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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. 3015/2017*, **

Communication submitted by:	R.E.I. (represented by counsel, Willem Hendrik Jebbink)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	22 May 2017 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 21 August 2017 (not issued in document form)
Date of adoption of decision:	4 November 2022
Subject matter:	Retroactive application of legislation amending conditions for early release from prison
Procedural issue:	Inadmissibility – non-exhaustion of domestic remedies; inadmissibility – lack of victim status; inadmissibility – lack of sufficient substantiation
Substantive issues:	Right to equality before courts and to a review of criminal sentence and conviction by a higher tribunal; prohibition of retroactive application of the law; non-discrimination
Articles of the Covenant:	14 (5), 15 (1) and 26
Articles of the Optional Protocol:	1, 2, 3 and 5 (2) (b)

1. The author of the communication is R.E.I., a national of the Netherlands born in Curaçao on 20 February 1962. He claims that the State party has violated his rights under articles 14 (5), 15 (1) and 26 of the Covenant. The Optional Protocol entered into force for the State party on 11 March 1979. The author is represented by counsel.

* Adopted by the Committee at its 136th session (10 October–4 November 2022).

** The following members of the Committee participated in the examination of the 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, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

Facts as submitted by the author

2.1 On 13 June 2003, the author was arrested on suspicion of involvement in a murder and importing drugs. On 8 September 2004, he was convicted by The Hague Court of Appeal of complicity in murder, the import of drugs, depriving a person of liberty and intentionally keeping a person deprived of liberty. He was sentenced to 18 years of imprisonment, the execution of which commenced on 13 June 2003. His appeal in cassation to the Supreme Court was rejected on 13 September 2005.

2.2 At the time the author was sentenced, the Criminal Code of the Netherlands stipulated that convicted persons would be released after having served two thirds of the sentence imposed. The release was unconditional (i.e., without a probation period). Consequently, the author had the expectation, at the time of sentencing, of being released from prison on 13 June 2015, without a probation period.

2.3 On 1 July 2008, the early release system in the Netherlands was replaced by conditional release. The new regulation under the Criminal Code stipulates that conditional release is subject to the general condition that the convicted person does not commit a criminal offence before the end of the probation period.[1] Article IV of the Act that replaced the "automatic" early release system,[2] included transitional provisions according to which the Act would not be applicable to prison sentences imposed before the entry into force of the Act. However, an exception was made for prison sentences imposed before the entry into force of the Act for convicted persons still serving a sentence five years after the entry into force of the Act. Such sentences would subsequently fall under the new system of conditional release, although the sentence had been imposed before the entry into force of the new regulation. When the Act entered into force, it was estimated that 10 per cent of prisoners sentenced before the Act entered into force would be subject to the new regulation. The Council of State of the Netherlands advised against the retroactive effect of the new regulation.

2.4 On 21 March 2015, while on custodial leave from prison, the author was arrested on suspicion of importing drugs into the State party. He was detained on 24 March 2015. Due to the detention, his conditional release was postponed to 9 February 2016. On 22 September 2015, North-Holland District Court convicted the author of being an accomplice in the transport of drugs and sentenced him to a prison term of six years. The author appealed the judgment to the Amsterdam Court of Appeal, which, on 6 July 2016, reduced the sentence to imprisonment of 40 months (i.e., until 16 August 2017).

2.5 On 9 November 2015, relying on the verdict of 22 September 2015, the prosecutor requested that the author be refused early release under the conditional release system. On 12 January 2016, The Hague District Court refused the author's conditional release, as requested by the prosecutor. Under the Criminal Code, this decision is not subject to appeal. This decision meant that, once the author had served the sentence imposed on 22 September 2015, as modified on appeal, the execution of the remaining part of the original sentence of 8 September 2004 by The Hague Court of Appeal – or one third of the 18-year sentence – would be executed next, starting on 16 August 2017. The author is expected to be released in 2023, after having served the remaining six years of the sentence.

