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Sixtieth session
14 July - 1 August 1997

DECISIONS

Communication No. 661/1995

Submitted by:	Paul Triboulet [represented by Mr. Alain Lestourneaud, lawyer in France]
Victim:	The author
State party:	France
Date of communication:	27 May 1995 (initial submission)
Date of present decision:	29 July 1997

[ANNEX]

*Made public by decision of the Human Rights Committee.

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ANNEX*

Decision of the Human Rights Committee under the Optional Protocol
to the International Covenant on Civil and Political Rights
- Sixtieth session -

concerning

Communication No. 661/1995**

Submitted by: Paul Triboulet [represented by Mr. Alain Lestourneaud, lawyer in France]

Victim: The author

State party: France

Date of communication: 27 May 1995 (initial submission)

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

Meeting on 29 July 1997,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Paul Triboulet, a French citizen born in 1929. He claims to be the victim of a violation by France of article 14, paragraphs 1 and 3(c) and (e), of the International Covenant on Civil and Political Rights. He is represented by counsel (Alain Lestourneaud).

The facts as presented by the author

2.1 On 8 February 1982, the joint-stock company Innotech Europe was set up to promote the industrial application of processes developed by a Canadian

*The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

**Pursuant to rule 85 of the Committee's rules of procedure, Ms. Christine Chanet did not participate in the examination of the case.

university for the bioconversion of vegetable waste into protein food for animals. The company had 10 shareholders, including the author and Mr. G. Morichon, a legal adviser. On the same day the author was appointed chairman and managing director of the company with the agreement of the principal directors.

2.2 In the course of 1983, relations between the partners of the company deteriorated, and on 15 April 1983 the auditor resigned following a disagreement over the magnitude of the author's travel expenses. On 8 March 1984, Mr. M. Botton, as resigning director, was replaced by another shareholder. At a general meeting on 28 June 1984, Mrs. Slobodzian, a director, was removed from office and replaced by Mr. Morichon. On 3 September 1984, the author was in turn relieved of his duties as chairman and managing director.

2.3 On 13 October 1986 the commercial court (tribunal de commerce) of Besançon ordered the affairs of the company, which by then had liabilities of around FF 1,300,000, to be administered under court supervision (redressement judiciaire). On 18 March 1991 the company went into liquidation by court order.

2.4 With regard to the legal action taken by the author, his first complaint was lodged on 28 September 1984 for false representation against Mr. Morichon, who was said by the author to have made him believe in the company's solvency. On 8 February 1985, after a report by the reporting judge of the commercial court of Besançon on the situation of Innotech, the public prosecutor attached to the tribunal of Besançon (tribunal de grande instance) requested the divisional commissioner of the Dijon crime squad (service des renseignements de la police judiciaire), to start an investigation. On 18 June, the chief prosecutor of Besançon, noting that there were serious allegations of misuse of company assets (abus de biens sociaux), against the author, requested the initiation of criminal proceedings, and an examining magistrate was appointed the following day. On 9 September 1986, the author filed a further complaint for threats, false representation and misuse of signature in blank, contending that the shareholders had concealed from him the exact amount of the company's debt.

2.5 On 13 January 1987, the author was charged with misuse of company assets and credits, and also with having claimed unwarranted travel expenses. On 7 September 1987, owing to problems of internal organization of the court, the public prosecutor requested the appointment of another examining magistrate; on the same day, a new examining magistrate was appointed. On 10 February 1988, the author informed the examining magistrate that he was unable to attend a hearing convened for 11 February. On 11 and 15 February, the magistrate heard two of the former shareholders appearing as witnesses.

2.6 On 26 May and on 9 and 17 June 1988, the author filed three new complaints. On 19 June, the examining magistrate issued an order of referral

and on the following day ordered the joinder of the investigation into misuse of company assets and some of the complaints whereby the author had brought criminal indemnification proceedings. On 12 June 1990, the magistrate proceeded with another examination of the author. On 26 December 1990, the author sent a letter to the Minister of Justice claiming that the court-appointed administrator had not proposed any recovery plan since the judgment placing the administrator of Innotech's affairs under court supervision, and that there had been substantial delays in examining his complaints. On 12 February 1991, the public prosecutor informed the examining magistrate of the author's claims. However, on 15 March 1991, the author, although summoned by the examining magistrate, did not enter an appearance because of an impediment at work.

