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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under the Optional Protocol, concerning communication No. 3256/2018*,**,***

Communication submitted by:	Dewradj Jaddoe (represented by counsel, Van Berge Henegouwen)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	12 June 2017 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 18 October 2018 (not issued in document form)
Date of adoption of Views:	26 July 2022
Subject matter:	Right to a review of the criminal conviction and sentence by a higher tribunal
Procedural issue:	Inadmissibility – non-exhaustion of domestic remedies
Substantive issues:	Right to equality before courts and to a review of criminal conviction and sentence by a higher tribunal
Article of the Covenant:	14(5)
Article of the Optional Protocol:	5(2)(b)

1. The author of the communication, dated 12 June 2017, is Mr. Dewradj Jaddoe, a national of Surinam, born on 18 March 1961. He claims to be a victim of a violation by the State party of his rights under article 14 (5) of the Covenant, due to a lack of judicial review of his criminal conviction and sentence by the Court of Appeal by a "court of third instance". The Netherlands acceded to the Optional Protocol to the Covenant on 11 December 1978. The author is represented by counsel (Mr. Van Berge Henegouwen).

* Adopted by the Committee at its 135th session (27 June – 27 July 2022).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Imeru Tamerat Yigezu and Gentian Zyberi.

*** Individual opinions (dissenting) of Committee members Arif Bulkan, Marcia V.J. Kran, Imeru Tamerat Yigezu and Gentian Zyberi are annexed to the present Views.

Facts as submitted by the author

2.1 The author was prosecuted for the murders of Mr. R.M.N. Karamatali and of Mr. B.A. Stein, which were committed in 2008. On 6 May 2010, the author was convicted to 18 years of imprisonment for the murder of Mr. R.M.N. Karamatali and was acquitted for the murder of Mr. B.A. Stein by the judgment of the First Instance Court Zwolle-Lelystad.

2.2 Following the appeal submitted by the Prosecutor to the Court of Appeal Arnhem-Leeuwarden against the acquittal by the First Instance Court, the Court carried out a new examination of the facts. The author also submitted an appeal against the judgment of the First Instance Court, but he could appeal only against his conviction for the murder of the first victim.

2.3 On 26 April 2013, the author was convicted by the Court of Appeal Arnhem-Leeuwarden for the murder of Mr. Karamatali, like in the judgment of the First Instance Court, and for the murder of Mr. Stein for which the author was acquitted in the first instance. He was sentenced to 29 years and six months of imprisonment.

2.4 On 31 December 2014, the author submitted a cassation appeal to the Supreme Court, arguing that the law has been misapplied as the Court of Appeal based its ruling on an incorrect understanding of the concepts of complicity ('together and in association with others') and premeditation, used witnesses' statements to the author's detriment, and made findings of fact which could not be made from the evidence and evidential grounds used.

2.5 On 29 September 2015, the Supreme Court dismissed the author's appeal in cassation, considering that there was no ground on which the contested judgement should be modified. The Supreme Court, however, decided to decrease the prison sentence from 29 years and six months to 29 years, and adjusted the rulings of the Court of Appeal as to damages awarded to the parties.

2.6 The author claims that no further remedies are available to contest the Supreme Court's decision. The same matter is not being examined under another procedure of international investigation or settlement.[1]

Complaint

3.1 The author submits that he was denied the possibility to have his conviction and sentence by the Court of Appeal for the murder of Mr. Stein, of which he was acquitted by the first instance court, to be reviewed by a higher tribunal according to law. Therefore, his rights under article 14(5) of the Covenant have been violated.

3.2 He asserts that there is no legal body in the Dutch system which reviews the facts of the case again after he has been convicted for the first time by the Court of Appeal. The First Instance Court and the Court of Appeal are the only two legal instances which review the facts of a case.

3.3 Although the author appealed in cassation against the judgment of the Court of Appeal at the Supreme Court, the latter Court did not look at the facts anymore. The aim of the cassation is to preserve legal uniformity, to steer the development of law and to safeguard legal protection. Cassation represents a quality control of contested judgments handed down by the Courts of Appeal as regards both the application of law and the legal reasoning. In addition, the Supreme Court dismissed the author's appeal in cassation.

3.4 According to the jurisprudence of the Committee, an effective review requires that a higher tribunal consider the facts of the case.[2] The author claims that he has the right to a new examination of the facts concerning the murder of Mr. Stein, as provided for in article 14(5) of the Covenant. However, the new examination of facts is not possible in the Dutch legal

[1] The author previously lodged a complaint to the European Court of Human Rights (ECtHR) on 18 February 2016 (application no. 10654/16). On 2 June 2016, the ECtHR, by a ruling of single judge, declared the complaint inadmissible. The complaint was not about the same matter, as it invoked a violation of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms due to the refusal of hearing an important witness.

[2] *H.K. v. Norway* (CCPR/C/112/D/2004/2010).

system once the author has been convicted for the first time by the Court of Appeal. The author therefore did not have an effective access to the instance of appeal.

3.5 Another factor is the severity of the crimes of which the author has been convicted. The maximum sentence for murder according to the Dutch law is a life sentence. When the case implies such a severity of the crime, it is even more important to enjoy the right to a conviction and sentence being reviewed on appeal by a higher tribunal.

3.6 The author requests the Committee to conclude that the State party has violated its obligations under article 14(5) of the Covenant, and to recommend that it adopt all necessary measures to provide the author with appropriate remedies, in accordance with article 2 (3) of the Covenant, including the re-examination of his case by the domestic authorities.

Additional information by the author

4.1 On 2 November 2018, the author indicated that he would like his case to be reviewed by a higher tribunal in the Netherlands, as set out in article 14(5) of the Covenant, including the facts of the case.[3] He would also like the State party to grant him full reparation for the violation of his rights.

4.2 In addition, the author would like to be given the opportunity of a revision of his case by the High Court, in case the Committee concluded that a violation of the Covenant took place, similarly to findings of a violation by the European Court of Human Rights (ECtHR), which serve as grounds for revision of the national judgment. The author also requests clearance of his criminal record regarding the offence concerned in the present case, deleting all data concerning the offence from the police records and compensating him for unlawful imprisonment.[4]

State party's observations on admissibility and the merits

5.1 On 18 April 2019, the State party submitted its observations on admissibility and the merits of the communication, recalling the main facts.

