



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. 3210/2018*, **

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| <i>Communication submitted by:</i> | J.S. (represented by counsel, Sjoerd Tom Van Berge Henegouwen) |
| <i>Alleged victim:</i> | The author |
| <i>State party:</i> | Kingdom of the Netherlands |
| <i>Date of communication:</i> | 2 November 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 18 July 2018 (not issued in document form) |
| <i>Date of adoption of decision:</i> | 22 March 2023 |
| <i>Subject matter:</i> | Arbitrary arrest and detention |
| <i>Procedural issues:</i> | Exhaustion of domestic remedies; insufficient substantiation of claims |
| <i>Substantive issues:</i> | Torture; cruel, inhuman or degrading treatment or punishment; arbitrary arrest and detention; deprivation of liberty; right to an effective remedy |
| <i>Articles of the Covenant:</i> | 2 (3), 4 (2), 7, 9 and 10 |
| <i>Articles of the Optional Protocol:</i> | 2 and 5 (2) (b) |

1. The author of the communication is J.S., a national of the Kingdom of the Netherlands born in 1958. He claims that the State party has violated his rights under articles 2 (3), 4 (2), 7, 9 and 10 of the Covenant. The Optional Protocol entered into force for the State party on 11 March 1979. The author is represented by counsel.

Facts as submitted by the author

2.1 The author was arrested on 18 July 2014 on charges of rape and illegal restraint. He was subsequently convicted and sentenced to six years' imprisonment by the Noord-

* Adopted by the Committee at its 137th session ((27 February–24 March 2023).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Farid Ahmadov, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Mahjoub El Haiba, Carlos Gómez Martínez, Laurence R. Helfer, Marcia V.J. Kran, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobayyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu. Pursuant to rule 108 of the Committee's rules of procedure, Yvonne Donders did not participate in the examination of the communication.



Nederland District Court. He claims that the manner in which his arrest was carried out was illegal, inhuman and degrading; the police officers conducting the arrest were not recognizable as such because they were not wearing uniforms and they were not using police vehicles; the police officers did not identify themselves to him; he was not provided with any information about his rights at the time of his arrest, such as the right to remain silent; a gun was pointed at him and he was dragged out of his car and blindfolded; and he was forcefully put into a car which drove away at high speed. The author states that he raised these claims before the domestic courts and that the domestic authorities did not refute his description of the manner in which the arrest was carried out. He claims that his arrest caused him mental distress and fear and that he only realized that he had been arrested by police officers when he arrived at a police station; initially, he feared that he was being attacked by criminals. He also claims that he made his initial statements to the police under psychological stress; those statements were later used as evidence at his trial.

2.2 In its judgment, the District Court found that there were sufficient facts and circumstances that led to a probable cause for the author's arrest, in accordance with article 27 of the Code of Criminal Procedure. It noted that the arrest order had been issued by a public prosecutor and found that the fact that the police officers had not immediately identified themselves as such did not make the arrest illegal. The author appealed the ruling of the District Court before the Arnhem-Leeuwarden Court of Appeal, which confirmed the ruling of the District Court. The author claims that, in his appeal, he argued that the manner in which his arrest had been carried out was illegal, inhuman and degrading. In its judgment, the Court of Appeal found that the author's arrest was legitimate and lawful. The author appealed this ruling to the Supreme Court. On 15 November 2016, the Supreme Court found the appeal to be inadmissible.

2.3 The author filed a complaint before the European Court of Human Rights on 5 May 2017, claiming violations of his rights under articles 3, 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). The complaint was found to be inadmissible in a single-judge decision dated 6 July 2017. Regarding the complaint under article 3 of the European Convention on Human Rights, the Court found that the author had not exhausted all domestic remedies, as he had not demonstrated that he had raised his claims under article 3 before the domestic authorities. The Court also found that the author had not exhausted all domestic remedies relating to his complaint under article 6 of the Convention, concerning the use as evidence of his statement made after his arrest, which he claimed was influenced by the fear he had experienced owing to the manner in which he was arrested. Concerning the author's remaining complaints under articles 6 and 13 of the Convention, the Court found that the material in its possession and the author's complaint did not disclose any apparent violation of the rights and freedoms set out in the Convention or the Protocols thereto. The Court therefore found the author's application to be manifestly ill-founded.