Complaint

3.1 The author claims that his rights under article 15 (1) of the Covenant were violated when a heavier penalty than the one applicable at the time of his initial sentencing was imposed on him, as the new legislation on conditional release was applied to his case retroactively. The author's prison sentence, imposed on him in application of the new legislation on conditional release, and handed down by The Hague District Court in its decision of 12 January 2016, amounts in fact to a detention for a period of 18 years. When sentenced in 2004 by The Hague Court of Appeal, the author had every reason to believe that he would be released after 12 years. As a consequence, a heavier penalty has been imposed

[1] Art. 15a.

[2] Act of 6 December 2007 amending the Criminal Code and any other laws related to the change from early release to conditional release (Official Gazette 2007, No. 500).

on the author than the one that was applicable at the time when the criminal offence was committed.

3.2 The author also claims that his rights under article 26 of the Covenant have been violated, as the retrospective effect of the new legislation was only applied to 10 per cent of persons convicted at the time the legislation entered into force. The author further claims that the only reason for the difference in treatment was financial: when the amendments were considered in parliament, it was noted that to apply the new regulations to all sentences imposed before the entry into force of the amendments would require a significant detention capacity to be retained, which was not possible due to financial constraints and the existing pressure on detention capacity.

3.3 The author finally claims that his rights under article 14 (5) of the Covenant have been violated. He states that, at the time of sentencing in 2004, he had every reason to believe that he would be released after 12 years under the then applicable automatic early release system. He submits that the enforcement of the remaining third of his sentence was reasonably unforeseeable in 2004 and that, consequently, the decision by The Hague District Court to refuse him early release should be regarded as a sentence within the meaning of article 14 (5). The author claims that, as this decision was not subject to appeal, his rights under article 14 (5) have been violated.

State party's observations on admissibility and the merits

4.1 On 11 December 2017, the State party submitted its observations on admissibility and the merits of the communication.

4.2 The State party is of the view that the author's claims in the communication are inadmissible on three grounds: non-exhaustion of domestic remedies, pursuant to article 5 (2) (b) of the Optional Protocol; incompatibility *ratione materiae* with the Covenant, pursuant to article 3 of the Optional Protocol; and lack of victim status, pursuant to article 1 of the Optional Protocol. As to the merits, the State party holds that there has been no violation of the provisions of the Covenant.

4.3 The State party recalled the main facts of the case. On 8 September 2004, The Hague Court of Appeal sentenced the author on appeal to 18 years in prison for being a co-perpetrator of the crimes of murder, intentional activity contrary to section 2, subsection 1, A (old) of the Opium Act and intentionally and unlawfully depriving a person of liberty and keeping that person so deprived. On 13 September 2005, when the author's appeal in cassation was dismissed, the judgment convicting him became final. In March 2015, while serving his prison sentence, the author was granted leave. On 21 March 2015, while on leave, the author was arrested on suspicion of the commission of new criminal offences. On 24 March 2015, he was remanded in custody by order of the examining magistrate in respect of these new offences. The author was held in pretrial detention from 21 March 2015 to 22 November 2015, and this had the effect of delaying the enforcement of his original sentence for a period of eight months. For this reason, the original date for his release on parole, 13 June 2015, was moved to 9 February 2016.

4.4 On 22 September 2015, the author was sentenced to six years in prison for the offences he had committed while on leave. The offences included being a co-perpetrator of a deliberate violation of article 2 (A) of the Opium Act, by importing hard drugs. On the basis of this new conviction, the Public Prosecution Service applied to the district court on 9 November 2015, requesting the denial of the author's release on parole. Referring to the conviction of 22 September 2015, the public prosecutor stated that the author had seriously misbehaved after the commencement of the enforcement of his original sentence.