5.2 The author was prosecuted for his participation in two murders committed in October 2008. By judgment of 6 May 2010, the District Court (*Rechtbank Zwolle-Lelystad*) sentenced him to 18 years of imprisonment for the joint perpetration of a murder and the concealment and disposal of the corpse, for the joint perpetration of the concealment and disposal of a second corpse and for an attempt to solicit murder. The Court considered that there were not enough elements to prove that the author was guilty of the joint perpetration of another murder and decided to acquit him of those charges. The author and the Prosecutor appealed against the District Court's judgment. By judgment of 26 April 2013, after the examination in court (on 7 November 2012, 9 January 2013 and 8, 9, 10 and 12 April 2013), the Court of Appeal upheld the conviction by the first instance court, but found him also guilty of the murder of which he had been acquitted in the first instance. The Court of Appeal imposed him a sentence of 29 years and six months.

5.3 An appeal in cassation was lodged on the author's behalf. At the hearing of 19 May 2015, the Prosecutor General at the Supreme Court recommended that the contested judgment be set aside, but only in respect of the prison sentence that had been imposed and a number of decisions allowing monetary claims. On 29 September 2015, the Supreme Court set aside the contested judgment, but only in respect of the duration of the prison sentence that had been imposed. The Supreme Court followed the Prosecutor General's advisory opinion. The sentence was reduced by six months to 29 years of imprisonment. In all other parts, the Supreme Court dismissed the appeal in cassation and the judgment of the Court of Appeal became enforceable.

5.4 The State party argued that the present communication is inadmissible for failure to exhaust available domestic remedies, pursuant to article 5(2)(b) of the Optional Protocol, as the author did not raise any of the issues presented to the Committee in the proceedings at the Supreme Court. In particular, he did not complain that the Dutch law of criminal

[3] Ibid.

[4] *S.Y. v. the Netherlands* (CCPR/C/123/D/2392/2014).

procedure is deficient as it does not provide for the availability of a second instance of appeal, which would reassess the facts of the case.

5.5 On the merits, the State party argues that article 14(5) of the Covenant has not been violated. In the present case, article 14(5) does not establish any right to a second instance of appeal in which the facts of the case are reassessed. Following each conviction, the author had a legal remedy available within the meaning of article 14(5). The *travaux préparatoires* of the provision concerned show that the intention was to express the general principle that a legal remedy must be available against a criminal conviction. As a general rule, any person convicted of a crime has the right of appeal. A decision was made not to specify any further details regarding the legal remedy, leaving States free to take further decisions on this point. There is also no indication that there is any right to several instances of appeal following a conviction. The State party holds that article 14(5) requires only one instance of appeal in which the facts are reassessed.

5.6 The author argues that an appeal in which the court reassesses the facts must always be available in such a situation.[5] The State party disagrees; such interpretation would be incompatible with the intention of all States parties to the Covenant. It would also contradict other human rights instruments, such as Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). If the author's line of argument were to be accepted, article 14(5) would have to be interpreted the way that, if a court of first instance reaches a conclusion on the basis of the facts, and an appellate court then comes to a different conclusion on the basis of the same facts, another appellate court would be required to reassess those same facts. This could lead to endless proceedings concerning the same facts, and entail a significant disruption of the court systems of civil law countries. Under these systems, it is possible (in contrast with common law countries) for a person to be convicted in appellate proceedings following an acquittal in the first instance. It is unlikely that an interpretation of article 14(5) that prohibits such an outcome if no second instance of appeal is available would correspond with the intention of all States parties to the Convention (in particular those in which conviction is possible after an acquittal). This intention is demonstrated by the reservations entered by several States parties to article 14(5) of the Covenant, which interpret article 14(5) in a way that national legislation, which provides that no further appeal is available against a conviction in appellate proceedings subsequent to an acquittal in the first instance, is not incompatible with the Convention. Although the Netherlands has not entered a declaration to this effect, the Government does not believe this to be necessary since it considers the aforementioned reservations as interpretative declarations.[6] If a so-called reservation merely offers a state's understanding of a provision but does not exclude or modify that provision in its application to that state, it is, in reality, not a reservation.[7] The other States parties did not object to such interpretative declarations.

5.7 A further indication that the author's interpretation of article 14(5) does not correspond to the States parties' intentions is the fact that 44 States parties have also ratified Protocol No. 7 to the ECHR. Article 2(2) of the Protocol No. 7 allows a person's right to have his conviction reviewed by a higher tribunal to be subject to exceptions in cases in which the person was convicted following an appeal against acquittal in the first instance. It seems therefore more likely that article 14(5) should be interpreted in such a way that it does not establish any right to a review at a third instance following a conviction in appellate proceedings.

5.8 In the present case, the author had a legal remedy within the meaning of article 14(5) of the Covenant available after each conviction. The State party recalls that a procedure that "provides for a judicial review (…) on matters of law only" is not a legal remedy within the meaning of article 14(5) of the Covenant.[8] Neither is a review that "is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts" considered sufficient.[9] However, a procedure in which "a higher instance court looks at the

[5] *Gomaríz Valera v. Spain* (CCPR/C/84/D/1095/2002), para. 7.
[6] See individual opinion of Committee member Ms. Ruth Wedgwood in *Gomaríz Valera v. Spain.*
[7] General Comment No. 24, Human Rights Committee (1994), para. 3.
[8] Communications nos. 623-627/1995, *Dumukovsky et al. v. Georgia* (CCPR/C/62/D/623-627/1995)
[9] General Comment No. 32 (2007), para. 48.

allegations against a convicted person in great detail, considers the evidence submitted at the trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case" is sufficient.[10] The jurisprudence of the Committee also shows that the fact that a supreme court can review an appeal court's assessment of the sufficiency of the evidence is important.[11] The Committee has pointed out that the phrase "according to law" must be understood to refer to the modalities by which the review by a higher tribunal is to be carried out.[12]

5.9 On the basis of the foregoing, the State party argues that both the appeal and the appeal in cassation must be regarded as legal remedies within the meaning of article 14(5) that were available to the author. The statutory provisions governing appeal require the Court of Appeal to deliberate and decide with reference to the examination in court in both the first instance proceedings and appeal proceedings.[13] In 2007, the system was amended by the introduction of the Criminal Appeal Procedures Act, making it possible for the examination in court during the appeal proceedings to focus on the objections raised by the defendant and/or the public prosecutor. Nevertheless, the Court of Appeal remains a second instance in which questions of facts are decided. Following acquittal on an entire indictment in the first instance, the offence in question will no longer be addressed in the appellate proceedings, unless the public prosecutor appeals against the acquittal.[14] The Court of Appeal must in all cases pronounce anew on *inter alia* the question of whether the charges in the indictment have been lawfully and convincingly proved. The legal remedy of appeal in cassation is intended *inter alia* to determine whether the Court of Appeal's decision was in accordance with the law, and whether the necessary procedural requirements were satisfied. There must be a specific complaint about a violation of a particular rule of law and/or a breach of an applicable procedural requirement by the court.