Complaint

3.1 The author claims that he experienced mental suffering during and after his arrest, owing to the violent, degrading and inhuman way in which it was carried out. He claims that the police officers who conducted the arrest were not held responsible for their conduct and that his complaints were not given any significant consideration by the domestic courts during the trials. He also claims that his request before the domestic courts to declare the statements he made shortly after his arrest inadmissible was denied without the courts providing any reasons. He further claims that, because of this, his complaints were not investigated effectively, and he was not provided with an effective remedy or compensation, in violation of his rights under article 7, read alone and in conjunction with article 2 (3), of the Covenant. He claims that the action by the authorities of the State party was unjustified and contrary to article 4 (2) of the Covenant.

3.2 The author claims that the violent manner in which he was arrested was inappropriate, unreasonable, unnecessary and disproportionate and, therefore, unlawful and arbitrary, in violation of his rights under article 9 (1) of the Covenant. He also claims that his rights under article 9 (2) of the Covenant were violated as, at the time of his arrest, he was not informed of the reasons for the arrest or of the charges against him. The author further claims that the

violent manner in which he was arrested amounted to a violation of his rights under article 10 of the Covenant.

3.3 The author requests that the Committee recommend that the State party: (a) investigate the alleged ill-treatment that he endured during his arrest and take appropriate measures against those responsible; (b) provide him with full and adequate compensation for the harm suffered; (c) re-examine his case in the light of the Committee's findings; and (d) clear his criminal record of the offence that is the subject matter of the present communication as well as any police data connected to it.

State party's observations on admissibility and the merits

4.1 On 18 January 2019, the State party submitted its observations on the admissibility and merits of the communication. It submits that the communication should be found inadmissible as being manifestly ill-founded. It also submits that parts of the author's claims should be found inadmissible for failure to exhaust domestic remedies. Should the Committee find the communication admissible, the State party submits that it is without merit.

4.2 The State party provided information on the arrest and trial of the author. It notes that, on 18 July 2014, the author was arrested on suspicion of the unlawful deprivation of liberty and rape of a 13-year-old girl. At the time of his arrest, he was registered in the police database as armed and dangerous. For this reason, it was deemed necessary to deploy an arrest and support unit to conduct the arrest. On 26 June 2015, the author was convicted of the unlawful deprivation of liberty and rape of a minor by the District Court. He was sentenced to six years' imprisonment and placed under a hospital order. At his trial before the District Court, the author argued that his arrest had been unlawful as the investigating officers were dressed in plain clothes and did not identify themselves as police officers before making the arrest. According to the author, the unlawful nature of his arrest warranted an acquittal. The District Court rejected this defence and held that the arrest was lawful as there was a reasonable suspicion of guilt based on the facts and circumstances of the case, and the arrest had been made by order of a public prosecutor. The State party notes that the District Court found that the fact that the investigating officers had not immediately identified themselves as police officers did not undermine the lawfulness of the arrest. In this connection, the court noted that there were exceptional circumstances in the author's case as he was registered in the police database as armed and dangerous. Consequently, speed was of the essence in the arrest. The court deemed it understandable that the investigating officers had not identified themselves before carrying out the arrest. On 25 January 2016, The Hague Court of Appeal upheld the judgment of the District Court. In his appeal, the author claimed that his arrest was unlawful because the investigating officers had worn plain clothes, had not used recognizable police vehicles, had not identified themselves as police officers before arresting him, and had not informed him of his rights. In the author's view, evidence obtained after the arrest should have been excluded because of the unlawfulness of the arrest. The Court of Appeal upheld the findings of the District Court and ruled that the arrest was lawful. On 15 November 2016, the Supreme Court found the author's appeal in cassation inadmissible.