4.5 The subsequent hearing took place in The Hague District Court on 29 December 2015 in the presence of the author and his authorized representative. On 12 January 2016, The Hague District Court granted the application by the Public Prosecution Service. The District Court considered, taking into account the conviction of 22 September 2015, that the author had seriously misbehaved after the commencement of the enforcement of the sentence of 8 September 2004, further to article 15d (1) (b) (1) of the Criminal Code. Pursuant to article 15f (5) of the Criminal Code, there are no legal remedies available against this decision. The author lodged an appeal against his conviction of 22 September 2015. The Amsterdam Court

of Appeal rendered judgment on 6 July 2016. It partially acquitted the author, but convicted him of importing approximately six kilograms of cocaine, and sentenced him to a prison term of 40 months.

4.6 The State party further submitted observations on the legal framework for release on parole that has been applicable since 1 July 2008, as the author complains that he has been disadvantaged by the introduction of this new framework. The State party explained the differences between the current system of release on parole, and the previous system of early release, and the transitional provisions.

4.7 As regards the current framework for release on parole, article 15 (2) of the Criminal Code sets out that any person upon whom a determinate custodial sentence of more than two years has been imposed is granted release on parole when at least two thirds of the sentence has been served. The Public Prosecution Service may apply to the district court, requesting that release on parole be denied. The application must be based on one of the grounds laid down in article 15d (1) of the Criminal Code.[3] The decision of 12 January 2016 by The Hague District Court, denying the author's release on parole, was based on article 15d (1) (b) (1) of the Criminal Code. The system of release on parole came into effect on 1 July 2008. This amendment took place after the author's conviction of 8 September 2004. Under the current system, early release of convicted persons with custodial sentences has become release on parole, which is subject to conditions. This means that when a prisoner is released after serving two thirds of their custodial sentence, conditions may be attached to that release. Consequently, if the conditions are not met, the person's release on parole may be rescinded, and the parolee will be required to serve the remainder of the sentence imposed by the court. Before this legislative amendment, the Netherlands had a system of early release. Under that system, no conditions could be attached to the granting of early release. Once early release had been granted, it could not be rescinded. Nevertheless, even under the old system of early release, the Criminal Code contained a provision comparable to the current article 15d (1) (b) (l).[4] The Public Prosecution Service's instructions on applications for or the denial of early release (2003) also show that an application requesting the postponement or denial of early release would be submitted in cases of serious misbehaviour.[5] It was possible under the old system of early release, and it remains possible under the current system of release on parole, to deny early release or release on parole, respectively, in cases of serious misbehaviour after the commencement of the enforcement of the sentence.[6] The legislative amendment that came into force on 1 July 2008 made it possible to attach conditions to release on parole. The point at which an offender can be granted early release or release on parole is no different as a result of this amendment. For a custodial sentence of more than two years, that point has always been after the offender has served two thirds of the sentence. Nor is there any difference in the scope for postponing or denying early release or release on parole in such a way as to be relevant for the author. As explained, in cases of serious misbehaviour, such as the commission of a serious offence, it was also possible prior to 1 July 2008 to postpone or deny early release.

4.8 As regards transitional provisions, article VI of the Act of 6 December 2007 provided that the old system of early release would remain applicable for five years in the case of convicted persons serving custodial sentences handed down prior to 1 July 2008. On 1 July 2013, this transitional period ended, and the rules under the old system are no longer applied. The author's sentence of 18 years was handed down on 8 September 2004. He is therefore

[3] That provision reads: "Release on parole may be postponed or denied in cases where ... it has been shown that the convicted offender seriously misbehaved after the commencement of the enforcement of his sentence, which serious misbehaviour can be evidenced by ... serious suspicions of or a conviction for a serious offence".

[4] According to article 15a (1) of the former provision in the Criminal Code on early release: "Early release may be postponed or denied in cases where ... the convicted person is convicted by final judgment of a serious offence ... for which, pursuant to article 67, paragraph 1 of the Code of Criminal Procedure, pretrial detention is permitted and which was committed after the commencement of his sentence [or] ... it has been established that the convicted person has otherwise misbehaved extremely seriously after the commencement of his sentence".