5.10 An example of the latter would be a complaint concerning defective reasoning in relation to the evidence for certain charges, for instance a violation of article 359(3) of the Code of Criminal Procedure. This provision enables the Supreme Court to consider the facts and the interpretation of the evidence. If the appeal in cassation is admissible and grounds for appeal have been submitted on time, they will then be discussed by the Advocate General at the Prosecutor General's office at the Supreme Court in his written advisory opinion.[15]

5.11 If, for example, the Advocate General discusses the defence's objections regarding the evidence in great detail, explains why they are unfounded and then recommends that section 81 of the Judiciary Act be applied, and the Supreme Court then hands down a decision to this effect – generally without providing further reasons – this indicates that the Supreme Court concurs with the advisory opinion. The appeal in cassation is always decided on by (at least) three members of a full-bench of the Supreme Court, after its own assessment. In the majority of cases in recent years in which the Committee has found a violation of article 14(5) of the Covenant, the limitations on the right of appeal imposed by the national systems meant that the merits of the authors' cases were only examined once.

5.12 The author's case has been examined in three instances of judicial proceedings. The facts were examined in extensive detail at both the district court and the Court of Appeal. The Court of Appeal found that there was sufficient incriminating evidence to justify a finding of guilt. The defendant's counsel appealed in cassation and submitted various grounds for appeal, submitting inter alia various complaints about the decisions given on the evidence for the charges and reasons given for those decisions. The Advocate General addressed these objections in great detail in his advisory opinion, explaining that the complaints could not succeed, and recommended that the appeal in cassation be dismissed by applying section 81 of the Judiciary Act. The Supreme Court also assessed the grounds for appeal in cassation and then followed the recommendation of the Advocate General. The

[10] Ibid, para. 48.
[11] *Piscioneri v. Spain* (CCPR/C/96/D/1366/2005).
[12] *Terron v. Spain* (CCPR/C/82/D/1073/2002), para. 7.4.; *Salgar de Montejo v. Colombia* (CCPR/C/15/D/64/1979), para. 10.4.
[13] Article 422(2) of the Code of Criminal Procedure.
[14] Article 404(1) of the Code of Criminal Procedure.
[15] Article 439 of the Code of Criminal Procedure.

Government believes that the appeal in cassation was a procedure in which "a higher instance court looks at the allegations against a convicted person in great detail, considers the evidence submitted at the trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case."

5.13 The State party further argues that the author's reference to the case *S.Y. v. the Netherlands* concerns different circumstances, involving a leave to appeal. In the present case, it is clear from the judgment of the First Instance Court, the Court of Appeal and the Supreme Court, that the author's case has been examined in great detail. There is no evidence of the rights of defence having been prejudiced in any way. It is inappropriate to use a settlement proposal from a different case as a benchmark for reparation in the present case, particularly since the substance of the cases differs significantly. The State party reiterates that there is no indication that several instances of appeal must be available. In the present case, it would go beyond reasonableness to require the availability of a further avenue of appeal in which the facts can be reassessed.

5.14 The State party requests the Committee to declare the complaint inadmissible due to non-exhaustion of domestic remedies, or to consider that the author's conviction does not constitute a violation of article 14(5) of the Covenant.

Author's further comments

6.1 On 4 October 2019, the author submitted his comments, arguing that the communication should be declared admissible as he had exhausted domestic remedies.

6.2 The author and the prosecutor have submitted an appeal against the judgment of the First Instance Court. The author submitted an appeal in cassation against the judgment of the Court of Appeal to the Supreme Court. In the cassation procedure, it was not possible to complain about the Dutch law of criminal procedure being deficient as it makes no provision for the availability of a second instance of appeal in which the facts of the case are reassessed, because in cassation a new examination of the facts of the case does not take place. In general, the author cannot complain about a missing legal instance, at a missing legal instance. There is no other instance of appeal after the appeal in cassation.

6.3 The author objects to the argument about the intention of all States parties to the Convention not to apply article 14(5) to the situations when no second instance of appeal is available. Such intention does not appear from the reservations made, and the Dutch Government did not enter a declaration. As regards the assertion that the author's interpretation of article 14(5) does not correspond to the States parties' intentions, based on the fact that 44 of the States parties have ratified Protocol No. 7 to the ECHR, the author submits that ECHR sets out the right to two legal instances and not a factual legal instance after a conviction such as in the Covenant. The latter is precisely the literal text of the concerned provision of the Covenant. The Covenant's provisions have also been directly applicable under the Dutch legislation. Since a citizen can complain about a violation of the Covenant, after having turned to the European Court of Human Rights, the Dutch legislator sees a difference between the two treaties, and accepts a possible broader legal protection by the Covenant. The author concludes that article 14(5) of the Covenant offers citizens a broader protection than Protocol No. 7 to the ECHR as it does not limit the right to appeal to two legal instances.

6.4 While article 14(5) does not require States parties to provide for several instances of appeal, in a situation when a suspect has been acquitted by the court in the first instance, but has been convicted by an appellate court, there must be a possibility for a suspect to have his conviction and sentence being reviewed by a higher tribunal. If this higher tribunal concludes that the suspect should be convicted based on the same facts, the suspect has had the possibility to have his conviction and sentence reviewed by a higher tribunal. The conviction would then be a final judicial decision. The fears of endless proceedings concerning the same facts are therefore unjustified.

6.5 Furthermore, the author does not share the State party's argument that, following each conviction, he had a legal remedy available within the meaning of article 14(5) of the Covenant. As determined in *H.K. v. Norway*, there needs to be a legal instance where a new

examination of the facts of the case takes place.[16] One can state that a pure cassation procedure is insufficient and not in accordance with article 14(5). It is not a procedure whereby an accused can resubmit his conviction and sentence to a judge. A new examination of facts of the case and evidence does not take place at the Supreme Court of the Netherlands.,

6.6 In a number of cases, the Committee found a violation of the right to a review of conviction and sentence by a higher court when the accused was acquitted at first instance and convicted on appeal.[17] Even in cases in which an accused was acquitted and convicted of a number of offenses at first instance and convicted on appeal for the offenses of which he was acquitted in the first instance, the Committee found a violation if no actual appeal instance had been available against those first instance convictions.[18] The referred cases relate to a similar if not identical situation to that of the author.

