



# 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. 3133/2018\*, \*\*

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| <i>Communication submitted by:</i>        | E.F. (represented by counsel, Dilbadi Gasimov)   |
| <i>Alleged victim:</i>                    | The author   |
| <i>State party:</i>                       | France   |
| <i>Date of communication:</i>             | 11 August 2015 (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 9 March 2018 (not issued in document form) |
| <i>Date of adoption of decision:</i>      | 13 March 2020  |
| <i>Subject matter:</i>                    | Access to domestic remedies  |
| <i>Procedural issues:</i>                 | Non-exhaustion of domestic remedies; failure to substantiate claims; incompatibility with the Covenant   |
| <i>Substantive issues:</i>                | Right to an effective remedy; right to a fair trial  |
| <i>Articles of the Covenant:</i>          | 2 (3) and 14 (1)   |
| <i>Articles of the Optional Protocol:</i> | 2 and 5 (2) (b)  |

1. The author of the communication is E.F., a national of France born in 1984. He claims that the State party has violated his rights under article 14 (1) of the Covenant. For the purposes of the present communication, the author is represented by counsel, Dilbadi Gasimov. France acceded to the Optional Protocol to the Covenant on 17 February 1984.

#### The facts as submitted by the author

2.1 The author alleges that, as he was leaving school one day in October 2000, when he was 16 years old, he was cornered and sexually assaulted by two classmates, in the presence of several other students. One of the classmates held on to him, while the other inserted his middle finger into the author's anus through his underwear.

2.2 On 4 October 2010, the author filed a complaint of rape with the Brigade for the Protection of Minors. On 1 June 2011, the author's complaint was dismissed for lack of evidence. Following this setback, on 17 January 2012 the author filed another complaint and

\* Adopted by the Committee at its 128th session (2–27 mars 2020).

\*\* The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja and Gentian Zyberi.



a claim for damages with the senior investigating judge, in connection with the same acts, against the two classmates concerned.

2.3 On 4 December 2012, the investigating judge ordered a confrontation of the author and the two alleged perpetrators. However, the author was unable to attend because he was ill. He was also unable to attend two other confrontations, scheduled for 11 December 2012 and 9 January 2013, for medical reasons. The author informed the investigating judge of the reasons for his absence and requested that the confrontations be postponed so that he could attend. This postponement would also allow the judge to hear other witnesses mentioned by the author who had not yet been given a hearing.

2.4 In an ordinance issued on 20 March 2013, the investigating judge refused to extend the investigation on the grounds that the author had failed to attend the hearings and that the information obtained from the statements of the alleged perpetrators and the witnesses was insufficient. The investigating judge deemed that the information available did not justify scheduling another confrontation, especially as there was no evidence to support the accusations. In the same ordinance, the investigating judge also responded to the author's request that other witnesses be heard and explained why those persons were not being summoned. In some cases, their statements had already been gathered in connection with the claim for damages and had been added to the case file, and they contained no relevant information about the alleged rape. In other cases, the witnesses had already been heard but had not provided any relevant information. Lastly, one of the witnesses could not be found. The author appealed against this ordinance to the Paris Court of Appeal, which invalidated the ordinance on 25 April 2013.

2.5 In a dismissal order issued on 20 June 2013, the investigating judge of the Paris *Tribunal de Grande Instance* (court of major jurisdiction) closed the inquiry on the grounds that the investigations as a whole, conducted primarily on the basis of the information and names provided by E.F., had not revealed any evidence that corroborated his accusation and that there was no evidence from any of the investigations that a scuffle or struggle had even taken place. The investigating judge also ordered that the case file be deposited with the court registry so that the case could be reopened if new evidence came to light.

2.6 On 27 June 2013, the author appealed against this order to the Paris Court of Appeal, which dismissed his appeal on 26 November 2013. The author lodged an appeal against the decision of the Court of Appeal with the Court of Cassation. The Court of Cassation dismissed his appeal in a decision handed down on 4 March 2015, on the grounds that the investigation was complete and there was insufficient evidence that anyone had committed the alleged offence or any other offence.