2.7 On 26 April 1991, the examining magistrate proceeded with another examination of the author, and on 4 January 1992 issued a new order of referral. Two days later, the presiding officer of the tribunal of Besançon appointed yet another examining magistrate owing to internal problems of organization of the court. On 27 May 1992, the public prosecutor submitted his final application against the author and, by order of 30 June 1992, committed the author to the criminal court (<u>tribunal correctionnel</u>) for trial. The complaints lodged by the author in 1984, 1986 and 1988 were, however, dismissed by the examining magistrate on the ground that the examination had not disclosed sufficient evidence of any false representation, threats, attempted extortion by force or duress of a promise, waiver or signature, fraud or misuse of signature in blank by anyone against the author.

2.8 On 8 and 9 July 1992, the author appealed both against the orders of dismissal of his complaints and against the order of committal to the criminal court. By decisions dated 9 December 1992, the indictment division (<u>chambre d'accusation</u>) of the Court of Appeal of Besançon rejected the author's appeals and confirmed the orders issued. On 18 December 1992, the author lodged an appeal with the Court of Cassation and, by decisions of 4 May 1993, the Court of Cassation, having ascertained that the author had abandoned his appeal, recorded that fact. As to the author's last appeal against the latter decision of the indictment division of 9 December 1992, which had concerned one of the orders of dismissal relating to the complaints lodged by the author, the Court of Cassation decided on 1 February 1994 to reject the author's appeal on the ground that the indictment division had replied to the main submissions of the claimant and had set out the grounds on which it had found that there was not enough evidence that anyone had committed the alleged offences.

2.9 At the hearing before the criminal court on 8 September 1993, the author requested a confrontation between him and several witnesses and an accounting expert evaluation. By judgment of 22 September 1993, the criminal court sentenced the author to two months' imprisonment (suspended) and fined him FF 20,000, concluding that the facts made it possible to determine with certainty that the author had squandered the company's capital in his own personal interest and that he was guilty as charged. On 4 October 1993, the

author and the public prosecutor appealed against his conviction, but his grounds of appeal only reached the court on 7 December 1993, the day of the hearing. By judgment of 21 December 1993, the Court of Appeal of Besançon sentenced him to 10 months' imprisonment (suspended) and fined him FF 25,000, on the ground that the author had used the company's accounts, including his current account as a partner, as a bank to pay off his loans and those of persons close to him, without any concern for the company's credit and finances.

2.10 On 22 December 1993, the author appealed against this judgment to the Court of Cassation. On 29 March, a reporting judge was appointed by the Court of Cassation. On 1 and 5 August 1994, the author and the reporting judge respectively submitted supplementary pleadings and a report. On 19 August 1994, the advocate-general was appointed and, by decision of 28 November 1994, the Court of Cassation rejected the author's appeal.

The complaint

3.1 According to the author, the criminal court failed to even mention in its judgment his request to obtain an expert evaluation of the company's accounts and a confrontation between several witnesses. This, he argues, constitutes a violation of article 14, paragraphs 1 and 3(e), of the Covenant.

3.2 The author affirms that he did not have a fair trial because the Court of Appeal of Besançon increased the sentence pronounced at first instance by the criminal court, basing itself on facts that did not form part of the original charges and on which he was not able properly to defend himself. The author claims that this constitutes a violation of article 14, paragraph 1.

3.3 Mr. Triboulet contends that he is a victim of a violation of article 14, paragraph 1, because the Court of Appeal of Besançon, which had to rule on the substance of the case, was not an independent and impartial tribunal. He points out that one of the judges of the Court of Appeal had also sat as a judge in the indictment division of that same Court when it ruled, on 9 December 1992, on the appeals against the dismissal orders issued by the examining magistrate. According to the author, the principle of the separation of the functions of examination and judgment should have prohibited that judge from deciding on the substance of the case. Counsel refers in this regard to the decision of the European Court of Human Rights in the Piersack case. However, this matter was not brought to the attention either of the Court of Appeal or of the Court of Cassation.

3.4 Lastly, Mr. Triboulet alleged a violation of article 14, paragraph 3(c), on account of the justifiable length of judicial proceedings in his case. He points out that the proceedings lasted for nine years and nine months from the outset of the investigation, ordered on 8 February 1985, to the date of the decision of the Court of Cassation. From the date of the indictment, on 13 January 1987, to the Court of Cassation's decision, the proceedings lasted

seven years and 10 months. In both cases, the author considers that the duration of the proceedings exceeded the requirements laid down in the Covenant.