6.7 In the Netherlands, there are only two factual legal instances; the First Instance Court and the Court of Appeal. After the author has been convicted by the Court of Appeal, there has been no possibility for him to submit appeal to a higher legal instance that would deal with facts. The argument that following each conviction, the author had a legal remedy available within the meaning of article 14(5) of the Covenant, is incorrect.

State party's further observations

7.1 On 9 December 2019, the State party submitted that the author's comments of 4 October 2019 do not give any reason to alter its initial observations.

7.2 As to admissibility, the State party maintains that the communication should be declared inadmissible. The cassation procedure represents a second instance of appeal in which the facts of the case are reassessed, referring to two national cases wherein article 14(5) of the Covenant was invoked before the Supreme Court.

7.3 On the merits, the State party indicated that article 14(5) has not been violated since it does not establish any right to a second instance of appeal in which the facts of the case are reassessed. It also argued that, following each conviction, the author had a legal remedy at his disposal.

7.4 The State party does not agree that the cases of *H.K. v. Norway* and *Gomaríz Valera v. Spain* relate to a situation similar or identical to that of the author's. In *H.K. v. Norway*, the case concerned the court of appeal's decision to deny leave to appeal the conviction by the district court. The author's claim was limited to the lack of a duly reasoned judgment. The Committee did not agree that article 14(5) of the Covenant had been violated.

7.5 In *Valera v. Spain*, the author's claims concerned a lack of legal possibility to challenge his conviction by the Provincial High Court before the Supreme Court of Spain. As explained, the author's case was assessed by the district court, the Court of Appeal and the Supreme Court, within the meaning of article 14(5).

State party's additional observations

8.1 On 9 July 2020, the State party requested an authorization to provide update on the decisions of the Supreme Court. The new case law has concerned the contention in the present communication, namely the scope of article 14(5) of the Covenant.

8.2 The Supreme Court judgment concerning a situation similar to that of the author was delivered on 18 February 2020.[19]

8.3 In that case, the district court had acquitted the defendant of the offences with which he had been charged. On appeal, the defendant was convicted of various offences. In the appeal proceedings, counsel for the defendant argued that in cases such as that, in which the defendant is acquitted at first instance and the Public Prosecution Service lodges an appeal,

[16] *H.K. v. Norway*, para. 9.3.
[17] *Gomaríz Valera v. Spain* (CCPR/C/84/D/1095/2002), para. 7.2.; *Gonzales Clares v. Spain* (CCPR/C/88/D/1332/2004).
[18] *Conde Conde v. Spain* (CCPR/C/88/D/1325/2004).
[19] ECLI: NL:HR:2020:285.

the Dutch law of criminal procedure does not comply with international requirements, in particular article 14(5) of the Covenant. Due to the restrictions inherent to appeal in cassation, it was argued that these proceedings could not be deemed "review by a higher tribunal" within the meaning of article 14(5) of the Covenant. After this defence failed on appeal, counsel lodged an appeal in cassation. The Advocate General submitted an advisory opinion on this case to the Supreme Court on 3 December 2019, arguing that article 14(5) does not preclude the Dutch cassation system, under which the Supreme Court's review encompasses the court of appeal's use of evidence.

8.4 The communication *Gomaríz Valera v. Spain*, referred to by the author, concerns the Spanish system of appeals prior to a "transformation" in the case law that broadened the traditional scope of cassation recognized by the Spanish Supreme Court. The questions of facts that are excluded from the Spanish appeal on cassation have since been reduced to those questions that would require the resubmission of evidence in order to permit re-evaluation.[20] In light of this transformation, the Committee noted that the Spanish Supreme Court thoroughly examined each of the grounds for appeal adduced by the author and subsequently declared the author's complaint relating to article 14(5) inadmissible.[21] Since then, there have been other instances in which the Committee has found that the Spanish system of appeals does not give rise to any issues under article 14(5) of the Covenant.[22]

8.5 From *V.S. v. Lithuania*, it is clear that the Lithuanian Court of Cassation does not re-evaluate the evidence of criminal cases or collect new evidence. However, it does examine the arguments of the cassation appeal. The Lithuanian Government emphasised that the Court of Cassation analysed the author's arguments, compared those with the evidence set out in the appellate court's judgment, and found no violation.[23] Had the Court of Cassation found a violation, it would have referred the case to an appellate court for re-examination.[24] The Committee considered that the author was not able to substantiate that the scope of appellate jurisdiction exercised by the Lithuanian Court of Cassation deprived him of his right to have his conviction and sentence reviewed by a higher tribunal according to law, and declared the author's claims on this point inadmissible.[25]

8.6 As regards the Netherlands, the State party emphasized that when examining the grounds of appeal in cassation, section 79 of the Judiciary Act allows the Supreme Court to determine whether a court of appeal's decision was in accordance with the law, and whether procedural requirements have been satisfied. If the Supreme Court considers that the evidence used cannot support a finding that the charges have been proved, it can refer the case back to a court of appeal, as reconfirmed by the Supreme Court in the judgment of 18 February 2020. In another judgment of 16 October 2018, the Supreme Court ruled that a court of appeal is required to carefully substantiate the reasoning that leads to such a conviction on appeal in part on the basis of a witness statement..

8.7 The Supreme Court held that the strict reasoning requirement enables it to review the court of appeal's use of evidence in even greater depth in situations like this.

Additional comments by the author

9.1 On 9 October 2020, the author submitted additional comments.

9.2 He objected that the appeal in cassation enables a review of the sufficiency of the evidence and of the reasons for decision on evidence, as it is determined by the grounds of appeal in cassation. The severity of the crime plays an important role as a determining

[20] *Rodríguez v. Spain* (CCPR/C/94/D/1489/2006), para. 2.3; *Carpintero Uclés v. Spain* (CCPR/C/96/D/1364/2005) .

[21] Ibid., para. 6.4.

[22] *S.S.F., S.S.E. & E.J.S.E. v. Spain* (CCPR/C/112/D/2105/2011); *M.R.R. v. Spain* (CCPR/C/111/D/2037/2011).

[23] *V.S. v. Lithuania* (CCPR/C/114/D/2437/2014), para. 4.4.

[24] Ibid, para. 4.5.

[25] Ibid, para. 6.3.

factor.[26] If the crime is serious enough, a review by a higher tribunal pursuant to article 14(5) of the Covenant is required.

