty by Utrecht District Court and what evidence had been used against her. Therefore, she did not have adequate facilities for the preparation of her defence on appeal.[7]

State party's observations

4. On 19 November 2014, the State party informed the Committee that it was trying to secure a friendly settlement with the author by offering to pay her financial compensation and to clear her criminal record in respect of the offence that is the subject matter of the communication before the Committee.

Author's comments on the State party's observations

5.1 On 16 October 2015, the author submitted that she was unwilling to accept the settlement that had been offered by the State party, as she would find compensation by the State party to be reasonable if it were as follows: (a) financial compensation for the fine imposed by Utrecht District Court; (b) financial compensation for the damages awarded to the civil party, imposed by Utrecht District Court; (c) removal of all information registered by the police in connection with the case, in accordance with the Police Data Act (*Wet politiegegevens*); (d) removal of all information registered by the judicial authorities in connection with the case, in accordance with the Judicial Information and Criminal Records Act (*Wet justitiële en strafvorderlijke gegevens*); (e) financial compensation for non-material damage, especially concerning the harm to her reputation; (f) financial compensation for legal costs concerning the first instance procedure; (g) financial compensation for legal costs concerning the (leave to) appeal procedure; and (h) financial compensation for legal costs concerning the procedure before the Committee. The author states that the State party was not willing to offer compensation for the items mentioned as (c), (e) and (f). As regards the legal costs mentioned under item (f), the author points out that she has never been given a chance to be acquitted on appeal, despite the Code of Criminal Procedure including a possibility to be fully compensated for such costs after an acquittal on appeal.

5.2 The author also submits that the State party has not yet amended its Code of Criminal Procedure, as recommended in the Committee's Views in *Mennen v. Netherlands* (CCPR/C/99/D/1797/2008).[8]

Additional observations by the State party

6.1 On 11 December 2015, the State party informed the Committee that its efforts to secure a friendly settlement with the author had not been successful, despite the fact that the State party had offered to: (a) reimburse the fine imposed in the domestic procedure; (b) reimburse the damages imposed in the domestic procedure and paid by the author to the

[6] A copy of the letter issued by the secretariat of the European Court of Human Rights on 11 October 2012 in relation to application No. 39456/10 is available on file.

[7] Reference is made to *Mennen v. Netherlands* (CCPR/C/99/D/1797/2008), paras. 8.2–9.

[8] See para. 10.

civil party; (c) compensate for legal costs and expenses regarding the leave to appeal procedure; (d) compensate for legal costs and expenses regarding the procedure before the Committee; (e) compensate for additional costs due to change of counsel by the author; (f) clear the criminal record regarding the offence that is the subject matter of the communication before the Committee; and (g) contrary to what had been claimed by the author, delete all data concerning the offence from the police records.

6.2 The State party notes that it has made considerable efforts to secure a friendly settlement with the author. Since a friendly settlement, by its very nature, includes benefits which exceed the mere interests that prompted the communication, that is, the avoidance of further litigation and of the costs and efforts for all parties concerned, it was unreasonable for the author to expect that all wishes could be fulfilled. The State party, therefore, respectfully requests the Committee to take these considerations into account in any procedural decision that it takes regarding the present communication.

6.3 The State party also submits that a proposal to abolish the system of leave to appeal under section 410 (a) of the Code of Criminal Procedure was under way as part of a wider exercise to modernize the Code. After broad consultations, the Government submitted a final memorandum to the House of Representatives on 30 September 2015 on the basis of which concrete legislative proposals were being drafted. Those proposals would be presented to the House of Representatives in four parts, with the last one expected to be presented in January 2018, to be followed by the Act implementing the changes. The State concludes by stating that it will not make any further observations concerning the present communication and that it will refer to the views of the Committee.

Additional comments by the author

7. On 16 March 2016, the author reiterated her earlier submission of 16 October 2015, containing a list of eight items that she would like to be compensated for by the State party. She adds that the State party has not yet abolished the Code of Criminal Procedure, as recommended by the Committee back in 2010.[9]

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

8.2 In accordance with article 5 (2) (a) of the Optional Protocol, the Committee has ascertained that a similar complaint filed by the author (No. 39456/10) was declared inadmissible by the European Court of Human Rights on 4 October 2012, since the admissibility criteria set out in articles 34 and 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) were not met. The Committee therefore considers that it is not precluded under article 5 (2) (a) of the Optional Protocol from examining the communication.[10]

8.3 The Committee recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5 (2) (b) of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.[11] The Committee notes that it is not disputed that the author has exhausted all available domestic remedies, and therefore considers that that requirement has been met.