### **The complaint**

3.1 The author claims that France has violated articles 2 (3) and 14 (1) of the Covenant because the proceedings before the investigating judge were not conducted fairly. He claims that only one of the witnesses mentioned in his complaint was given a hearing and that the investigating judge gave no explanation for this choice. The author asserts that the period of time that has elapsed since the rape, which took place when he was a minor, places the courts under an obligation to make use of all the information submitted to them, including his statements, which he claims were not thoroughly examined.

3.2 The author is of the view that the judge's refusal to extend the investigation even though the author had been unable to attend the confrontations for medical reasons constitutes a violation of his right to a fair hearing.

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

4.1 On 4 May 2018, the State party submitted its observations on the admissibility of the communication. It considers that the Committee should declare the communication inadmissible for two main reasons: firstly, article 14 (1) of the Covenant, which is invoked by the author, is not applicable in this case; secondly, the author has not exhausted all available domestic remedies, since he has not invoked article L141-1 of the Judicial Code.

4.2 As regards the inadmissibility *ratione materiae* of the communication with respect to article 14 (1) of the Covenant, the State party submits that the author has not taken the trouble to demonstrate the link between this article and the proceedings undertaken by the investigating judge in connection with the complaint and the claim for damages, or to explain which procedural safeguard was not provided. However, the State party acknowledges that article 14 (1) of the Covenant, like article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), is applicable to the conduct of an investigation by an investigating judge in connection with a criminal complaint accompanied by a civil claim for damages, as recognized by the European Court of Human Rights.<sup>1</sup> The State party also acknowledges that, as with article 14 (1) of the Covenant, some of the procedural safeguards provided for in article 6 (1) of the European Convention on Human Rights, including those relating to the right to a fair trial, apply to investigations conducted by an investigating judge, insofar as the judge examines the evidence for both the prosecution and the defence.<sup>2</sup>

4.3 The State party nevertheless considers that, in most of his allegations, the author invokes the safeguards provided for in article 14 (3) of the Covenant instead of presenting arguments based on article 14 (1) of the Covenant. The State party argues that, in his communication, the author is critical of the fact that there was no confrontation with the alleged perpetrators and claims that this situation was contrary to the principle established by the Court of Cassation regarding the right of any accused person to examine, or have examined, the witnesses against him and on his behalf, under the same conditions. According to the State party, this is a reference to article 14 (3) (e) of the Covenant, which the author would like the Committee to apply to his case. The State party points out that the author is not bringing his case before the Committee as an accused person and that article 14 (3) of the Covenant applies only to accused persons. Furthermore, the State party considers that the author does not explain how the lack of confrontation with the alleged perpetrators, the failure to question certain witnesses of the alleged rape and the failure to make enquiries among his family and friends might constitute a violation of article 14 (1) of the Covenant. The State party therefore requests the Committee to find the communication inadmissible *ratione materiae*.

4.4 As regards the inadmissibility of the communication owing to the author's failure to exhaust domestic remedies, the State party asserts that the author did not invoke the remedy provided for in article L141-1 of the Judicial Code,<sup>3</sup> which stipulates that the State may be held responsible for malfunctions of the justice system that constitute gross negligence or a denial of justice. The State party notes that an error committed by an investigating judge during an investigation may be classed as gross negligence within the meaning of article L141-1 of the Judicial Code and may therefore engage the responsibility of the State. The State party argues that the European Court of Human Rights considers the remedy provided for in article L141-1 of the Judicial Code to be an effective remedy.<sup>4</sup> The State party asserts that the Committee itself found a communication containing similar claims inadmissible on the grounds that the author had not exhausted domestic remedies since he had not invoked the remedy provided for in article L781-1 (now article L141-1) of the Judicial Code.<sup>5</sup> The State party requests that the Committee find that the remedy provided for in article L141-1 of the Judicial Code is an available and effective domestic remedy within the meaning of articles 2 and 5 (2) (b) of the Optional Protocol and, consequently, that the communication is inadmissible on the grounds that the author has not exhausted domestic remedies.