4.3 The State party also provided information on applicable domestic regulations. It notes that articles 53 and 54 of the Code of Criminal Procedure specify the persons who are competent to arrest a suspect. In certain cases, the deployment of an arrest and support unit may be deemed necessary. An arrest and support unit is a specialized police unit that is deployed for purposes such as carrying out arrests in situations where it is reasonable to assume that circumstances could arise that would threaten the lives of police officers or others. The deployment of the unit is intended to prevent or control violence. Under article 2 (a) of the Code of Conduct for the Police, the Royal Military and Border Police and Other Investigating Officers, investigating officers in plain clothes are required to identify themselves without being asked, unless exceptional circumstances make this impossible. Exceptional circumstances include those in which special units are deployed, given the aim of their specific mandate. Preventing or controlling violence is the hallmark of arrest and support units when arresting persons who are not caught in the act. The operating procedures of arrest and support units are based on rapid action and the element of surprise. To this end, suspects who are about to be arrested may be blindfolded and handcuffed. In order to work

rapidly and to catch suspects off guard, arrest and support unit officers usually do not identify themselves immediately. The State party notes that the National Ombudsman confirmed that the operating procedures of arrest and support teams are based on rapid action and surprise. The aim of the element of surprise is to ensure that a person who is considered armed and dangerous is unable to make use of a firearm during arrest.

4.4 The State party also notes that, pursuant to article 27 (c) (1) of the Code of Criminal Procedure, a suspect is informed upon arrest of the criminal offence(s) of which he or she is suspected. Pursuant to paragraph 3 of the same article, immediately following arrest and in any event before the first interview, the suspect must be informed in writing of the right to receive the information referred to in paragraph 1, as well as the right to legal assistance, the right to interpretation and translation services, if applicable, and the right to remain silent. If procedural rules are deemed to have been breached during an investigation, the court can attach consequences to such breaches pursuant to article 359a of the Code of Criminal Procedure.¹

4.5 The State party argues that the author has not sufficiently substantiated that he was actually affected by the contested arrest, as he has not provided any information in support of his claim that he suffered harm as a result of the actions of the investigating officers. It notes that the author stated that he was afraid because he thought he was being attacked by criminals. The State party also notes that it does not dispute that being arrested by an arrest and support unit can be overwhelming, given the method with which such units operate. However, it emphasizes that the aim of that type of arrest is to overwhelm a potentially dangerous individual in order to neutralize him or her. It argues that this does not mean, however, that an arrest by an arrest and support unit is incompatible with the Covenant.

4.6 The State party argues that the arrest in the author's case was conducted in accordance with applicable domestic legislation and was reasonable and proportionate in the circumstances and that the author presented no information showing that he experienced so much stress that his rights under the Covenant were breached. Regarding the author's claim that his arrest was inhuman or degrading and, as a consequence, his rights under articles 4 (2) and 7 of the Covenant were violated, the State party does not dispute the author's description of the manner of his arrest. It notes that being arrested by an arrest and support unit may be overwhelming; however, there is no evidence whatsoever that the method used to arrest the author was incompatible with article 7 of the Covenant. The arrest and support unit acted in accordance with applicable domestic regulations and did not take action beyond what was necessary, given that the author was registered as armed and dangerous.

4.7 The State party notes that the author was arrested at 3.25 p.m. on 18 July 2014 and that he was brought before the assistant public prosecutor at 3.35 p.m. on the same day. The alleged stress that the author experienced as a result of believing he was being abducted could therefore not have lasted longer than 10 minutes, since it must have become clear to him as soon as he was brought before the assistant public prosecutor that he had been arrested, not abducted. The purpose of the actions of the investigating officers was to arrest the author without giving him the opportunity to use a firearm. For this reason, the officers did not identify themselves before making the arrest, as this would have removed the element of surprise and given the suspect the opportunity to use a firearm. It was in the interest of safety that the arrest and support team blindfolded the author and pointed a firearm at him. The State party also notes the author's claim that the treatment he received from the officers caused him stress and fear as he did not realize that they were from the national law enforcement authorities. The State party argues that, while this may be true, it is far from certain since the author was convicted for serious offences that had taken place just the day before his arrest.

¹ Article 359a of the Code of Criminal Procedure provides that, if it emerges that procedural rules were breached during the preliminary investigation, that the breach can no longer be remedied and that the law does not stipulate the legal consequences of such a breach, the court may (a) reduce the penalty in proportion to the seriousness of the breach, if such a reduction compensates for the disadvantage resulting therefrom; (b) declare that the findings of the investigation obtained as a result of the breach may not be used as evidence in support of the charges; (c) declare the Public Prosecution Service's application inadmissible, if as a result of the breach, trying the case would contravene the principles of due process.