[5] Official Gazette 2003, No. 60.

[6] Parliamentary Papers, House of Representatives, 2005–2006, 30 513, No. 3, pp. 13 and 27.

not exempt from the immediate application of the current system of release on parole. Such a transitional provision was introduced because it was not possible for the bodies responsible for reintroducing the system of release on parole to switch directly from the old system to the new. A transitional period of five years was decided on at the time. The State party emphasizes that the legislative amendment has no retroactive effect whatsoever. Contrary to what the author suggests in his initial communication, the Council of State did not use the term *terugvverkende kracht* (retroactive effect) in its advisory opinion on the amendment.

4.9 The courts of the Netherlands have assessed the current system of release on parole and the transitional provisions, and found them to be in compliance with the relevant human rights standards, as laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).[7]

4.10 The State party observes that, when the public prosecutor asked the court to deny release on parole, the author did not complain to The Hague District Court about the alleged violations of the Covenant that he now complains of to the Committee. The author did not argue before the court why he believed the denial of his release on parole was contrary to the principles of legality and non-discrimination. Accordingly, the national court was not afforded the opportunity to address the alleged violations of the Covenant. The State party is of the opinion that the communication is inadmissible, as the author failed to exhaust all domestic legal remedies, pursuant to article 5 (2) (b) of the Optional Protocol.

4.11 The State party also observes that the author's claim that the decision of The Hague District Court of 12 January 2016 to deny him release on parole was contrary to article 15 (1) of the Covenant is incompatible with that provision. According to the author, the decision served to impose a heavier penalty than the one applicable at the time the offence was committed. He claims he had every reason to believe that, after 12 years in prison, he would be granted early release.

4.12 In the State party's view, this claim does not fall within the scope of article 15 (1) of the Covenant. By judgment of 8 September 2004, the author was sentenced to 18 years in prison. The District Court's decision of 12 January 2016 to deny the author release on parole did not amount to the imposition of a penalty, but was purely a decision concerning the continuation and enforcement of the original penalty.[8] Such a decision therefore does not qualify as the imposition of a heavier penalty within the meaning of article 15 (1) of the Covenant. That such a decision does not constitute a penalty is also made clear by the purpose of the system. The legislative history shows that the decisive issue, when determining

[7] The Hague District Court, in its summary judgment of 30 July 2014, ECLI:NL:RBDHA:2014:9411, para. 3.4, reasoned that:

> One element of the principle of legality enshrined in article 7 of the [European Convention on Human Rights] is a prohibition on the imposition of a heavier penalty than the one that was applicable at the time the criminal offence was committed. This implies that a sentence may not be increased with retroactive effect. When applying this principle, a distinction is made between the penalty imposed and the manner in which the penalty that has been imposed is enforced. According to the established case law of the European Court of Human Rights, as adduced by both parties, rules relating to such enforcement, including rules relating to early release or release on parole, do not in principle fall within the scope of article 7 of the European Convention on Human Rights. In *Uttley v. the United Kingdom* ... for example, it was established that the changes in the regime for early release (which were disadvantageous to the applicant) did not form part of the "penalty" within the meaning of article 7 and therefore no heavier penalty was applied than the one applicable when the offences were committed. From the above, it may be concluded that the manner of enforcement has no bearing on the penalty imposed by the court. This was also the point of departure with respect to the establishment of the current system of release on parole and the transitional provisions, as well as in the case law adduced by the parties. This means that, in principle, it must be assumed that the application of the current system of release on parole to prisoners sentenced before its entry into force is not incompatible with the principle of legality.

See also para. 3.7; and The Hague Court of Appeal, ECLI:NL:GHDHA:2014:3259, 10 October 2014, para. 5.

[8] See *A.R.S. v. Canada*, communication No. 91/1981, para. 5.3, in which the Committee considers that a system of "mandatory supervision" does not qualify as a penalty within the meaning of the Covenant.

whether release on parole can be postponed or denied, is whether the risk of recidivism with regard to (serious) violent offences can be minimized sufficiently.[9] A decision to deny an offender release on parole is therefore aimed at preventing repeat offences as far as possible, in the interests of a safer society; it is explicitly not aimed at punishing an offender more severely.