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

5.1 On 25 July 2018, the author submitted his comments on the State party's observations to the Committee. As regards the inadmissibility *ratione materiae* of the communication, he

<sup>1</sup> *Perez v. France* [GC], No. 47287/99, ECHR 2004-I.

<sup>2</sup> See European Court of Human Rights, *Vera Fernández-Huidobro v. Spain*, No. 74181/01, 6 January 2010.

<sup>3</sup> Formerly article L781-1 of the Judicial Code.

<sup>4</sup> See *Mifsud v. France* (dec.) [GC], No. 57220/00, ECHR 2002-VIII. See also *Benmouna et al. v. France* No. 51097/13, paras. 49 and 52.

<sup>5</sup> *Deperraz and Delieutraz v. France* (CCPR/C/83/D/1118/2002).

asserts that his communication concerns a violation of his right to a fair trial. He argues that the State party does not dispute the fact that the requirements of a fair trial apply to preliminary inquiries conducted in France. He adds that, although he is not being tried by a criminal court, the conclusions reached by the investigating judge have a direct and real effect on his rights in the context of civil proceedings. The author explains that, contrary to the State party's claims, he never invoked article 14 (3) of the Covenant. He submits that, in its general comment No. 13 (1984), the Committee notes that the general provisions of article 14 aim at ensuring the proper administration of justice and that the article applies to all courts and tribunals within its scope, whether ordinary or specialized. The author notes that the lack of confrontation between him and the alleged perpetrators and the failure to question certain witnesses were contrary to the overall principle of a fair trial. He also asserts that the judgments of the European Court of Human Rights cited by the State party, namely, *Perez v. France* and *Vera Fernández-Huidobro v. Spain*, do not deal with article 6 (3) of the European Convention on Human Rights in the context of a preliminary inquiry.

5.2 As regards the argument that he has not exhausted domestic remedies, the author emphasizes that, contrary to the State party's claims, the case law of the European Court of Human Rights establishes that bringing a case before the national courts under article L 141-1 of the Judicial Code constitutes a domestic remedy to be exhausted only in cases relating to the issue of reasonable time and the length of proceedings before national courts, as per the decision handed down in *Mifsud v. France*,<sup>6</sup> in the context of article 6 of the European Convention on Human Rights. The author considers that the rule that a case must be brought before the national courts under article L141-1 of the Judicial Code before it is brought before an international body is not automatically applicable and does not apply in all cases. While acknowledging that article L141-1 of the Judicial Code comes into play as soon as there has been gross negligence on the part of the State, the author argues that, when he submitted his communication to the Committee in 2015, the notion of gross negligence mentioned in paragraph 1 of article 781-1 of the Judicial Code had not yet been clearly defined, although it has since been clarified in case law. The author considers that, by lodging appeals with the Court of Appeal and the Court of Cassation, he exhausted all domestic remedies.

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

6.1 On 13 September 2018, the State party submitted its additional observations on the admissibility and merits of the communication to the Committee. The State party emphasizes that the various people who were questioned, including the author's classmates and teachers, stated that they had no memory of the rape alleged by the author. The State party asserts that it was because of the lack of strong evidence to support the author's allegations of rape that the prosecutor decided to dismiss the case on 1 June 2011. The State party adds that, on 2 April 2012, a judicial investigation was opened and all the information gathered during the preliminary police investigation was handed over to the investigating judge.

6.2 The State party notes that the investigators made sure to interview not only people who were still living in France but also people living abroad, who responded to their questions by email or telephone. The author's psychiatrist refused to answer the investigators' questions on the grounds of doctor-patient confidentiality. The State party reports that, consequently, on 16 April 2012 the investigating judge appointed an expert to conduct a medical and psychological examination of the author.

6.3 The State party indicates that the author failed to respond to two summonses from the investigating judge and to attend two confrontations; he claimed that his absence was due to health problems and provided medical certificates to support his claim. After the author had missed these hearings and since the information collected did not constitute sufficient evidence that would justify continuing the investigation, on 10 January 2013 the investigating judge notified the parties that the investigation was closed. The State party submits that it was on this basis that, on 28 January 2013, the author filed a request for further hearings of those he had named as witnesses. The State party also submits that, on 20 March 2013, the investigating judge refused to grant the author's request on the grounds that the investigations based on the information and names provided by the author had not revealed anything. The

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<sup>6</sup> *Mifsud v. France* (dec.) [GC], No. 57220/00, ECHR 2002-VIII.

