



## 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. 3052/2017<sup>\*,\*\*</sup>

<i>Communication submitted by:</i>	A.G. (represented by counsel, J. Bravo Mougán)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Netherlands
<i>Date of communication:</i>	31 October 2017 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 23 November 2017 (not issued in document form)
<i>Date of adoption of decision:</i>	6 November 2020
<i>Subject matter:</i>	Forced labour
<i>Procedural issue:</i>	Insufficient substantiation of claims
<i>Substantive issues:</i>	Right to an effective remedy; protection against forced labour and servitude
<i>Articles of the Covenant:</i>	2 (3) read in conjunction with 8
<i>Article of the Optional Protocol:</i>	2

\* Adopted by the Committee at its 130th session (12 October–6 November 2020).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Furuya Shuichi, Christoph Heyns, Bamariam Koita, Marcia V.J. Kran, David Moore, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.



1.1 The author of the communication is A.G., a citizen of Morocco born in 1962. She claims to be a victim of a violation by the Netherlands of her rights under article 2 (3), read in conjunction with article 8, of the Covenant. The author is represented by counsel.

1.2 On 23 November 2017, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided not to issue a request for interim measures under rule 94 of the Committee's rules of procedure.

### **Facts as submitted by the author**

2.1 The author was born on 27 April 1962 in Morocco and currently lives in Amsterdam, the Netherlands. The author grew up in Morocco in a very poor family. She received no education and worked as a servant, first in Saudi Arabia, and later in Morocco when she worked for a woman named Naima, a Dutch-Moroccan national. In 2002, Naima asked the author to come and work for her in the Netherlands. After the author agreed, Naima tried to smuggle her illegally in her car, but was caught at the border. In 2003, Naima again hid the author in her car and this time managed to bring her illegally to the Netherlands. When the author entered the Netherlands, she had her passport but no valid visa.

2.2 In the Netherlands, the author lived with her employer, Naima. The author worked in the household for eight years, taking care of Naima's children. Apart from board and lodging, the author received no salary for her work. The author had to be available for Naima 24 hours a day and 7 days a week. She did not have fixed working hours and was treated badly. For example, Naima would sometimes send the author outside in the middle of the night without a coat, or she would verbally humiliate her.

2.3 Naima had promised that she would seek and obtain a residence permit for the author, but this never happened. Instead, Naima threatened the author that she would be arrested by the police if she were to leave. The author was never paid, except for a couple of times when she was given around 50 euros. Furthermore, the author did not receive the medical care she needed for her diabetes, and Naima did not arrange health insurance for her despite knowing about her medical condition. In 2010, after having worked for Naima for about eight years, the author left the house when Naima was at work and went into hiding with another family, where she also worked in the household.<sup>1</sup>

2.4 On 8 December 2015, the author reported to the police the crime of human trafficking, against Naima, under article 273f of the Criminal Code.<sup>2</sup> In a letter dated 11 November 2016, the Public Prosecutor decided to dismiss the case, because the official report of the crime did not show any signs of employment exploitation that warranted a criminal investigation – the author had a valid passport, her illegal status did not prevent her from doing things that she wanted to do and she had managed to survive for five years since leaving Naima. Furthermore, in the opinion of the Public Prosecutor, the tasks that the author had to carry out were not heavy, dirty or too long, and the author received board and lodging, medical care and a telephone. Therefore, according to the Public Prosecutor, she was not being forced to work or perform services, nor was she in any other way exploited as defined by article 273f of the Criminal Code. The Public Prosecutor also took into account that the author did not report the crime until five years after it happened, when she wanted to stay in the Netherlands and her further residence in the Netherlands depended on her reporting the crime.

2.5 On 2 March 2017, the author lodged a complaint with the Court of Appeal for non-prosecution of an offence. In her complaint, the author, referring to law and jurisdiction, pointed out that her situation contained all the elements of exploitation, and that the Public Prosecutor had provided insufficient grounds for its conclusion of lack of exploitation as defined in article 273f of Criminal Code.

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<sup>1</sup> The author does not give further information on this.

<sup>2</sup> Article 273f (1) reads as follows: "Anyone who with the intention of exploiting a person or removing a person's organs, recruits, transports, transfers, accommodates or shelters that person – including exchanging or transferring control over that person – by means of duress, violence or another hostile act, or the threat of violence or another hostile act, or by means of extortion, fraud, deception or the abuse of power arising from specific circumstances, or by means of the abuse of a position of vulnerability, or by giving or receiving payments or advantages in order to obtain the consent of a person having control over that person ... shall be guilty of human trafficking and as such shall be liable to a term of imprisonment not exceeding eight years or a fine of the fifth category".