The State party's observations on admissibility and the author's comments thereon

4.1 In its observations under rule 91 of the rules of procedure, dated 4 April 1996, the State party requests the Committee to declare the communication inadmissible, principally on account of non-exhaustion of domestic remedies and subsidiarily because Mr. Triboulet does not qualify as "victim" within the meaning of article 1 of the Optional Protocol. In the first context, the State party points out that the author failed to avail himself of the means provided by domestic law that could have made it possible, had his allegations been substantiated, to remedy the violations of the Covenant which he claims before the Committee. Thus, in his application to the Court of Cassation, for judicial review of the decision of the criminal appeals division (chambre des appels correctionnels) of the Court of Appeal of Besançon on 21 December 1993, the author did not bring to the attention of the Court of Cassation the arguments relating to the length of the proceedings, the impartiality of the judge who had also taken part in the deliberations of the indictment division of the Court of Appeal, or the lack of response from the criminal court to his request for an expert evaluation and a confrontation with witnesses. Concerning the latter claim, the State party observes that the author omitted to restate his request for a confrontation with witnesses and an expert evaluation before the Court of Appeal of Besançon. The Government notes, with regard to the complaint questioning the impartiality of the Court of Appeal judge, that the author failed to avail himself of an effective remedy - a motion challenging the judge - which would have enabled the President of the Court of Appeal to consider the merits of the complaint.

4.2 The State party recalls that, when filing his supplementary pleadings before the Court of Cassation on 1 June 1994 calling for the Court of Appeal's decision of 22 September 1993 to be set aside, the author neglected to refer to any of the above-mentioned claims. Accordingly, the Court of Cassation notes that the argument put forward by the author, "who confines himself to questioning the sovereign appreciation by the judges on the merits of the facts and circumstances of the case in adversary proceedings, cannot be accepted". The State party invokes the Committee's jurisprudence to the effect that domestic remedies cannot be said to have been exhausted when complainants have not submitted to the national authorities, even in substance, the complaints which they then bring before the Committee.[1]

[1] See, for example, the decision on communication No. 243/1987 (S.R. v. France), 5 November 1987, para. 3.2.

4.3 As to the question of the impartiality of the judge of the Court of Appeal of Besançon who had sat in the indictment division of the same Court, the State party notes that the author could have introduced a motion challenging the judge pursuant to articles 668 and 669 of the Code of Criminal Procedure. Since the author did not avail himself of that remedy, he is hardly in a position to question the impartiality of the judge before the Committee. As to the absence of a response from the criminal court to the request for an accounting expert's evaluation and a confrontation with the witnesses, the State party notes that in the submissions which reached the Court of Appeal on the day of the hearing on 7 December 1993, the author had not called either for such an evaluation or for a confrontation with the witnesses. According to the State party, it was for the author to submit any such request to the Appeal Court and in particular to assess, in substance, all the violations of the Covenant, in accordance with article 509 of the Code of Criminal Procedure (Code de Procédure Pénale), which stipulates that "the matter shall be brought before the Court of Appeal within the limit set by the notice of appeal and by the standing of the appellant...".

4.4 Subsidiarily, the State party considers that the author does not qualify as a victim in respect of the alleged violations of article 14. As regards the alleged violation of paragraph 1, concerning the partiality of one of the judges and the principle of separation of the functions of examination and judgment, the State party, while subscribing to the principle of the separation of functions, submits that, it is necessary to scrutinize the facts in the author's case in order to determine the extent to which the same judge had cognizance of the same elements of the case at different stages in the proceedings. The State party points out that the author withdrew his appeal before the indictment division concerning the order of committal to the criminal court issued by the examining magistrate. Thus, it has to be determined whether the applicant's fears can be held to be objectively justified,[2] when a judge sitting in the criminal appeals division has previously, in the indictment division, merely confirmed the dismissal orders of the examining magistrate. In the indictment division, the judge in question was called upon only to decide on the validity of the dismissal orders concerning the proceedings brought by the author against his former partners: at no time was this judge required, in the indictment division, to pronounce upon the charges laid against the author. The State party submits that a distinction has to be made between the nature of the facts set before the judge in the indictment division, which concerned only the proceedings brought by the author himself, and the charges in respect of which he was sent for trial before the criminal court: the facts were different since in one case Mr. Triboulet was the plaintiff and in the other he was the accused.

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[2] Reference is made to the case law of the European Court of Human Rights - Saraiva de Carvalho judgment of 22 April 1994, series A No. 286-B, para. 35, p. 10.