4.13 The position of the State party is also in keeping with the interpretation of article 7 of the European Convention on Human Rights given by the European Court of Human Rights, which held that: "where the nature and purpose of a measure relate to the remission of a sentence or a change in a regime for early release, this does not form part of the 'penalty' within the meaning of article 7".[10] Only decisions concerning the enforcement of a sentence that amount to "the redefinition or modification of the scope of the penalty imposed"[11] could potentially fall within the scope of article 7 of the European Convention on Human Rights. As explained above, this is not the case in the present communication.

4.14 Additionally, it cannot be concluded that the original sentence has been made more severe. The author seems to imply that under the old system of early release, a prison sentence of 18 years would have been changed into a sentence of 12 years. That is absolutely not the case. Under the old system, sentences imposed remained valid just as they do now under the current system. As explained previously, it was also possible under the old system to deny early release, for example in cases of serious misbehaviour. Therefore, the sentence imposed previously has in no way been made more severe. The State party emphasized that the author's contention that he had every reason to believe that he would be released after 12 years of detention does not accurately reflect the actual situation. At the time of his conviction in 2004 – and at the time he committed the new offences – it was absolutely clear that any form of early release or release on parole would depend on the convicted person's behaviour. Both in 2004 and in 2015, serious misbehaviour would prevent an offender being released early or released on parole. The author was therefore aware, or should have been aware, of the risk he was taking when he committed new offences while on leave. The consequences of the author's actions were to be expected. The State party therefore considers the expectations described by the author incorrect and gives no credence to them. In view of the foregoing, the State party is of the opinion that the author's claim of an alleged violation of article 15 (1) of the Covenant should be declared inadmissible *ratione materiae*.

4.15 The State party further argues the incompatibility of the author's allegations with article 14 (5) of the Covenant, as the court conducting the review must be able to examine the facts of the case, including the incriminating evidence.[12] The author claims that there was no possibility of appeal against the district court's decision of 12 January 2016 to deny his release on parole; however, in the State party's view, this communication does not fall within the scope of article 14 (5) of the Covenant as the right to appeal relates to a criminal charge.[13] Article 14 (5) provides for the right to have one's conviction and sentence reviewed by a higher tribunal. As explained above, the district court's decision of 12 January 2016 to deny the author's release on parole constituted neither a conviction nor the imposition of a sentence. This part of the communication is therefore incompatible *ratione materiae* with the article invoked and should be declared inadmissible pursuant to article 3 of the Optional Protocol.

4.16 As regards the author's claim under article 26 of the Covenant about the application "with retrospective effect" of the new system of release on parole to a small group of convicted persons, the State party argues that the author's victim status under article 26 of the Covenant has not been established. It disputes the author's presentation of the national statutory provisions. The author believes he is a victim of the legislative amendment that entered into force on 1 July 2008 and the associated transitional provisions. Since he was not exempted from the applicability of the current system of release on parole, the author claims that he is a victim of discrimination prohibited by article 26 of the Covenant. However, this

[9] Parliamentary Papers, House of Representatives, 2005–2006, 30 513, No. 3, p. 14.

[10] *Del Río Prada v. Spain*, application No. 42750/09, judgment, 21 October 2013, para. 83. See also *Uttley v. United Kingdom*, application No. 936946/03, decision, 29 November 2005.

[11] *Del Río Prada v. Spain*, para. 89.

[12] See, e.g., *Uclés v. Spain* (CCPR/C/96/D/1364/2005), para. 11.3.