2.6 At the request of the Court of Appeal, the complaint was addressed by the Advocate General, who, in a letter dated 24 April 2017, recognized that the author had worked over a long period of time, for long hours, and had not been remunerated in a proper manner. However, the Advocate General concluded that this did not suffice to consider that the working conditions constituted exploitation as defined in article 273f of Criminal Code, as the author's work consisted of "normal activities performed by lots of Dutch women working part- or full-time". The Advocate General also stated that the author had possession over her passport, had the freedom to leave the house and did not have to work under unhealthy conditions.

2.7 On 27 June 2017, the author again appealed to the Court of Appeal, submitting that the Advocate General had wrongfully concluded that her situation did not constitute exploitation, servitude or forced labour. She added that although the Dutch authorities conducted an investigation, it was inadequate. She concluded that the Government did not meet its positive obligation to respect and ensure her rights as a victim and did not take the necessary steps to adopt necessary measures to protect her rights. In its decision dated 12 July 2017, the Court of Appeal confirmed the decision of the Public Prosecutor.

### Complaint

3.1 The author claims that the Netherlands violated her rights under article 8 of the Covenant because her situation constitutes exploitation, servitude and/or forced labour, and that the legal and administrative procedures applied were inconsistent with the guarantees set forth in article 2 (3) of the Covenant.

3.2 The author states that her situation falls within the scope of article 8 of the Covenant, as human trafficking usually refers to the process through which individuals are placed or maintained in an exploitative situation for economic gain.<sup>3</sup> The author also points out that the Netherlands has ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, on 27 July 2005.<sup>4</sup> She refers to the jurisprudence of the European Court of Human Rights<sup>5</sup> and submits that she was a victim of exploitation, servitude and/or forced labour. She stresses that all four elements of article 273f of the Criminal Code are met: (a) the act, as she was taken by car and entered the Netherlands illegally; (b) the means, as she had no legal status in the Netherlands, no command of the language and no knowledge of the country, and she was thus subjected to threats, faced hostile acts, including acts of violence, was a victim of abuse of power and received no salary; (c) the intent, as the author's employer was fully aware of the author's situation of vulnerability and of the fact that she fully depended on her; and (d) the objective, which includes the nature and duration of her work and the economic advantage of her employer.

3.3 Thus, the author states that the Public Prosecutor failed to make a valid assessment of her case in light of all the circumstances. She refers to domestic jurisprudence,<sup>6</sup> to a report on her situation by a local organization called FairWork<sup>7</sup> and to the International Labour

<sup>3</sup> The author refers to Office of the United Nations High Commissioner for Human Rights (OHCHR) factsheet No. 36, entitled "Human rights and trafficking", available at [www.ohchr.org/Documents/Publications/FS36\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS36_en.pdf).

<sup>4</sup> The author refers particularly to art. 3 (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, in which it is stated that trafficking in persons "shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

<sup>5</sup> See the following European Court of Human Rights cases: *Rantsev v. Cyprus and Russia* (application No. 25965/04), judgment of 7 January 2010, para. 282; *Siliadin v. France* (application No. 73316/01), judgment of 26 October 2005, paras. 126–127; and *C.N. v. the United Kingdom* (application No. 4239/08), judgment of 13 November 2012, para. 80.

<sup>6</sup> The Hague District Court, *Mehak* case, ECLI:NL:RBSGR:2007:BC1195, judgment of 14 December 2007. In this case, the court ruled that the fact that the victims were grateful to their employers did not detract from the impossibility of escaping, as they were fully dependent on the employers.

<sup>7</sup> The author provides a report by the organization FairWork, dated 28 February 2017.

Organization (ILO)<sup>8</sup> to argue that her situation meets the indicators of exploitation constituting servitude and/or forced labour, notably the abuse of vulnerability, deception, restriction of movement, isolation, physical neglect, intimidation and threat, withholding of wages, debt bondage, abusive working and living conditions, and excessive overtime.