State party points out that the Code of Criminal Procedure does not specify the procedural steps that must be taken in the investigation of sexual offences, including rape, and that it is up to the investigating judge to determine which steps are necessary in order to discover the truth.

6.4 As regards the inadmissibility *ratione materiae* of the communication with respect to article 14 (1) of the Covenant, the State party argues that, in his communication, the author is trying to request the Committee to evaluate facts and evidence even though he is unable to demonstrate that the national courts' evaluation was clearly arbitrary or that there has been a denial of justice. The State party reiterates that the author's claims relate mainly to the rights enshrined in article 14 (3) (e) of the Covenant, which applies only to accused persons.

6.5 As regards the merits of the communication, the State party points out that the acts of violence reported by the author to the Committee were barred by limitation at the time when the communication was submitted and that it was a charge of gang rape that was referred to the office of the investigating judge, after the author filed his complaint and his claim for damages. The State party notes that, in an effort to uncover the truth, the investigating judge looked further than the list of six people provided by the author and interviewed others who were likely to have witnessed the alleged incident. The State party reiterates that, at all stages of the preliminary inquiry and the investigation, the 14 people who were interviewed denied the author's allegations of rape. The State party notes that the two alleged perpetrators admit that they mocked the author but deny that he was raped or that their mockery was of the kind that could be classed as sexual harassment. The State party reiterates that the investigation conducted by the investigating judge was thorough and took into account the time that had elapsed since the alleged incident, which took place 10 years before the author filed his initial complaint. The State party adds that the investigation was complicated by the fact that the author had not mentioned the incident to anyone at the time and the fact that there was no medical report; a special unit of the Brigade for the Protection of Minors<sup>7</sup> was therefore called upon to conduct preliminary inquiries that were appropriate to the nature of the allegations. The State party asserts that none of the higher courts to which the case was referred found anything wrong with the decision of the investigating judge and therefore requests the Committee, primarily, to find the communication inadmissible and, subsidiarily, to dismiss it as unfounded.

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

7.1 On 13 December 2018, the author submitted additional comments to the Committee. In those comments, he argues that the nicknames given to him by his classmates had sexist connotations and show that there was an atmosphere of psychological or even sexual harassment. The author insists that, contrary to the State party's claims, he never invoked article 14 (3) (e) of the Covenant. The author reiterates that his claim primarily concerns the State's violation of article 14 (1), particularly with respect to his rights and obligations in the context of civil proceedings. Nevertheless, he argues that, although article 14 (3) (e) of the Covenant recognizes a particular right held by accused persons, it does not specify whether this right is held only by them and not by claimants. The author adds that the Committee has already established that it has the power to act when the national authorities' assessment of a case contradicts the principles enshrined in the Covenant. In this regard, the author considers that the proceedings were not conducted fairly, especially as some witnesses were interviewed remotely, which meant that they did not respond with the same spontaneity and in the same manner as if they had been interviewed face to face.

7.2 The author submits that, contrary to the State party's claims, there were several contradictions in the statements made by the students who were questioned, which show that he was the target of harassment and mockery, and that one of the alleged perpetrators had admitted subjecting him to homophobic insults. The author adds that it is clear from the statements of some of the people who were questioned that they colluded with one another in order to ensure that they gave the same answers to the investigators. He insists that the mockery and harassment of a sexual nature that he suffered constituted an attack on his honour and reputation, and that the evaluation of the evidence falls within the competence of

<sup>7</sup> See the instructions issued by the investigating judge, dated 13 April 2012.

the Committee under articles 17, 19 (3) and 26 of the Covenant. The author adds that the Paris Court of Appeal found in its judgment of 26 November 2013 that some of the statements confirmed that he had suffered taunts of a sexual nature. The author considers that, for this reason, the investigating judge should have ordered another confrontation.