[13] Human Rights Committee, *I.P. v. Finland*, communication No. 450/91, para. 6.2.

is not the case. Under the old system, the author's serious misbehaviour would have made him ineligible for early release. Equally, under the current system, the author is ineligible for release on parole. The State party fails to see how there is any question of discrimination in this case. In paragraph 7 of its general comment No. 18 (1989), the Committee explains that the term "discrimination" as used in the Covenant should be understood to imply any "distinction, exclusion, restriction or preference which is based on any ground ... or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms". In the State party's view, the author is not a victim in the context of article 26 of the Covenant. His complaint in this regard is not sufficiently substantiated for the purpose of admissibility.

4.17 When the current system entered into force, the transitional provisions stipulated that the old system would remain applicable for five years to persons serving custodial sentences handed down prior to 1 July 2008. Since 1 July 2013, the current system has applied to everyone, including persons who were convicted prior to 1 July 2008. This means that, for a small group of convicted persons (i.e., those who received a multi-year custodial sentence before 1 July 2008 that they were still serving five years after the entry into force of the current system), the old system applied at the time of their conviction and the current system will apply at the time of their potential release on parole. The transitional provisions depart from the standard practice of implementing with immediate effect legislative amendments relating to rules of criminal procedure and rules on the enforcement of sentences. When changes to the enforcement of sentences have immediate effect, they are applied from the date on which the legislative amendment entered into force. Changes (both to rules of criminal procedure and to the enforcement of sentences) therefore also apply in principle to persons who have committed or been convicted of criminal offences prior to the date of entry into force. However, for reasons of practicability, it was decided to depart from the principle of immediate effect in the implementation of the current system. As the State party has already explained, this measure constitutes neither a conviction nor the imposition of a penalty. The changes to the system therefore have no consequences with respect to the sentence already imposed. The author has not been affected by the legislative amendment of 2007.

4.18 As explained above, the point at which convicted persons are granted release on parole under the legislative amendment is no different from the moment at which they would have been granted early release under the old system. Nor does the scope for postponing or denying release on parole under the current system differ in any way from the scope for postponing or denying early release under the old system. Even prior to 1 July 2008, early release could be postponed or denied if a convicted person seriously misbehaved – for example, by committing a new serious offence, as occurred in the present case. Therefore, nothing has changed for the author in a material sense. The imposition of a determinate custodial sentence does not – and has never – entailed the absolute certainty of or entitlement to a shorter term of imprisonment in practice. Even prior to 2008, convicted persons could not always assume that the final third of their sentences would not be enforced, regardless of the circumstances.

4.19 Since the point at which the author could have been eligible for early release, had the old system remained in place, falls after 1 July 2013, the author falls within the scope of the new (current) system of release on parole. The crux of the legislative amendment that came into force on 1 July 2008 is that, in addition to the possibility of denying release at the relevant point before the end of the sentence, it is also possible to attach conditions to release on parole. The author was not released from prison early and therefore no conditions were attached to his release on parole. Instead, the author's release on parole was denied by the court, because he had again committed a serious criminal offence. As illustrated, this possibility existed also under the old system of early release. The serious misbehaviour of the author himself was the reason he was not granted release on parole. This assessment would have been no different under the old system. For the foregoing reasons, the author is not a victim under article 26 of the Covenant. In any event, he has failed to substantiate in what way the denial of release on parole would constitute discrimination. According to the Committee's case law, a person can only claim to be a victim, in the sense of article 1 of the Optional Protocol, if he

or she is actually affected by the act that is at issue.[14] In the present communication, the author challenges a law in the abstract, without explaining why he should be considered a victim of the change in the law. For this reason, this part of the communication is inadmissible in accordance with article 1 of the Optional Protocol.[15]

4.20 The State party concludes that the present communication should be declared inadmissible under articles 1, 3 and 5 (2) (b) of the Optional Protocol. Should the Committee not accept this view, the State party holds that there has been no violation of articles 14 (5), 15 (1) or 26 of the Covenant, and that the communication should be dismissed as unfounded in its entirety.