3.4 Even though the authorities opened an investigation, the author states that it was inadequate, as the Public Prosecutor provided insufficient grounds for concluding that her case did not constitute exploitation as defined in article 273f (1) of the Criminal Code and article 8 of the Covenant. She argues that article 2 (3) of the Covenant entails a procedural duty on the part of States, which obliges States to criminalize and prosecute effectively any person who maintains another person in a situation of slavery, servitude or forced or compulsory labour and which requires States to put in place a legislative and administrative framework to prohibit and punish such acts. Referring to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children<sup>9</sup> and to the jurisprudence of the European Court of Human Rights,<sup>10</sup> she argues that the State party did not meet its positive obligation to investigate the labour exploitation and that her case was wrongfully dismissed.

3.5 After she reported her case to the police, the author was provided with accommodation and medical assistance. However, since her case was closed in 2016, all protection and care has been terminated. The author maintains that the Netherlands remains responsible for providing her with protection and support after the criminal proceedings, which is why she had requested interim measures.<sup>11</sup>

#### **State party's observations on admissibility and the merits**

4.1 On 23 May 2018, the State party submitted its observations on admissibility and the merits. The State party considers that the communication is unfounded and should be declared inadmissible.

4.2 The State party recalls the main facts described in the communication, stating that on 14 September 2015 an Amsterdam unit of the police force held an initial interview with the author to establish whether she may have been a victim of human trafficking, an offence which is punishable under article 273f of the Criminal Code. Because there were indications of possible human trafficking for the purpose of labour exploitation, the author was offered temporary residence on humanitarian grounds in accordance with part B8 of the Aliens Act Implementation Guidelines (the B8 procedure). On this basis, the author was given three months to lodge a criminal complaint and was granted lawful residence in the Netherlands for this period.

4.3 The State party explains that on 8 December 2015 the author lodged a criminal complaint for human trafficking. In her complaint, the author stated that she had been able to escape from this situation in 2010. After her escape, she stayed in various places in the Netherlands. She did not report her situation to the authorities until 2015. The authorities decided ex officio to look into the criminal complaint and granted her a residence permit subject to the "temporary humanitarian grounds" restriction, for a period of one year, starting on 8 December 2015, under the scheme for victims and witnesses who file criminal complaints of human trafficking, as referred to in article 3.45 (1) (a) of the Aliens Act and part B8/3 of the Aliens Act Implementation Guidelines.

4.4 On 11 November 2016, the Public Prosecutor decided not to institute criminal proceedings in response to the author's criminal complaint. The Public Prosecutor was not convinced that the author's case had involved forced labour as defined in article 273f of the Criminal Code; this decision was upheld by the Court of Appeal of The Hague in its ruling of 12 July 2017. On the basis of the available evidence, the Court of Appeal concluded that

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<sup>8</sup> ILO Special Action Programme to Combat Forced Labour, "Indicators of forced labour", available at [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_203832.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_203832.pdf).

<sup>9</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, preamble and art. 5.

<sup>10</sup> See *C.N. v. The United Kingdom*, para. 76; and *Rantsev v. Cyprus and Russia*, para. 285.

<sup>11</sup> See para. 1.2 above (in which it is noted that interim measures were denied).

there had been no forced labour or rendering of services within the meaning of article 273f of the Criminal Code. The State party notes that all appeals by the author against the refusals of the Public Prosecutor's Office to open a criminal case have been considered and upheld by the respective courts and considers that the author has had access to effective domestic legal remedies. With respect to the economic benefit gained by the employer, it was acknowledged in the domestic proceedings that the employer had enjoyed a substantial financial benefit from the author's work. During those proceedings, the author was made aware of the possibility of recovering any unpaid wages through civil proceedings against the employer.

4.5 On 14 September 2016, the author applied for renewal of her residence permit. On 23 November 2016, the author was informed that the Minister for Migration intended to revoke her residence permit with retroactive effect from 11 November 2016, and to deny her application for a renewal of that residence permit, on the grounds that the Public Prosecutor had decided not to institute criminal proceedings in response to the author's criminal complaint concerning human trafficking.

4.6 On 17 January 2017, the author submitted her response to this notification of intent, as well as an application for her residence permit to be amended to read "non-temporary humanitarian grounds" within the meaning of article 3.51 (1) (k) of the Aliens Act. On 24 February 2017, the author's residence permit was revoked with retroactive effect from 11 November 2016, and the application for renewal and amendment was denied. On 16 March 2017, the author lodged a notice of objection to the decision of 24 February 2017, which was declared unfounded in a decision dated 9 October 2017. On 26 October 2017, the author appealed the decision to the district court, which considered her application at a hearing. On 28 February 2018, the district court declared the application for judicial review unfounded. On 28 March 2018, the author lodged an appeal with the Administrative Jurisdiction Division, which is still pending.