8.4 The Committee considers that the author has sufficiently substantiated, for the purposes of admissibility, her claims under articles 2 (3) (a) and 14 (5) of the Covenant.

[9] Ibid.

[10] The State party has not entered a reservation to article 5 (2) (a) of the Optional Protocol.

[11] See, for example, Human Rights Committee, *A.P.A. v. Spain*, communication No. 433/1990, para. 6.2; *P.L. v. Germany* (CCPR/C/79/D/1003/2001), para. 6.5; and *Timmer v. Netherlands* (CCPR/C/111/D/2097/2011), para. 6.3.

Accordingly, it declares the communication admissible and proceeds with its consideration of the merits.

Consideration of the merits

9.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

9.2 The Committee notes the author's allegations that she has been unable to exercise her right to appeal under article 14 (5) of the Covenant in an effective and meaningful way. The Committee also notes that although the State party has not commented on the author's allegations, it did inform the Committee that it had made considerable, albeit unsuccessful, efforts to secure a friendly settlement with the author by offering to pay her financial compensation and to clear her criminal record regarding the offence that is the subject matter of the communication before the Committee.

9.3 The Committee recalls that the right to have one's conviction reviewed requires that the convicted person be entitled to have access to a duly reasoned, written judgment of the trial court, and to other documents, such as trial transcripts, that are necessary to enjoy the effective exercise of the right to appeal.[12] In the absence of a motivated judgment, a trial transcript or even a list of the evidence used, the author was not provided, in the circumstances of the present case, with the materials necessary for the proper preparation of her appeal.

9.4 The Committee notes that the Court of Appeal in Arnhem denied the author's application for leave to appeal, on the grounds that a hearing of her appeal would not be in the interests of the proper administration of justice. The Committee considers that article 14 (5) of the Covenant requires a review by a higher tribunal of a criminal conviction and sentence.[13] Any such review, in the context of a decision regarding a request for leave to appeal, must be examined on its merits — taking into consideration the evidence presented to the first instance judge, as well as the conduct of the trial on the basis of the legal provisions applicable to the case in question.[14]

9.5 The Committee recalls that, under article 2 (3) of the Covenant, States parties must ensure that individuals have accessible, effective and enforceable remedies to uphold Covenant rights. The Committee refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, according to which States parties must establish appropriate judicial and administrative mechanisms for addressing claims of rights violations.[15] In the present case, the information before the Committee indicates that the author did not have access to the remedies that would have allowed her to appeal against the decision of the Court of Appeal in Arnhem not to grant leave to appeal. Consequently, the author was effectively denied the possibility of benefiting from the right guaranteed under article 14 (5) of the Covenant to have her conviction and sentence reviewed by a higher tribunal. Accordingly, in these specific circumstances, the Committee finds that the right to appeal of the author under article 14 (5), read alone and in conjunction with article 2 (3) of the Covenant, has been violated.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it reveal a violation by the State party of article 14 (5), read alone and in conjunction with article 2 (3), of the Covenant.

11. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. The Committee considers that, in the present case, an effective remedy will allow a review of the author's conviction and sentence by a higher tribunal, or the implementation of other appropriate measures capable of removing the adverse effects caused to the author, together with

[12] See Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 49.

[13] See *Mennen v. Netherlands*, para. 8.3; and *Timmer v. Netherlands*, para. 7.3.

[14] Ibid.

[15] See para. 15.

adequate compensation. In this context, the Committee welcomes the fact that the State party has already expressed its readiness to clear the author's criminal record in respect of the offence that is the subject matter of the communication before the Committee, to delete all data concerning the offence from the police records, to reimburse the fine and the damages paid to the civil party which were imposed by Utrecht District Court, and to compensate the author for legal costs and expenses relating to the leave to appeal procedure and the procedure before the Committee, including additional costs occasioned due to the change of counsel by the author. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In this connection, the Committee reiterates that, in accordance with its obligation under article 2 (2) of the Covenant, the State party should bring the relevant legal framework into conformity with the requirements of article 14 (5) of the Covenant.[16]

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the present Views.

[16] See *Mennen v. Netherlands*, para. 10; and *Timmer v. Netherlands*, para. 9.