9.3 The review by the Supreme Court is not factual because it only makes a legal review of the evidence used. Such review should be factual.[27] The Supreme Court only does a legal test afterwards. A legal assessment of the evidence used is not sufficient to state that the Supreme Court looks at factual dimensions.[28]

9.4 The Supreme Court's test whether there is lawful and sufficient evidence (if there is enough legal evidence to convict someone) is not a complete and factual review by a higher tribunal. Even in cases where there is lawful and sufficient evidence for a conviction, the Dutch judges can acquit because they haven't been persuaded or there are alternative scenarios.

9.5 On 18 February 2020, the Supreme Court ruled that its proceedings do not breach article 14(5) of the Covenant. The Supreme Court has stated many times that the first instance court and the court of appeal are the only two legal instances which review the factual dimensions of a case, and the Court works with the facts as they have been established by the court of appeal. The author therefore concludes that there has been a violation of article 14(5).

9.6 On 5 November 2020, the author requested that his interpretation of the new Dutch case law, as contained in the submission of 9 October 2020, be treated equally to the State party's additional observations.

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[29] under another procedure of international investigation or settlement.[30]

10.3 The Committee recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5 (2)(b) of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.[31] The Committee notes the State party's objection that the author has not exhausted domestic remedies since the claims before the Committee have not been raised in the context of the cassation proceedings before the Supreme Court, and that the author did not complain about the absence of a second instance of appeal in the Dutch law of criminal procedure, in which the facts of the case would be reassessed. The Committee notes the author's argument that he appealed against the judgment of the First Instance Court, convicting him for the first crime, and submitted an appeal in cassation against the judgement of the Court of Appeal, convicting him for the second crime. Both instances have assessed the facts of the case. The Committee also notes the author's claim that since the Supreme Court of cassation reviews only the application of law, he could not enjoy an effective appeal against his conviction and sentence for murdering Mr. Stein by the Court of Appeal. The

[26] *Salagar de Montejo v. Colombia.*

[27] *H.K. v. Norway*.

[28] Ibid.

[29] The State party has not entered a reservation to article 5(2)(a) of the Optional Protocol.

[30] The author's complaint filed to the European Court of Human Rights (application no. 10654/16), which concerned another matter, was declared inadmissible by the European Court, sitting in a single judge formation, on 2 June 2016, since the admissibility criteria set out in articles 34 and 35 of the European Convention on Human Rights have not been met.

[31] See e.g. *Patiño v. Panama* (CCPR/C/52/D/437/1990), para. 5.2; *P.L. v. Germany* (CCPR/C/79/D/1003/2001), para. 6.5; *Riedl-Riedenstein et al. v. Germany* (CCPR/C/82/D/1188/2003), para. 7.2; *Gilberg v. Germany* (CCPR/C/87/D/1403/2005), para. 6.5; *Warsame v. Canada* (CCPR/C/102/D/1959/2010), para. 7.4; and *Singh et al. v. Canada* (CCPR/C/125/DR/2948/2017), para. 6.4.

Committee further notes the author's argument that in the cassation proceedings, it was not possible for him to complain about the deficiencies of Dutch law of criminal procedure since there are no provisions for the availability of a second instance of appeal in which the facts of the case are reassessed, and because cassation appeals do not provide for a new examination of the facts of the case. The Committee observes that the author could not complain about a missing legal instance during the cassation proceedings, and that no further appeal following the Supreme Court decision on appeal in cassation is available in the Dutch law. The Committee therefore considers that it is not precluded from examining the author's claims by the requirements of article 5 (2)(b) of the Optional Protocol.

10.4 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, his claims under article 14(5) of the Covenant. Accordingly, it declares the communication admissible and proceeds with its consideration on the merits.

Consideration of the merits

11.1 The Human Rights Committee has considered the communication in light of all the information made available to it by the parties, as provided for under article 5 (1) of the Optional Protocol.

11.2 The Committee notes the author's claim that his rights under article 14(5) of the Covenant were violated, since the Court of Appeal convicted him on 26 April 2013 for the murder of Mr. Stein, after he had been acquitted for this offense by the First Instance Court, and since he did not have access to an effective review of his conviction and sentence by a higher tribunal in accordance with the law.

11.3 The Committee recalls that, while States parties are free to determine the modalities of appeal, under article 14(5) of the Covenant, they are under an obligation to review substantially the conviction and sentence.[32] The Committee also recalls that the right to have one's conviction and sentence reviewed by a higher tribunal imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.[33] A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant.[34] According to the jurisprudence of the Committee, article 14(5) does not require a full retrial or a "hearing", as long as the tribunal carrying out the review can look at the factual dimensions of the case.[35] The Committee further recalls that the right to an appeal also applies to the case of aggravation of sentence by the appellate court; the absence of any right of review in a higher court of a sentence handed down by an appeal court, where the person was found not guilty by a lower court, is a violation of article 14(5) of the Covenant.[36]

11.4 The Committee notes the State party's argument that the author appealed each conviction (by the First Instance Court and the Court of Appeal), and enjoyed effective remedies at two instances (before the Court of Appeal and the Supreme Court). The Committee notes also the State party's claim that the Supreme Court, in its decision on the author's cassation appeal, considered the application of legislation also in respect of the facts and sufficiency of evidence and of the reasons for decision on evidence in this case, and the author therefore had his conviction and sentence reviewed by a higher factual legal instance. Furthermore, the Committee notes the author's objection that the State party did not enter a reservation to article 14(5) of the Covenant, that the scope of the review by the Supreme Court is determined by the grounds of appeal in cassation, and that the severity of the crime is an important determining factor for a review by a higher tribunal. The Committee also

[32] General comment No. 32, para. 45; *Aboushanif* v. *Norway* (CCPR/C/93/D/1542/2007), para. 7.2; and *Reid* v. *Jamaica* (CCPR/C/51/D/355/1989), para. 14.3.

[33] General comment No. 32, para. 48, and *T.L.N* v. *Norway* (CCPR/C/111/D/1942/2010), para. 9.2; and *Aboushanif* v. *Norway*, para. 7.2.

[34] *Gómez Vázquez v. Spain* (CCPR/C/69/D/701/1996), para. 11.1. See also *Wade v. Senegal* (CCPR/C/124/D/2783/2016), para. 12.4.

[35] *Perera* v. *Australia* (CCPR/C/53/D/536/1993), para. 6.4; and *Rolando* v. *Philippines* (CCPR/C/82/D/1110/2002), para. 4.5.