4.7 The State party recalls the admissibility criteria set out in articles 1, 2, 3 and 5 of the Optional Protocol and adds that if the Committee is competent to consider possible violations of the rights guaranteed by the Covenant, it does not however operate as an appellate court or a fourth instance court. The State party also considers that according to the Committee's established case law, assessing facts and evidence is a matter for domestic courts, not for the Committee.<sup>12</sup> The national authorities are better placed to establish and consider the specific circumstances of a case than the Committee and it is not for the Committee to re-evaluate facts that have been considered by the domestic courts.

4.8 If the Committee were nevertheless to decide that the author's communication was admissible, the State party considers that the communication is unfounded. The State party notes that the author argues that she was a victim of servitude or forced labour in violation of article 8 of the Covenant. In that regard, it recalls that human trafficking was made a criminal offence in article 273f of the Criminal Code, in compliance with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and with the case law of the European Court of Human Rights, and that the domestic procedure for lodging a criminal complaint and for prosecuting a case of human trafficking has been designed with due care. In doing so, the State party considers that it has fulfilled its positive obligations to combat labour exploitation of vulnerable individuals by private parties.

4.9 The State party recalls that the situation of the author was assessed by a specialized Public Prosecutor within the meaning of article 273f of the Criminal Code, and that the Public Prosecutor concluded that the circumstances of the case did not suffice to give rise to a reasonable suspicion of exploitation within the meaning of article 273f of the Criminal Code. According to the State party, the assessments of the Public Prosecutor and the Court of Appeal were not unreasonable and were compatible with article 8 of the Covenant. Furthermore, contrary to the author's claims in her communication to the Committee, during her police interview of 8 December 2015 she denied that there had been any violence or threats.

4.10 With regard to the case law invoked by the author, the State party considers that it cannot be compared to her situation. In *Siliadin v. France*,<sup>13</sup> the case concerned a minor who

<sup>12</sup> *O'Neill and Quinn v. Ireland* (CCPR/C/87/D/1314/2004), para. 8.4.

<sup>13</sup> See *Siliadin v. France*.

had been brought into France without legal resident status, had worked seven days a week without pay for several years, without any time off or freedom of movement, and had had her passport taken from her. In the *Mehak* case, the district court indeed ruled that the situation of the persons concerned was hopeless and the circumstances were degrading. The persons concerned had no access to their passports without asking for special permission, and had very little or no contact with the outside world, and physical violence was involved. In *Siliadin v. France* and *C.N. v. the United Kingdom*,<sup>14</sup> the European Court of Human Rights found a violation because the law was not effective in criminalizing servitude and forced labour. Contrary to the statutory regimes referred to in those cases, the law of the Netherlands does explicitly criminalize servitude and forced labour.

4.11 Regarding the report of 28 February 2017 by FairWork on the situation of the author, the State party notes that – contrary to the author’s claims in her communication – it does not conclude that she was actually a victim of exploitation. The fact that, at an early stage, it was presumed that there were indications of possible exploitation does not mean that the elements of the offence of trafficking in human beings or exploitation have been fulfilled, and this is in any case independent from the authorities’ duty to investigate.

4.12 The State party also considers that it has fulfilled its duty of investigation arising from article 2 (3), read in conjunction with article 8, of the Covenant. The State party recalls that article 2 (3) of the Covenant means that remedies must be provided to test claims under the Covenant domestically for claims that are sufficiently well founded to be arguable under the Covenant.<sup>15</sup> Furthermore, in order to properly provide for a right to a remedy, a State must also take positive steps in response to credible allegations of violations of the Covenant.

4.13 The State party refers to *Horvath v. Australia*,<sup>16</sup> and acknowledges that it has positive obligations to protect victims against those who exploit them. This means, inter alia, that once the authorities become aware of indications of exploitation, an investigation must be instituted. The Government believes that the statutory provisions and procedures in the Netherlands for preventing, suppressing and punishing human trafficking are sufficient.