4.5 The State party therefore concludes that there is compatibility, in the present case, between the exercise of the functions of a judge within the criminal appeals division - hence, the author has no standing before the Committee as a victim in that regard. The State party also notes that the case law of the European Court of Human Rights referred to by the author does not have strict application and has undergone a number of changes (particularly in the Saraiva de Carvalho judgment).[3]

4.6 Concerning the question of the lack of a fair hearing, insofar as the Court of Appeal is said to have increased the sentence previously imposed by the criminal court basing itself on facts that did not form part of the original charges, the State party notes that the Court of Appeal, in characterizing one course of conduct of the author, specifically that he did not comply with certain provisions of the Companies Act (loi sur les sociétés) of 24 July 1966, merely evaluated one of the elements of the file submitted for free discussion of the parties, without adding it to the initial charges. Clearly, the Court of Appeal could not base itself on acts not punishable in criminal law to increase the sentence pronounced at first instance against the author: only the more severe appreciation of the actions of Mr. Triboulet which were punishable in criminal law motivated the heavier sentence handed down by the Court of Appeal. For this reason, too, according to the State party, the author does not qualify as a victim.

4.7 With regard to the alleged violation of article 14, paragraph 3(c), of the Covenant, the State party notes that, in view of the complexity of the case and the conduct of the author himself, a duration of seven years and 10 months for the proceedings is justified. Firstly, the author himself filed several complaints against his former partners and this, according to the State party, complicated the proceedings. Secondly, since the author made a large number of related accusations against his former partners, a long and thorough investigation of all the complainant's accusations was required. In this regard, the examining magistrate, noting a connection between the proceedings brought against the author and those initiated by the author himself, decided on 20 June 1988 to join the proceedings: the multitude of claims and counterclaims made the case more complex and added to the task entrusted to the examining magistrate.

4.8 The State party submits that the author's course of conduct contributed significantly to delaying the proceedings. On two occasions, the author failed to attend hearings convened by the examining magistrate (February 1988 and March 1991). In the same sense, the former associates against whom the author took action manifested no particular interest in helping the proceedings to move forward. As regards the duration of the proceedings, the State party

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[3]Reference is made to the decisions in the cases Hauschildt v. Denmark, judgment of 24 May 1989, and Nortier v. the Netherlands, judgment of 24 August 1993.

observes that the author initiated numerous actions and appeals before the higher courts in a manner that was not pertinent, and that he should be regarded as solely responsible for the length of the proceedings. By contrast, the domestic courts showed great diligence: for example, the Court of Appeal, seized on 4 October 1993 by the author, rendered its judgment on 21 December 1993; the proceedings before the Court of Cassation were likewise conducted with all the necessary diligence.

5.1 In his comments, counsel reaffirms that there were excessive delays in the examination of the case, in violation of article 14, paragraph 3(c). He recalls that the author had addressed a letter to the Minister of Justice, dated 26 December 1990, complaining of the length of the proceedings, and adds that claiming a violation of the notion of reasonable time before the Court of Cassation, the court of last resort in criminal proceedings, would have served no purpose in so far as the duration of the previous proceedings is concerned. For counsel, to require that the length of criminal proceedings should be invoked before the highest appellate instance is tantamount to denying the content of the right protected.

5.2 Counsel argues that the problems of internal organization of the Tribunal of Besançon, referred to by the State party, do not justify the excessive delays in the examination of his client's case. As to the action of the author himself, counsel submits that Mr. Triboulet cannot be blamed for having used all the domestic remedies available to him to protect his rights and organize his defence. That the author appealed the committal order to the criminal court but abandoned his appeal in the end does not in itself constitute a valid argument for justifying the excessive length of the proceedings.

5.3 According to counsel, the inadmissibility argument of the State party in relation to the heavier sentence pronounced by the Court of Appeal cannot be allowed, since the author had expressly included in his pleadings before the Court of Cassation the argument that the criminal judge is barred from ruling on facts other than those set out in the formal charges. This is said to be a violation of the concept of a fair hearing guaranteed by article 14, paragraph 1, of the Covenant.

5.4 Counsel argues that there is no requirement for the author to refer expressly to the relevant provision of the Covenant - it is sufficient for there to be a "substantive" link between the alleged violation and one of the rights guaranteed by the instrument concerned. In his view, the fact that neither the author nor his lawyer had themselves based their claim on the Covenant "does not make it possible to conclude that the domestic court has not availed itself of the opportunity that the rule of the exhaustion of domestic remedies has precisely the aim of affording to States...".