[36] *Conde v. Spain* (CCPR/C/88/D/1325/2004), para. 7.2.

observes the author's argument that the review by the Supreme Court in itself is not factual because it only makes a legal review of the evidence used, and that the cassation is a check on the quality of contested judgments given by the courts of appeal as regards both the application of law and the legal reasoning behind it, which is not sufficient to state that the Supreme Court looks at factual dimensions.

11.5 The Committee observes that the author's appeal in cassation of 31 December 2014 has stated that the law was misapplied, entailing nullity, as the Court of Appeal based its ruling on an incorrect understanding or application of the concepts of complicity ('together and in association with others'), premeditation, use of witness statement to the author's detriment or the length of conviction, and that the court findings of fact could not be made from the evidence and evidential grounds used. The Committee further observes that on 29 September 2015, the Supreme Court set aside the contested judgment of the Court of Appeal exclusively in relation to the claims of damages by injured parties and to the imposed prison sentence, decreasing its duration to 29 years; the Court rejected the rest of the author's appeal in cassation, considering that "the argued grounds do not lead to cassation and that with reference to art. 81.1 of the Judiciary Act, this requires no further reasoning since the grounds do not demand any answers with regard to legal questions in the interests of the unity of law or the development of the law".[37] In that regard, the Committee observes that the Court's decision did not contain any reference or assessment of the facts or evidence used by the Court of Appeal to convict the author for the murder of Mr. Stein, but on the contrary explicitly stated that no further reasoning, in addition to the conclusion that there are no grounds demanding any answers, is required.

11.6 In light of the above, the Committee considers that the Supreme Court did not provide adequate details of its considerations of the lawfulness and sufficiency of the facts and evidence used and the reasoning of its re-assessments. The Committee therefore considers that in the present case, the Supreme Court did not properly assess the sufficiency of facts and incriminating evidence which supported the author's conviction for a second murder on appeal, since the main reasons for rejection of the author's cassation appeal related to the legal considerations, taking into account the nature of the cassation proceedings and the absence of any reasoning to the contrary, and not the review of facts, as required by the Committee's jurisprudence. Accordingly, in these specific circumstances, the Committee finds that, due to the lack of evidence that the Supreme Court sufficiently reviewed the facts and evidence in the author's case, he was deprived of the effective exercise of his right to have his conviction and sentence reviewed by a higher tribunal, as required by article 14 (5) of the Covenant.

12. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it reveal a violation by the State party of article 14 (5) of the Covenant.

13. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. In the present case, the State party is under an obligation, inter alia: (a) to review the author's conviction and sentence by a higher tribunal in relation to the murder of Mr. Stein and (b) to provide the author with adequate compensation. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In this connection, the Committee reiterates that, in accordance with its obligation under article 2 (2) of the Covenant, the State party should ensure that the relevant legal framework and practices are in conformity with the requirements of article 14 (5) of the Covenant.

14. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from

[37] The decision by the Supreme Court of the Netherlands on appeal in cassation, dated 29 September 2015.

the State party, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the present Views.

Annex I

Individual opinion by Committee member Marcia V. J. Kran (dissenting)

1. I have come to a different conclusion from the majority of the Committee. I am of the view that the legal process of upholding the author's conviction by the Supreme Court of the Netherlands did not violate his rights under article 14(5) of the Covenant.

2. The author claims that his initial acquittal and subsequent conviction for the first time by the Court of Appeal, coupled with the claim that on appeal the Supreme Court of the Netherlands did not adequately review the facts of his case, demonstrate a violation of his right to appeal a criminal conviction and sentence under article 14(5) of the Covenant.

3. In contrast, the State party argues that the Dutch legal system has examined the facts and evidence of this case multiple times, thus granting the author legal remedies in accordance with article 14(5) of the Covenant.

4. Thus, the issue in this case is whether the author has sufficiently substantiated his claim that his right under article 14(5) has been violated because the Supreme Court of the Netherlands did not adequately review the factual dimensions of his case.

5. The jurisprudence of the Committee and the *travaux préparatoires* of article 14(5) of the Covenant clarify that State parties can determine the manner of appeal under article 14(5) so long as there is a substantive review of the conviction and sentence.[1] In addition, while General Comment 32 requires a substantive review of the case,[2] including examining factual dimensions, it does not require a full retrial.[3]

6. In the present case, the facts were reviewed both by the Court of First Instance and the Appellate Court. Subsequently, the Supreme Court examined the grounds on which the author appealed. On appeal, the author did not argue that Dutch criminal law is not in consonance with article 14(5) of the Covenant or indeed argue any deficiency of Dutch criminal law. The author instead stated he was unable to make any claim about the deficiency of Dutch criminal law because cassation appeals only review the quality of the contested judgement on the application of law and its reasoning. In effectively rebutting the claims of the author, the State party has provided explanations about the manner in which a cassation appeal does consider evidence and the manner in which the relevant facts in this case were considered by the Supreme Court to satisfy article 14(5) of the Covenant, as discussed below. The State party references section 359(3) of the Code of Criminal Procedure, which enables courts to consider the facts as well as the interpretation of evidence more broadly. The State party indicates that when the Supreme Court considers the evidence used by the lower court and determines the evidence cannot support a particular finding, the case can be referred back to the lower court. In addition, the State party provides case law supporting the proposition that reasons must be provided by the Court of Appeal if overturning an acquittal.

7. In making its decision, the Supreme Court had access to the complete factual record of the case, including proceedings in the lower courts, the author's submissions upon appeal to the Supreme Court, and the Procurator General's recommendations. Indeed, the Office of the Procurator General forms a part of the Supreme Court of the Netherlands and is tasked with providing advice to the Supreme Court.[4] In this case, the detailed 25 page letter of the Procurator General, dated 19 May 2015, has been specifically referenced and its

1 See generally, William A. Schabas, Nowak's CCPR Commentary, 3rd revised edition p 415; General Comment No. 32, para. 45; Aboushanif v. Norway (CCPR/C/93/D/1542/2007), para. 7.2; Reid v. Jamaica (CCPR/C/51/D/355/1989), para. 14.3.

2 General Comment No. 32, para. 48; T.L.N v. Norway (CCPR/C/111/D/1942/2010) para. 9.2; Aboushanif v. Norway (CCPR/C/93/D/1542/2007), para. 7.2.