Author's comments on the State party's observations on admissibility and the merits

5.1 On 3 February 2021, the author submitted his comments on the State party's observations of 11 December 2017.

5.2 While the State party is of the view that the author did not exhaust all domestic remedies since he did not complain to The Hague District Court about the violations of the Covenant, the author argues that there were no further domestic remedies available. The communication should thus be declared admissible.

5.3 The author admits that he did not claim a violation of the Covenant during the procedure before The Hague District Court. However, multiple courts in the Netherlands, including The Hague District Court, have already held that the new system of conditional release, introduced on 1 July 2008, did not infringe article 7 of the European Convention on Human Rights, which, more or less, guarantees the same fundamental rights as set out in article 15 of the Covenant.[16]

5.4 In these circumstances, it cannot be held that the procedure before The Hague District Court represented an effective remedy in the case of the author, at least concerning the violation of article 15 of the Covenant.

5.5 Finally, it was not possible for the author to complain to The Hague District Court about the violation of article 14 (5) of the Covenant, since this Court could not remedy a lack of a review by a higher tribunal. The author maintains the claims presented in his initial communication of 22 May 2017.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee recalls its jurisprudence that although there is no obligation to exhaust domestic remedies if they have no chance of being successful, authors of communications must exercise due diligence in the pursuit of available remedies and that mere doubts or assumptions about their effectiveness do not absolve the authors from exhausting them.[17] The

[14] *Aumeeruddy-Cziffra et al. v. Mauritius*, communication No. 35/1978, para. 9.2.

[15] See, e.g., *A.R.S. v. Canada*, para. 5.2.

[16] For example, Utrecht District Court, ECLI:NL:RBUTR:2012:BY6268, 13 December 2012; Oost-Brabant District Court, ECLI:NL:RBOBR:2013:6731, 29 November 2013; The Hague District Court, ECLI:NL:RBDHA:2014:9411, 30 July 2014; and Zeeland-West-Brabant District Court, ECLI:NL:RBZWB:2014:7176, 22 October 2014.

[17] See, inter alia, *X. et al. v. Greece* (CCPR/C/126/D/2701/2015), para. 8.5; *Vargay v. Canada* (CCPR/C/96/D/1639/2007), para. 7.3; *V.S. v. New Zealand* (CCPR/C/115/D/2072/2011), para. 6.3; and *García Perea and García Perea v. Spain* (CCPR/C/95/D/1511/2006), para. 6.2. See also *B.P. and P.B. v. the Netherlands* (CCPR/C/128/D/2974/2017), para. 9.3.

Committee notes the State party's position that the author has not exhausted domestic remedies, as required by article 5 (2) (b) of the Optional Protocol. It also notes the State party's position that under the legal framework for release on parole, applicable since 1 July 2008, the author was entitled to contest the allegedly heavier penalty imposed on him than the one applicable at the time of his initial sentencing in 2004, and the retroactive application of the legislation on conditional release to his case, but he has not exhausted domestic remedies in that respect. The State party argues that, when the public prosecutor requested the court to deny the author's release on parole, the author did not complain to The Hague District Court, as admitted by the author, about the alleged violations of the Covenant he has complained of to the Committee. The Committee further notes the State party's assertion that the author did not argue before the court why he believed the denial of his release on parole was contrary to the principles of legality and non-discrimination, and that the national court was not afforded the opportunity to address the alleged violations of the Covenant. In that context, the Committee notes the author's claim that no further domestic remedies were available, since multiple courts in the Netherlands, including The Hague District Court, held that the new system of conditional release did not infringe the principles of legality. The Committee further observes the State party's claim that the District Court's decision of 12 January 2016 to deny the author release on parole did not amount to the imposition of a penalty, but was purely a decision concerning the continuation and enforcement of the original penalty. In the light of the above, the Committee cannot conclude, taking into account the existing domestic jurisprudence on conditional release, that domestic remedies would not be available or effective in the author's case. Given the absence of the author's complaint to The Hague District Court to challenge the public prosecutor's request to deny his release on parole, the Committee considers that it is precluded from examining the author's claims under article 15 (1) of the Covenant by the requirements of article 5 (2) (b) of the Optional Protocol.