5.5 As to the claim that the author does not qualify as a victim within the meaning of article 1 of the Optional Protocol, counsel points out that the

distinction made by the Government regarding the functions exercised by the same judge in the indictment division and then in the criminal appeals division of the Court of Appeal of Besançon cannot be allowed inasmuch as this argument has no relevance to the victim's standing. Firstly, the State party stresses that the examining magistrate, in June 1988, ordered the joinder of the investigation into misuse of company funds with some of the complaints initiated by the author against his ex-associates. His case therefore formed an indivisible whole in law. These facts are further stated in the public prosecutor's final application on 17 May 1992, which led to the conviction of Mr. Triboulet.

5.6 For counsel, the facts alleged were indeed connected inasmuch s there was a close link between the allegations contained in the complaints lodged by the author and the charges brought against him in the same context. Reference is made to article 39 of the Code of Criminal Procedure, which prohibits the examining magistrate, on pain of nullity, from "participating" in the judgment of criminal cases of which he had cognizance as an examining magistrate. Therefore, the judge who served in the indictment division of the Court of Appeal of Besançon was not entitled to sit in the criminal appeals division of the same court as well, when it decided on the substance of the case.

5.7 Furthermore, counsel notes that the State party has not shown that the author was not personally affected by the conviction. It is clear that the Court of Appeal unilaterally increased the sentence pronounced at first instance on the basis of elements of fact not mentioned in the charges, and without having held any adversary hearing. The reasoning of the Court of Appeal enabled it to characterize what it even describes as the author's "bad faith" and the Court of Cassation for its part did not review that point at all. The author can therefore properly claim to be the victim of a violation of article 14, paragraph 1. Counsel adds that there must be no confusion between lack of standing as a victim, which is to be determined when considering the admissibility of the complaint, and the substantive arguments which relate to the alleged violation itself and which are to be taken into account in the adoption of any views.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of the its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The author alleges a violation of article 14, paragraphs 1 and 3(e), on the ground that the criminal court of Besançon did not accede to his request to obtain an expert evaluation of the accounts of his company and the confrontation between several witnesses in the case, and because a judge sitting in the criminal appeals division of the Court of Appeal of Besançon

had also sat in the indictment division of that same court, as the instance which reviewed the dismissal orders issued by the examining magistrate. The State party concludes in this regard that the claim is inadmissible because all available remedies have not been exhausted. The Committee notes that the author did not bring these complaints either before the Court of Appeal or before the Court of Cassation. He did not, for example, introduce a motion to challenge the judge who had sat in the indictment division and the Court of Appeal, pursuant to articles 668 and 669 of the Code of Criminal Procedure, a remedy which would have enabled the President of the Court of Appeal of Besançon to evaluate the merits of that claim. The Committee recalls that while complainants are not required to invoke specifically the provisions of the Covenant which they believe have been violated, they must set out in substance before the national courts the claim which they later bring before the Committee. Since the author did not raise these complaints either before the Court of Appeal or before the Court of Cassation, this part of the communication is inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

6.3 The author contends that the Court of Appeal increased the sentence pronounced at first instance by the criminal court basing itself on facts that did not form part of the original charges and on which he was not able properly to defend himself. The Committee notes that the author did in fact raise this complaint in his supplementary pleadings before the Court of Cassation; he cannot therefore be criticized for not having exhausted available domestic remedies in this respect. It appears from the file, however, that the Court of Appeal of Besançon based itself on exactly the same charges as the court of first instance but simply judged more severely than the first instance some of the acts of which the author was charged, including non-compliance with certain provisions of the Companies Act of 24 July 1966. The Committee recalls that it is in general for the appellate courts of States parties to the Covenant to evaluate the facts and evidence in any given case, unless it can be ascertained that the evaluation of evidence was arbitrary or otherwise amounted to a denial of justice. Since no such irregularities have been shown to have occurred in the instant case, this part of the communication is inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant.

6.4 The author claims that the length of the examination of his case and of the judicial proceedings was excessive and therefore in violation of article 14, paragraph 3(c), of the Covenant. The State party has argued that the author has failed to exhaust domestic remedies in this regard, since he has not brought this claim before the Court of Cassation. The author's counsel has argued that this remedy would have served no purpose. The Committee recalls its jurisprudence that mere doubts about the effectiveness of an available remedy do not absolve the author of a communication from exhausting it. In the circumstances, the Committee concludes that this part of the communication is inadmissible for non-exhaustion of domestic remedies, under article 5, paragraph 2(b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

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

(b) that this decision shall be communicated to the State party, to the author and to his counsel.

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