3 Perera v. Australia, (CCPR/C/53/D/536/1993) para. 6.4; Rolando v. Philippines (CCPR/C/82/D/1110/2002), para. 4.5.

4 "About the Supreme Court", available at: https://www.hogeraad.nl/english/.

recommendations followed in the decision of the Supreme Court of the Netherlands. This letter discusses all grounds appealed by the author to the Supreme Court of the Netherlands and considers the evidence presented during the trial in depth on each ground, including pathology reports, DNA evidence, and testimony of other suspects. Based on all the material before it, including this evaluation of evidence, the Supreme Court provided a succinct judgment relying on the recommendation of the Procurator General, which dismissed all grounds of the appeal except for the last ground, which related to a technical point on late submission of documents. And as a former Committee member has stated, though in a slightly different context, final courts of appeal should not be required to mention their reasoning at length.[5] In accordance with the jurisprudence of the Committee, the examination of the available information before the Netherlands Supreme Court satisfies the requirements of article 14(5) of the Covenant.[6]

In light of the foregoing, the author has failed to substantiate his claim under article 14(5) of the Covenant and the claim should be found inadmissible.

5 Aboushanif v. Norway (CCPR/C/93/D/1542/2007) Concurrence of Ivan Shearer, discussing a leave to appeal application.

6 Sevostyanov v. Russian Federation (CCPR/C/109/D/1856/2008), para. 7.3; S.S.F. v Spain, (CCPR/C/112/D/2105/2011), para. 8.4-8.6.

Annex II

Joint opinion by Committee members Gentian Zyberi and Imeru Tamerat Yigezu (dissenting).

Introduction

1. We strongly disagree with the Committee's finding of a violation of article 14(5) of the Covenant in this case. The Committee found that, "due to the lack of evidence that the Supreme Court sufficiently reviewed the facts and evidence in the author's case, he was deprived of the effective exercise of his right to have his conviction and sentence reviewed by a higher tribunal, as required by article 14(5) of the Covenant."[1] The complaint should have been declared inadmissible, either because it failed to exhaust domestic legal remedies, or otherwise on grounds of insufficient substantiation.

Non-exhaustion of domestic remedies

2. The author argued before the Committee that his rights under article 14(5) of the Covenant were violated, since he did not have access to an effective review of his conviction and sentence by a higher tribunal in accordance with the law. According to the author, the review by the Supreme Court of the conviction by the Court of Appeal is not factual because it only makes a legal review of the evidence used, and that the cassation only checks the quality of contested judgments given by the courts of appeal regarding both the application of law and the legal reasoning behind it. The author never argued before a Dutch court that the Netherlands' law of criminal procedure is deficient insofar as it failed to grant him a substantial appeal from convictions rendered in a second-instance court. Hence, the complaint should have been declared inadmissible for failing to exhaust domestic remedies.

Insufficient substantiation and the application of Article 14(5) of the Covenant to convictions on appeal

3. Article 14(5) requires from a State party that "Everyone convicted of a crime shall have the right to his conviction *and sentence* being *reviewed by a higher tribunal* according to law."[2] The Committee has grappled with ensuring an adequate interpretation of article 14(5), including concerning review of a criminal conviction on appeal during cassation.[3] The clear language of this article does not allow for imposing extensive legal requirements that are not borne out either from the text of the provision, or from its *travaux preparatoires*.[4]

4. While States parties to the Covenant are free to determine the modalities of appeal under their laws, under article 14(5) of the Covenant they are under an obligation to review the conviction and sentence in criminal cases.[5] As the Committee has explained, Article 14(5) is violated not only if the decision by the court of first instance is final, but also where a conviction imposed by an appeal court or a court of final instance, following acquittal by a lower court, according to domestic law, cannot be reviewed by a higher court.[6] What article 14(5) requires in such circumstances is two-level criminal proceedings. Additionally, a review that is limited to the formal or legal aspects of the conviction without any

[1] Para. 11.6. of the Views.

[2] Emphasis added.

[3] For a commentary of the Committee's practice on article 14(5) see among others William A. Schabas, Nowak's CCPR Commentary, 3rd revised edition (N.P.Engel, Publisher, 2019), pp. 414-422, especially pp. 420-21, paras. 125-6.

[4] A/C3/L795/Rev.3, Official Records, Third Committee, 4th Session, 1959. See also Marc J. Bossuyt, Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights (Brill 1987), p. 310.

[5] See General Comment No. 32, para. 45. See also *Calderon Bruges v Colombia*, Communication No. 1641/2007, para. 7.3; *Gomariz Valera v.* Spain, Communication No. 1095/2002, para. 7.1.

[6] See General Comment No. 32, para. 47 (footnotes omitted). See also *Conde v. Spain*, Communication No. 1325/2004, para. 7.2.

consideration *whatsoever* of the facts is not sufficient under the Covenant.[7] According to the jurisprudence of the Committee, article 14(5) does not require a full retrial or a "hearing", as long as the tribunal carrying out the review can look at the factual dimensions of the case.[8] When it comes to General Comment 32, it must be noted that paragraph 48 concerns legal requirements for regular appeals, whereas appeals on cassation are briefly addressed in paragraph 47.

5 The State party has argued that according to section 79 of the Judiciary Act, the Supreme Court can determine whether a court of appeal's decision was in accordance with the law, and whether procedural requirements have been satisfied. Additionally, a failure to satisfy procedural requirements would constitute defective reasoning in relation to the evidence for certain charges, for instance a violation of article 359(3) of the Code of Criminal Procedure, which provides that the decision that the charge against the defendant has been proved must be founded on the substance of evidence specified in the judgment, consisting of facts and circumstances supporting this conclusion, and that, if the Supreme Court considers that the evidence used cannot support a finding that the charges have been proved, it can refer the case back to a court of appeal. The State party has affirmed that there is a special requirement to provide reasons when the defendant is acquitted at first instance but convicted on appeal, and it has provided relevant case law in support. The author has failed to sufficiently address the above-mentioned arguments by the State party, thus failing to show that the Supreme Court in its decision of 29 September 2015 did not assess the factual circumstances of his case.

6. Notably, with regard to the functioning of the Dutch Supreme Court, the Procurator General and his office, the Supreme Court, and the Director of Operations form a single organisation.[9] In this case, the Procurator General prepared a lengthy advice of 25 pages with detailed references to the facts of the case and exhaustive analysis of the legal issues involved, which the Supreme Court decided to follow. Hence, it is plain wrong for the Committee to conclude as it did.