6.4 In the light of the above finding, the Committee deems the author's claims under article 15 (1) of the Covenant to be inadmissible due to non-exhaustion of available domestic remedies and will not consider whether they have been sufficiently substantiated or admissible *ratione materiae*.

6.5 The Committee takes note of the author's claim under article 14 (5) of the Covenant that his right to have access to a court and to an effective review by a higher tribunal were violated because, at the time of sentencing in 2004, he had every reason to believe that he would be released after 12 years under the then applicable automatic early release system. The author claims in that context that there was no possibility of appeal against the District Court's decision of 12 January 2016 to deny his release on parole. The Committee also notes the State party's argument that the communication does not fall within the scope of article 14 (5) of the Covenant as the right to appeal relates to a criminal charge.[18] As the State party explained above, the District Court's decision of 12 January 2016 to deny the author's release on parole constituted neither a conviction nor the imposition of a sentence. Accordingly, the Committee considers this part of the communication to be incompatible *ratione materiae* with article 14 (5) and declares it to be inadmissible pursuant to article 3 of the Optional Protocol.

6.6 As regards the author's claim under article 26 of the Covenant about the application "with retrospective effect" (since 1 July 2008) of the new system of release on parole to a small group of convicted persons, the Committee notes the State party's argument that the author's victim status under article 26 of the Covenant has not been established. Since he was not exempted from the applicability of the current system of release on parole, the author claims that he is a victim of discrimination as defined in article 26 of the Covenant and further elaborated in the Committee's general comment No. 18 (1989). However, the State party has observed that under the old system the author's serious misbehaviour would have made him ineligible for early release. Equally, under the current system, the author is ineligible for release on parole. The Committee also notes the State party's claim that any discriminatory treatment of the author has not been substantiated.[19] In the circumstances of the present case, the Committee considers that the author has not demonstrated that he is a victim in the context

[18] *I.P. v. Finland*, para. 6.2.

[19] See, e.g., *G.E. v. the Netherlands* (CCPR/C/118/D/2299/2013), para. 11.6.

of article 26 of the Covenant because he has not demonstrated that he has suffered any distinction or disadvantage that would be unreasonable or not objective. His complaint in this regard is insufficiently substantiated for the purpose of admissibility. Therefore, the Committee considers this part of the communication to be inadmissible, pursuant to articles 1 and 2 of the Optional Protocol.

6.7 The Committee notes that most of the author's claims relate to the interpretation and application of domestic law and practice by the courts of the State party under articles 14 and 15 of the Covenant. In that context, the State party provided lengthy explanations that the author has not received a new conviction for the same crime, nor a new penalty for the first crime committed. The Committee recalls that it is generally for the courts of States parties to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.[20] In the light of the above, the Committee is not in a position to conclude, on the basis of the materials at its disposal, that in deciding the author's case the domestic courts acted in a clearly arbitrary or manifestly erroneous manner or that their decisions amounted to a denial of justice.

7. Accordingly, the Committee considers that the author has not exhausted all available domestic remedies and that the communication is insufficiently substantiated for the purposes of admissibility and declares it inadmissible under articles 1, 2, 3 and 5 (2) (b) of the Optional Protocol.

8. The Committee therefore decides:

(a) That the communication is inadmissible under articles 1, 2, 3 and 5 (2) (b) of the Optional Protocol;

(b) That the present decision will be communicated to the State party and to the author.

[20] General comment No. 32 (2007) para. 26. See also *Riedl-Riedenstein et al. v. Germany* (CCPR/C/82/D/1188/2003), para. 7.3; *Schedko v. Belarus* (CCPR/C/77/D/886/1999), para. 9.3; *Arenz et al. v. Germany* (CCPR/C/80/D/1138/2002), para. 8.6; and *M.S. v. the Netherlands* (CCPR/C/127/D/2739/2016), para. 6.6.