Even if it were true, the arrest would still have been in compliance with articles 7 and 10 of the Covenant.

4.8 Regarding the author's claims under article 9 of the Covenant, the State party reiterates its argument that the author's arrest was appropriate and lawful. The State party notes that, in the official report of the arrest, the arresting officers stated that, before the author was transferred to the police station, he was informed that he was under arrest for rape, and that he had the right to remain silent and to be assisted by a lawyer prior to being interviewed. In addition, before each interview, the author was informed that he was under no obligation to answer the questions asked. The State party adds that the author's defence could not have been damaged as a result of the contested arrest. The State party notes that the author asserts that he made statements under psychological stress and that those statements were used by the national courts as a foundation for his conviction. However, the Noord-Nederland District Court based its judgment on the victim's statement, which was supported by DNA evidence and additional supporting evidence. Concerning the author's claims regarding the lack of effective remedies, the State party argues that the domestic courts examined the author's complaints sufficiently and that the judgments of the domestic courts clearly set out the grounds for dismissing his complaints. The State party argues that the author has not sufficiently shown that he was actually affected by the arrest or that he suffered harm. It submits that the communication should therefore be declared inadmissible pursuant to article 2 of the Optional Protocol.

4.9 The State party submits that the author's claims under articles 4 (2), 7 and 10 of the Covenant should be found inadmissible under article 5 (2) (b) of the Optional Protocol for failure to exhaust domestic remedies. It argues that at no time during the national proceedings did the author explicitly claim that his rights under these provisions had been violated, nor did he make any implicit reference to said alleged violations during the national proceedings.

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

5. On 16 May 2019, the author submitted his comments on the State party's observations. He reiterates his claim that his arrest was unlawful and arbitrary in violation of his rights under article 9 of the Covenant. He claims that the domestic courts did not respond to his claims, that his arrest was unlawful and that the courts did not provide any reason for failing to examine or investigate his claims. Regarding the State party's submission that his claims under articles 4 (2), 7 and 10 of the Covenant should be found inadmissible for failure to exhaust domestic remedies, he maintains that he raised complaints regarding his alleged degrading and inhuman arrest before the domestic courts and that these complaints were not taken into account by the courts.

State party's additional observations

6.1 On 25 November 2019, the State party submitted additional observations. It maintains that the communication should be found inadmissible.

6.2 With regard to the author's claim that the domestic courts failed to sufficiently provide a reason as to their rulings on the lawfulness of his arrest, the State party reiterates its argument that the author's claims were thoroughly considered by the domestic courts. It refers to the judgment of the District Court, which concluded that the author's arrest was lawful. It notes that the court stated that investigating officers wearing plain clothes must identify themselves as required by article 2 of the Code of Conduct for the Police, the Royal Military and Border Police and Other Investigating Officers; however, they may depart from this rule in exceptional circumstances. The court concluded that the author's arrest presented exceptional circumstances as the author was registered in the police files as "armed and dangerous". The District Court therefore deemed it understandable that the investigating officers did not immediately identify themselves since, in the light of the information registered about the author, speed was of the essence in making the arrest. The State party therefore argues that the author's claim that the domestic courts failed to respond to his complaints or provide any reason in their judgment is inaccurate.

6.3 Regarding the author's claims under articles 7, 4 (2) and 10 of the Covenant, the State party does not refute that the author disputed the lawfulness of his arrest before the domestic

courts. It notes, however, that the case file shows that his complaints concerning his arrest were based on the fact that the investigating officers could not be identified as such, had not used recognizable police vehicles and had not identified themselves prior to the arrest. The State party also notes that, at no point during the proceedings in the domestic courts did the author claim that his arrest was so cruel, inhuman or degrading as to constitute a violation of his rights under the Covenant, nor did he adduce any evidence to support such claim.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 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.

7.2 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.