4.14 The State party notes that the author has not presented any argument to demonstrate that the investigation was not conducted with due care. Therefore, the communication is unfounded. The fact that the outcome was not the one sought by the author – that is, criminal prosecution and the granting of a residence permit to her – does not mean that article 2 (3) of the Covenant has been violated. Article 2 (3), read in conjunction with article 8, of the Covenant does not go so far as to confer an entitlement to criminal prosecution.

4.15 The State party adds that the author has had access to an effective remedy and that the duty of investigation with respect to an alleged case of labour exploitation was fulfilled. Likewise, she was offered a reflection period of three months following the initial interview, and was given the opportunity to provide a detailed account of her situation to trained police officers, with the presence of an interpreter. The Public Prosecutor, in its conclusion, informed the author of its decision and the reasons for it. The State party considers that the indications of human trafficking that existed with respect to the author were examined with serious care and were considered on their merits. The author has had the opportunity to challenge the Public Prosecutor’s decision not to institute criminal proceedings. On the merits, the Public Prosecutor and the Court of Appeal concluded that there was no evidence that the author had been exploited in the sense referred to by article 273f of the Criminal Code.

4.16 The State party adds that the author did not contact the authorities about her allegations of exploitation until five years after leaving her employer. The passage of such a period of time made it unlikely that further investigation in 2015 and 2016 would generate sufficient lines of inquiry about alleged labour exploitation in the period from 2003 to 2010.

<sup>14</sup> *Ibid.*, and see *C.N. v. the United Kingdom*.

<sup>15</sup> *Kazantzis v. Cyprus* (CCPR/C/78/D/972/2001), para. 6.6.

<sup>16</sup> In *Horvath v. Australia* (CCPR/C/110/D/1885/2009), para. 8.2, the Committee notes as follows: Art. 2 (3) of the Covenant does not impose on States parties any particular form of remedy, and the Covenant does not provide a right for individuals to require that the State criminally prosecute a third party. However, art. 2 (3) does impose on States parties the obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. See also *Bautista de Arellana v. Colombia* (CCPR/C/55/D/563/1993), para. 8.6; and the Committee’s general comment No. 31 (2004), para. 15.

4.17 The State party considers that the author has not sufficiently substantiated her claim that the State party did not provide her with adequate protection in the present case. The investigation conducted by the national authorities in the author's case was sufficient for the purposes of article 2 (3), read in conjunction with article 8, of the Covenant. In conclusion, the State party considers that the communication is inadmissible since it is not the Committee's role to act as an appellate court. Should the Committee not endorse that view, the State party is of the opinion that there has been no violation of article 2 (3), read in conjunction with article 8, of the Covenant and that the communication as a whole is unfounded.

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

5.1 On 27 August 2018, the author submitted her comments on the State party's observations. The author submits that the issue at stake is that the State party, in its decision by the Public Prosecutor to dismiss the case, did not conduct an examination of the evidence or of the criminal liability of an individual, or a review of the question of innocence or guilt.

5.2 The author recalls that she did not state that the State party had not carried out proper investigations, but that it made an error in assessing whether the credible facts and circumstances amounted to a violation of article 8 of the Covenant and as a consequence, did not provide an effective remedy within the meaning of article 2 (3) of the Covenant. As such, the author stresses that she does not request the Committee to give a decision on evidence, criminal liability or the question of innocence or guilt, but requests the State party to reopen the case in order for the State party to resume investigations into her case.

5.3 The author refers to the European Court of Human Rights case *S.M. v. Croatia*<sup>17</sup> and argues that in that case, the Court concluded that although there was an adequate legal framework in the member State criminalizing trafficking in human beings, forced prostitution and exploitation, there had been shortcomings in the authorities' investigation. Therefore, the Court was not satisfied that the prosecuting authorities and the domestic courts had submitted the applicant's case to the careful scrutiny required under article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

5.4 The author notes that the "fourth instance doctrine" presupposes that the Committee cannot review findings of fact or law by a domestic court acting within its competence, unless the Committee considers that a possible violation of the Covenant is involved. As the present communication portrays a claim that the domestic legal decision constitutes a disregard of the right to an effective remedy and therefore violates another right guaranteed by the Covenant, the applicant is of the opinion that the Committee is competent to declare her communication admissible and to rule on its merits.

5.5 The author adds that in the present case, the exhaustion of domestic remedies is not in dispute, and that the communication meets the condition contained in article 5 (b) of the Optional Protocol. The author considers that her communication is admissible and requests the Committee to consider it on its merits.