7. Finally, the Committee has avoided answering an important argument made by the State party about it being unlikely that 44 States parties to the Covenant would have ratified Protocol No. 7 of the ECHR, if they had considered that it meant diverging from their obligations under the Covenant.[10] While some countries have chosen to enter reservations or make declarations with regard to the application of article 14(5),[11] the Committee should avoid interpreting the Covenant in an expansive manner that could force a significant number of States parties to the Optional Protocol (about a third) to enter reservations or to make declarations concerning provisions of the Covenant that have a similar effect.

Concluding remarks

8. Regrettably, this decision of the Committee shows a lack of appreciation of the institutional functioning of the Dutch legal system and its Supreme Court, in relation to Article 14(5) of the Covenant. Besides not having exhausted domestic remedies, the author's complaint was not sufficiently substantiated. Accordingly, the Committee should have found the complaint inadmissible.

[7] See General Comment No. 32, para. 48 (emphasis added). See also *Gómez Vázquez v. Spain*, Communication No. 701/1996, para. 11.1; *Wade v. Senegal*, Communication No. 2783/2016, para. 12.4.

[8] See *Perera* v. *Australia*, Communication No. 536/1993, para. 6.4; and *Rolando* v. *Philippines*, Communication No. 1110/2002, para. 4.5.

[9] More on the Supreme Court at https://www.hogeraad.nl/english; on the role of the Procurator General at www.hogeraad.nl/english/the-procurator-general-the-supreme-court.

[10] Para. 5.7 of the Views.

[11] Namely Austria, Denmark, France, Germany, Italy, Korea (withdrawn in 2007), Luxembourg, Monaco, Norway, Switzerland (withdrawn in 2007), Trinidad and Tobago. For more details, see the UN treaties database at https://treaties.un.org.

Annex III

Individual Opinion by Committee member Arif Bulkan (dissenting)

1. I strongly disagree with the majority's conclusion in this case. By finding the communication admissible and that the author was denied the effective exercise of his right to have his conviction and sentence reviewed by a higher tribunal, the majority has not only ignored the failures of the author to exhaust domestic remedies and to properly substantiate his claim, it has also conflated two distinct positions – that of the availability of a review of the facts and the right to a duly reasoned judgment.

2. The author's initial claim was that it is not possible in the Dutch legal system to obtain a review of the facts of a case after conviction for the first time by the Court of Appeal, but this alleged incompatibility of Dutch criminal procedure with art 14(5) of the ICCPR was never raised by him in the domestic proceedings. The author admits this failure and explains it by arguing weakly that he could not do so because it is not possible to complain about a missing legal instance *at* a missing legal instance. The patent absurdity of this argument is exposed by the fact that he did appeal further to the Supreme Court, and there was nothing to preclude him from raising this alleged deficiency there. His failure to do so is even more inexcusable given that, according to him, the Supreme Court "renders judgment only on legal issues".[1] As such, the majority's finding that the author was precluded from raising this procedural point during the cassation proceedings ignores the author's own description of the Supreme Court's jurisdiction. Given his unjustified failure to canvass the alleged deficiency of the legal system in the domestic system, this communication is clearly inadmissible under art 5(2)(b) of OP 1.

3. The substance of the author's claim is also contradicted by the extensive arguments put forward on behalf of the State party, which the author has completely failed to address. The State party explained Dutch criminal procedure in painstaking detail, revealing that article 359(3) of the Code of Criminal Procedure enables the Supreme Court in cassation proceedings to examine the facts and interpretation of the evidence and to assess anew whether the evidence led in the courts below is capable of supporting the conviction.[2] Nowhere does the author contradict this unequivocal explanation; worse, the majority simply accepts the author's unsubstantiated assertions and finds a violation on the basis of the brevity of the court's ruling. But the latter is a separate issue, also explained by the State party, so what we are left with is the rejection of the State's affirmative explanation for no good reason.

4. Not only is a review of evidence possible on appeal to the Supreme Court, but in this case one was actually conducted. The author disclosed that in his cassation appeal he raised grounds related to the evidence led and the interpretation of the facts,[3] which would be an odd thing to do if the Supreme Court were precluded from reviewing facts. In any event, as the State party explained further, the Advocate General responded to the author's arguments in great detail, the Supreme Court considered these arguments, and then dismissed the appeal by applying s. 81 of the Judiciary Act.[4] Once again, this direct rebuttal of the author's allegation stands unanswered by him and blithely ignored by the majority.

5. The lynchpin of the majority's reasoning is the brevity of the Supreme Court's ruling in dismissing the appeal.[5] But even this was explained by the State party. Article 81 permits the Supreme Court to dismiss an appeal without detailed reasoning, though prior to doing so it must consider an appellant's arguments and the Advocate General's response. To accept the author's claim, therefore, one would have to ignore Article 81 and find that the State party is engaged in deliberate deceit, a course I am unwilling to adopt.

[1] Author's further submissions, para. 6.5.
[2] SP's observations on admissibility and merits, para. 5.10; see also 7.2 and all of section 8.
[3] Facts as submitted by the author, para. 2.4.
[4] SP's observations on admissibility and merits, para. 5.12.
[5] Consideration of the merits, paras. 11.5 and 11.6.

6. Another factor against the author's claim is his shifting positions. In answer to the State party's thorough reply to his original claim that the Dutch legal system cannot undertake a review of the factual basis for the conviction, he shifted his position,[6] arguing that what obtains is not enough. While eventually acknowledging that the Supreme Court can in fact review facts and evidence, the author adjusts his position to say they cannot acquit "because they haven't been persuaded or there are alternative scenarios".[7] Important to note here is the author's concession that the Supreme Court adopts a test of whether there is lawful and sufficient evidence – the crux of his complaint to the committee – but which is now changed to require a standard far beyond anything required by art 14(5) of the Covenant.

7. Ultimately, the majority's conclusion conflates two different positions – that of the availability of a review on the facts and the right to a duly reasoned judgment.8 However, the latter is not the claimed violation, and the State party has nonetheless explained why it was not necessary for the Supreme Court to provide detailed reasons. As for the author's actual claim as to the deficiency of Dutch criminal procedure, according to the uncontested position of the State party, such an appeal is available and did take place in this case. Thus, not only did the author fail to raise this claim in the domestic proceedings, he utterly failed to substantiate it. I would accordingly reject his claim as inadmissible.

[6] Repeatedly argued by him in 3.2, 3.4, 6.2, 6.5 and elsewhere.

[7] Additional comments by the Author, para. 9.4.

[8] See 11.5 and 11.6