7.3 The Committee notes the State party's submission that the author's claims under articles 4 (2), 7 and 10 of the Covenant should be found inadmissible under article 5 (2) (b) of the Optional Protocol for failure to exhaust domestic remedies as the author failed to raise these claims during the domestic proceedings. The Committee also notes the author's claims that he raised complaints about his degrading and inhuman arrest before the domestic courts and that these complaints were not properly assessed by the domestic courts. The Committee recalls its jurisprudence that, although there is no obligation to exhaust domestic remedies if they have no prospect of being successful, authors of communications must exercise due diligence in the pursuit of available remedies. It notes that mere doubts or assumptions about the effectiveness of domestic remedies do not absolve authors from exhausting them.² In the present case, the Committee notes the State party's assertion that the record of the author's arrest and hearing only shows that he challenged the alleged unlawfulness of his arrest before the domestic courts, based on the fact that the investigating officers could not be identified as such, had not used recognizable police vehicles, and had not identified themselves prior to arresting him. However, the Committee also notes that the author failed to raise before the domestic authorities any of his other claims presented in the communication. The Committee observes that, while the author disagrees with the State party's assertion in this regard, he has not presented any specific information or adduced any evidence to substantiate his claims under articles 7 and 10, read alone and in conjunction with articles 2 (3) and 4 (2), of the Covenant before the domestic authorities. The Committee therefore finds the author's claims under those articles inadmissible for failure to exhaust domestic remedies in accordance with article 5 (2) (b) of the Optional Protocol.

7.4 The Committee notes the author's claim that the manner in which he was arrested was inappropriate, unreasonable, unnecessary and disproportionate and, therefore, unlawful and arbitrary, in violation of his rights under article 9 (1) of the Covenant. The Committee also notes the author's claims that his rights under article 9 (2) of the Covenant were violated as he was not informed, at the time of the arrest, of the reasons for it or the charges against him. The Committee, however, notes the State party's uncontested argument that the arrest was conducted in accordance with applicable domestic legislation and that the measures taken were necessary and proportionate given that the author was considered to be armed and dangerous. It also notes that, according to the official report of the arrest, the author was brought before a judicial authority only 10 minutes after his arrest and that, before his transfer to the police station, he was informed of the reason for his arrest. He was made aware of the charges against him for the commission of a serious crime the previous day, and he was informed of his rights, including the right to remain silent and to be represented by legal counsel prior to questioning. The Committee further notes the State party's uncontested

² *V.S. v. New Zealand* (CCPR/C/115/D/2072/2011), para. 6.3; *García Perea v. Spain* (CCPR/C/95/D/1511/2006), para. 6.2; and *Zsolt Vargay v. Canada* (CCPR/C/96/D/1639/2007), para. 7.3.

information that, before each interview, the author was informed that he was under no obligation to answer the questions asked.

7.5 Regarding the author's claims that the domestic courts failed to adequately assess and sufficiently provide reasons for their ruling on the lawfulness of his arrest, the Committee notes the State party's argument that, based on the facts and circumstances of the case, the domestic courts concluded that there was sufficient evidence to order the author's arrest. The Committee also notes the findings of the domestic courts that the manner of the author's arrest was lawful under applicable domestic legislation; the courts found that there were exceptional circumstances to justify the arresting officers not immediately identifying themselves as police officers prior to arresting the author, as the author was registered in the police database as being armed and dangerous. The Committee further notes that the author disagrees with the reason given by the domestic courts. However, it notes that the author's arrest was found to be lawful under applicable domestic legislation during the domestic proceedings.

7.6 The Committee notes that the author has failed to provide any specific information refuting the findings of the domestic authorities in this regard, nor has he provided any specific information or arguments as to the alleged arbitrariness of his arrest. The Committee therefore concludes that, in the light of the findings of the domestic courts and the information provided by the State party with regard to the domestic proceedings, the author has failed to substantiate his claims under article 9, read alone and in conjunction with article 2 (3), of the Covenant for the purposes of admissibility.

8. The Committee therefore declares the author's claims under article 9 (1) and (2), read alone and in conjunction with article 2 (3), of the Covenant insufficiently substantiated and thus inadmissible under article 2 of the Optional Protocol.

9. The Committee therefore decides:

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

(b) That the present decision shall be transmitted to the State party and to the author.