5.6 With regard to assessment of the communication on its merits, the author argues that the State party did not sufficiently consider the nature and duration of the labour she performed. She refers to *Faure v. Australia*, in which the Committee observed that the Covenant did not spell out in further detail the meaning of the terms "forced or compulsory labour".<sup>18</sup> She reiterates the factors formulated by ILO and submits that the question as to whether a case involves servitude or forced labour as defined by article 8 of the Covenant should be assessed on the concrete circumstances of the case. The author also refers to *C.N. v. the United Kingdom*,<sup>19</sup> in which the European Court of Human Rights ruled that "domestic servitude is a specific offence ... which involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance. A thorough investigation into complaints of such conduct therefore requires an understanding of the many subtle ways an individual can fall under the control of another." In light of the aforementioned, the author

<sup>17</sup> European Court of Human Rights, *S.M. v. Croatia* (application No. 60561/14), judgment of 19 July 2018, para. 75.

<sup>18</sup> CCPR/C/85/D/1036/2001.

<sup>19</sup> See para. 80.

submits that, even if household work and taking care of children does not by its nature constitute labour exploitation, it may be regarded as servitude or forced labour within the meaning of article 8 of the Covenant if assessed within all the circumstances of the case.

5.7 The author submits that the State party also failed to recognize the severe circumstances under which she had to perform her work, which included means of coercion, as she was verbally humiliated, threatened with being subjected to physical violence and threatened with being reported to the Dutch police who would then report her to the Moroccan police, who would beat her. Therefore, she was afraid when walking in the streets and wanted to get back to her employer's house as soon as possible, which is also the reason why she waited so many years to file a complaint. She also lacked the necessary and appropriate medical assistance for her diabetes and other situations where she needed medical care: she once injured her foot and her employer refused to allow her to get treatment, until it became infected and a friend of her employer took her to a hospital. Another time, when she had toothache, her employer called a clandestine dentist to come to the house, who pulled out her teeth without an anaesthetic.

5.8 The author submits that, contrary to the assessment of the State party and according to the explanatory memorandum on article 273f of the Criminal Code, it is not relevant whether the victim of the human trafficking has consented, if use was made of one of the means of coercion, such as, in the present case, following her employer to the Netherlands. She states that she was manipulated by her employer, who promised her a bright future in the Netherlands. The author submits that she had wanted to leave several times but was too afraid to do so. The author adds that she was the victim of a "dominance resulting from abuse of actual circumstances",<sup>20</sup> which, according to the Supreme Court of the Netherlands, is abuse of a position of dominance in a relationship, which is more likely to exist if a person is not legally resident in the Netherlands. She was also vulnerable, coming from a poor background and lacking a command of the Dutch language and general knowledge of the country, and was thus fully dependant on her employer.

5.9 The author notes that even the State party acknowledged that her employer had enjoyed substantial financial benefit from her work. She adds that although she had access to her own passport, her employer had free access to it too and would take it occasionally and without her knowledge to extend its validity at the Moroccan embassy.

5.10 As regards the suggestion by the State party that the passage of a long period of time made it unlikely that further investigation in 2015 and 2016 would generate sufficient lines of inquiry about alleged labour exploitation, the author stresses that the question of evidence is not relevant in the present communication, since her case was not dismissed due to lack of evidence but due to insufficient indications of labour exploitation to warrant a criminal investigation. Likewise, she gave the full name and address of her former employer, therefore the State party could have conducted further investigation and brought a prosecution in respect of her former employer.

5.11 In light of the above, the author concludes that the State party's decision to dismiss the case contained insufficient grounds to allow a determination that this was not a case of servitude or forced labour as defined in article 8 of the Covenant. Likewise, article 2 (3) of the Covenant imposes on States an obligation to investigate allegations of violations promptly, thoroughly and effectively, and the State party failed to fulfil its positive obligations to combat labour exploitation and to respect and ensure the rights of the author as a victim. Consequently, the State party violated the right to an effective remedy within the meaning of article 2 (3) of the Covenant.

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

6.1 On 4 December 2018, the State party submitted further observations and reiterated that the communication should be declared inadmissible or unfounded. Regarding the admissibility of the communication, the State party points out that the author focuses on whether the facts of the case warrant the conclusion that the author was a victim of servitude or forced labour, and not on the question of whether the investigations were carried out properly. The State party reiterates that it is not the Committee's task to re-evaluate the facts.