7.3 The author also asserts that the State party, having noted in its submission that the medical and psychological examination had indicated that there was a possible link between the claimant's mental health problems, which were noted during the examination, and the alleged acts, should have adopted a far more conciliatory attitude towards him. The author considers that the dismissal of his request for a confrontation ran counter to his right to a fair trial and that the fact that he was ill when he received the earlier summonses from the judge did not justify depriving him of his right to a confrontation with the people whom he was accusing.

### **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 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

8.2 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.

8.3 The Committee notes the author's claim that the State party has violated his rights under articles 2 (3) and 14 (1) of the Covenant on the grounds that the investigating judge of the State party decided not to hold any further confrontations or interviews in connection with his complaint of rape.

8.4 The Committee notes the State party's argument that the author has not exhausted domestic remedies because he has not invoked the remedy provided for in article L141-1 of the Judicial Code.<sup>8</sup> The Committee notes the author's argument that this remedy applies only to cases relating to the issue of reasonable time and the length of proceedings. Given the ambiguity surrounding the use of article L141-1 of the Judicial Code, the Committee considers that, in this case, there is no need for the author to invoke the remedy provided for in this article and that, consequently, domestic remedies have been exhausted.

8.5 The Committee notes the State party's argument that the communication is inadmissible *ratione materiae* with respect to article 14 (1) of the Covenant inasmuch as the author has failed to demonstrate how the lack of interviews with other witnesses and the lack of confrontation constitute a violation of his right to a fair trial. The Committee notes the State party's argument that the communication relates mainly to article 14 (3) of the Covenant, even though the author is bringing his case before the Committee as a victim, not an accused person. It also notes the State party's argument that the author is requesting the Committee to substitute its own assessment of the facts and evidence for that of a national judge, who is the sovereign authority when it comes to ordering investigations and evaluating the findings of those investigations.

8.6 The Committee notes the author's argument that the purpose of the communication is to draw attention to the unfairness of the investigation and, in particular, to its consequences from a civil law perspective. It also notes the author's assertion that the national authorities did not evaluate the evidence fairly and that the statements of the alleged perpetrators reveal that he faced homophobic taunts, which should have led the investigating judge to conduct a more thorough investigation, including by allowing another confrontation to be held.

8.7 The Committee recalls that, generally speaking, the provisions of article 14 (1) of the Covenant aim at ensuring the proper administration of justice,<sup>9</sup> including as regards obligations in a suit at law. However, in the present case, the Committee considers that its

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<sup>8</sup> See *Deperraz and Delieutraz v. France*.

<sup>9</sup> Human Rights Committee, general comment No. 32 (2007), para. 2.

role is not to supplant the investigating judge by evaluating the facts of the case and that the matter cannot be brought before it unless the author is able to show that the judge's behaviour was arbitrary or amounted to a denial of justice or that the judge otherwise violated his or her obligation of independence and impartiality.<sup>10</sup> The Committee considers that, in the present case, the author has not adequately demonstrated how the evaluation of all the information gathered during the investigation was arbitrary or amounted to a denial of justice. Regarding the claims under article 2 (3) of the Covenant, the Committee recalls that the provisions of this article, which lay down general obligations for States parties, cannot, in and of themselves, give rise to a claim in a communication under the Optional Protocol. The Committee considers that the author has not demonstrated how the State party failed to provide him with an effective remedy.<sup>11</sup> The Committee finds that the author's claims under articles 2 (3) and 14 (1) of the Covenant, read together, are not sufficiently substantiated for purposes of admissibility.

9. The Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
  - (b) That this decision shall be transmitted to the State party and to the author.
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<sup>10</sup> See, inter alia, *Crochet v. France* (CCPR/C/100/D/1777/2008), para. 9.4; *Moraël v. France* (CCPR/C/36/D/207/1986), para. 9.4; *Simms v. Jamaica* (CCPR/C/53/D/541/1993), para. 6.2; and *Gerashchenko v. Belarus* (CCPR/C/97/D/1537/2006), para. 6.5.

<sup>11</sup> *P.K. v. Canada* (CCPR/C/89/D/1234/2003), para. 7.6.