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<sup>20</sup> Supreme Court of the Netherlands, 27 October 2009, ECLI:NL:HR:2009:BI7097, para. 2.4.2, available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2009:BI7097>.

6.2 The State party submits that the author refers to a judgment in which the European Court of Human Rights concluded that there had been shortcomings in the authorities' investigation.<sup>21</sup> In the State party's view, this judgment shows that the European Court of Human Rights did not evaluate the facts, but merely determined whether the investigations had met the procedural requirements under article 4 of the European Convention on Human Rights.

6.3 Regarding the merits of the communication, should the Committee find the communication admissible, the State party once again emphasizes that the facts have been evaluated by the Public Prosecutor and an independent court, which considered whether the facts warranted criminal prosecution. Statements in the author's comments concerning the question of whether the State party recognized the gravity of the circumstances and the nature and duration of the work require an assessment of the facts and of the extent to which they fulfil the elements of the definition of a criminal offence and therefore fall outside the scope of the communication. The State party reiterates that its duty of investigation was fulfilled and emphasizes that it does not have an obligation to achieve a particular result.

#### **Additional comments from the author**

7.1 On 28 March 2019, the author submitted her comments on the observations shared by the State party on 4 December 2018 and reiterated her previous statements. The author considers that the Committee is competent to consider whether these facts amount to a violation of the rights guaranteed by the Covenant and to assess the question of whether the State party met its positive obligation to respect, ensure and effect the author's rights as a victim. The positive obligation of the State party to ascertain whether the applicant has been a victim of exploitation stems from case law of the European Court of Human Rights<sup>22</sup> and requires not only careful scrutiny of such a case, but also penalization and effective prosecution of any act aimed at maintaining a person in a situation of slavery, servitude, or forced or compulsory labour.

7.2 The author included a report by the local organization FairWork in her observations, which she presents as a third-party intervention. In its report, FairWork assesses whether the author was a victim of labour exploitation in the domestic sphere under international and national law. The report states that, according to article 4 of the European Convention on Human Rights, the State party has a positive obligation to conduct effective investigations into alleged cases of servitude and forced labour and that effective investigation must take into account the circumstances of the specific case. FairWork states that this procedural obligation may have been violated by the closure of the complainant's case, as there may not have been enough knowledge and understanding by the Dutch authorities of the forms of subtle coercion that may play a role in situations of servitude, when investigating the complainant's case.<sup>23</sup> The report states that there are important indications based on international and national law that the complainant may have been a victim of domestic labour exploitation and advises that the complainant's case be investigated more thoroughly.

#### **State party's further observations**

8.1 On 28 May 2019, the State party submitted its further observations on the comments provided by the author on 28 March 2019, which included the report by FairWork. The State party reiterates its position and considers that the author's comments do not raise any additional points. It also raises an objection to consideration of the FairWork submission as a third-party submission within the meaning of rule 96 of the Committee's rules of procedure.

8.2 The State party notes that in its submission, FairWork mostly assesses the question of whether the author was the victim of labour exploitation in the domestic sphere under international or national law. In the State party's view, this question has no connection with the central question in the proceedings before the Committee. The question before the Committee is whether the State party failed to thoroughly and effectively investigate the

<sup>21</sup> See *S.M. v. Croatia*.

<sup>22</sup> See *Rantsev v. Cyprus and Russia*, *Siliadin v. France* and *S.M. v. Croatia*.

<sup>23</sup> *C.N. v. the United Kingdom*, para. 80; and William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press, 2015), p. 210.

circumstances in the case of the author and as a consequence violated her right to an effective remedy, within the meaning of article 2 (3) of the Covenant.

8.3 The State party stresses that several facts were misrepresented or misinterpreted in the report by FairWork. For instance, FairWork argues that the author did not have access to her passport, which would point to a situation of servitude or forced labour. This is in contradiction to the facts of the case, since the author did have free access to her passport and was therefore not restricted in her freedom of movement. FairWork also briefly mentions the obligation of the contracting parties to investigate alleged violations of article 4 of the European Convention on Human Rights, but it fails to comment on the investigation that the Public Prosecution Service did indeed carry out, and concludes that the authorities may have lacked special insight into the many subtle forms of compulsion. The State party considers this conclusion as speculative and factually incorrect, as the author's case was dealt with at the national level by a specialized Public Prosecutor – the appointed manager of the human trafficking portfolio at the National Public Prosecutor's Office for Financial, Economic and Environmental Offences – who assessed on the basis of the author's statements whether labour exploitation within the meaning of article 273f of the Criminal Code had occurred. Every office of the Public Prosecution Service has a human trafficking portfolio manager, who advises other public prosecutors heading investigations into human trafficking, liaises with bodies reporting evidence of human trafficking, and acts as contact for the Immigration and Naturalization Service in cases where the residence status of victims or potential victims is a key issue.

8.4 The State party agrees with FairWork that there were indications in the present case that the author may have been the victim of forced labour. After all, it was these indications that led to an investigation of the author's case and to the granting of a temporary residence permit after she had lodged a criminal complaint. However, as FairWork acknowledges, the existence of one or more indications does not necessarily mean that human trafficking or forced labour actually happened or can actually be proved. If the investigation shows that human trafficking or forced labour cannot be proved, the Public Prosecution Service can decide not to prosecute, which is what happened in the present case. The fact that a decision not to prosecute is made does not mean that the authorities failed to thoroughly and effectively investigate the circumstances of the case.

#### **Author's further comments**

9. On 18 March 2020, the author submitted further comments on the State party's further observations. She clarified that the report by FairWork should be considered as part of her submission, pursuant to article 5 (1) of the Optional Protocol, and not as a third-party intervention.

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

##### *Consideration of admissibility*

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

10.2 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.

10.3 The Committee notes the author's claim that she has exhausted all available legal domestic remedies. In the absence of any objection by the State party in that connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

10.4 The Committee takes note of the State party's arguments that the communication is inadmissible due to insufficient substantiation. It also notes the State party's argument according to which it is for the domestic courts to review facts and evidence and that the Committee should not act as an appellate court or a fourth instance court. With regard to the author's claim under article 8 of the Covenant, the Committee also notes the State party's submission according to which the author's complaint was carefully examined by a specialized Public Prosecutor – the appointed manager of the human trafficking portfolio at

the National Public Prosecutor's Office for Financial, Economic and Environmental Offences. The author's claims were assessed within the meaning of article 273f of the Criminal Code, and she was granted a one-year residence permit for the time of the procedure. Finally, the Committee notes the State party's argument that the law of the Netherlands does explicitly criminalize servitude and forced labour.

10.5 The Committee notes the author's claim that the investigation of her situation of forced labour and servitude was ineffective and violated her rights under article 2 (3), read in conjunction with article 8, of the Covenant, as the Public Prosecutor provided insufficient grounds for concluding that her case did not constitute exploitation as defined in article 273f (1) of the Criminal Code and article 8 of the Covenant. On the other hand, the Committee notes that she was interviewed by the police, who gave her three months to file a criminal complaint. The Committee notes that, at an early stage, the State party recognized that the victim may have been subjected to forced labour or servitude, but that in the end the Public Prosecutor considered that her case did not fall within the scope of article 273f (1) of the Criminal Code and decided not to institute criminal proceedings. The Committee also notes the author's claims that the investigation was ineffective, as the facts of her complaints were not adequately examined and assessed. The Committee recalls that it has repeatedly held that it is not an apex court of final instance competent to re-evaluate findings of fact or the application of domestic legislation, unless it can be ascertained that the proceedings before the domestic courts were clearly arbitrary or amounted to a manifest error or denial of justice.<sup>24</sup>

10.6 In the present case, the Committee observes that the information before it does not allow it to conclude that the criminal investigation was ineffective or that the judicial proceedings following the decision by the Public Prosecutor not to institute criminal proceedings lacked adequate and sufficient reasoning, transparency, independence or impartiality or that they were clearly arbitrary or amounted to a manifest error or denial of justice. The Committee considers that the author has not provided sufficient information to substantiate her claims under article 2 (3), read in conjunction with article 8, of the Covenant, and finds these claims inadmissible under article 2 of the Optional Protocol.

11. The Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That the present decision shall be communicated to the State party and to the author.

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<sup>24</sup> *Simms v. Jamaica* (CCPR/C/53/D/541/1993), para. 6.2; *Röder, Thomas and Dagmar v. Germany* (CCPR/C/80/D/1138/2002), para. 8.6; *Arutyunyan v. Uzbekistan* (CCPR/C/80/D/917/2000), para. 5.7; and *Fernández Murcia v. Spain* (CCPR/C/92/D/1528/2006).