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International Covenant on Civil and Political Rights

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Views

Communication No. 1620/2007

Submitted by:	Mr. J. O. (represented by counsel, Adam Weiss, AIRE Centre)
Alleged victim:	The author
State party:	France
Date of communication:	4 June 2007 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 12 February 2008 (not issued in document form)
	CCPR/C/97/D/1620/2007 – decision on admissibility dated 7 October 2009
Date of adoption of Views:	23 March 2011
Subject matter:	Allegation of abuse of criminal procedure and conviction for a non-existent offence
Procedural issue:	Non-exhaustion of domestic remedies
Substantive issues:	Right to an effective remedy, right to a fair trial
Articles of the Covenant:	2, paragraph 1; 14, paragraphs 2, 3 (a) and (b) and 5; 15, paragraph 1; and 26
Article of the Optional Protocol:	5, paragraph 2 (b)

On 23 March 2011, the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1620/2007.

[Annex]

* Made public by decision of the Human Rights Committee.

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Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (101st session)

concerning

Communication No. 1620/2007*

Submitted by:	Mr. J. O. (represented by counsel, Adam Weiss, AIRE Centre)
Alleged victim:	The author
State party:	France
Date of communication:	4 June 2007 (initial submission)
Decision of admissibility:	7 October 2009

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

Meeting on 23 March 2011,

Having concluded its consideration of communication No. 1620/2007, submitted to the Human Rights Committee on behalf of Mr. J. O. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mr. J. O., a British national born on 24 January 1954. He claims to be the victim of a violation by France of article 2, paragraph 1; article 14, paragraphs 2, 3 (a) and (b) and 5; article 15, paragraph 1; and article 26 of the Covenant. The author is represented by counsel, Mr. Adam Weiss (Advice on Individual Rights in Europe (AIRE) Centre).[1]

* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabian Omar Salvioli and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee members, Ms. Christine Chanet, Sir Nigel Rodley and Mr. Krister Thelin did not participate in the adoption of the present decision.

[1] The Covenant and Optional Protocol thereto entered into force for France on 4 February 1981 and 17 May 1984, respectively.

1.2 On 12 February 2008, at the State party's request, the Special Rapporteur on New Communications and Interim Measures, acting on behalf of the Committee, decided to consider the admissibility and merits of the communication separately.

The facts as submitted by the author

2.1 In October 1993, the author co-founded a company in France called Riviera Communications and accepted the honorary title of manager of the company. The author devoted an average of one hour a month to this job, carrying out simple administrative tasks. He was never paid and never spent more than an hour a month on the company. In the 1980s and 1990s, the author occupied various accounting posts in American and British companies in Europe. From April 1994 to December 1995, he was employed by the French branch of a British company, Willis Corroon, as an accounting and financial director. He was laid off on 31 December 1995.

2.2 The author registered as a jobseeker at the French National Employment Agency (ANPE), and filed a claim for unemployment benefit on 31 January 1996. His entitlement to benefit started on 28 February 1996. From 10 September 1995 to the end of 1995, the author sent out 108 job applications. In 1996 and most of 1997, the author frequently sought guidance from ANPE to help him with his job search, and responded to 811 job offers. Finally, after two years of intensive job hunting, he found a job that matched his skills, signed a contract in December 1997, and began working as a financial director for a company in the United Kingdom. Throughout this period of professional inactivity, from the end of 1995 to the end of 1997, the author had devoted all his time to looking for a new job.

2.3 On 10 November 1997, ASSEDIC[2] wrote to the author to inform him that, upon review of his case, on 22 October 1997, it had come to light that he had worked as manager of Riviera Communications ever since the company's establishment on 21 October 1993. ASSEDIC deemed that this unpaid work which he had failed to declare at the proper time was incompatible with the status of jobseeker. On 14 November 1997, ASSEDIC wrote again stating that the author was obliged to pay back all the benefits he had received over the past 20 months within 30 days. The letter also stated that the author could submit an application for reconsideration to the Joint Committee of ASSEDIC within one month.

2.4 On 26 November 1997, ASSEDIC sent a third letter contradicting the first letter of 10 November 1997. According to the Joint Committee of ASSEDIC, collection of partial unemployment benefit while receiving income from gainful occupation was possible only under certain conditions, and under the unemployment benefit rules the author's position as manager of Riviera Communications precluded the collection of partial benefit. This clearly reflects confusion on the part of ASSEDIC since the author did not receive remuneration as manager of Riviera Communications. His counsel therefore submitted an application for reconsideration on 19 January 1998. The Joint Committee of ASSEDIC rejected this application on 15 April 1998, invoking the same grounds as in the ruling of 10 November 1997.

2.5 On 17 March 1998, ASSEDIC summoned the author to appear before the Criminal Court of Grasse for fraud or making a false statement in order to obtain unemployment benefits. The summons was ruled invalid in the proceedings of 25 June 1999 on the grounds that it did not give either the date or period of the events. On 27 September 2000, ASSEDIC issued a new summons to appear before the Court, stating that the author's position as manager of Riviera Communications since its establishment in October 1993

[2] French Association for Industrial and Commercial Employment (ASSEDIC).

was incompatible with the status of jobseeker, notwithstanding the author's claims that the position was not a real job and that he had never stopped looking for work. The author contends that the summons contained two blatant contradictions. Firstly, it stated that he had collected unemployment benefit while engaged in undeclared gainful employment from 28 February 1996 to 31 October 1997. Secondly, it stated that he had started working again during the period he was receiving unemployment benefits, without notifying ANPE, and that he had kept that job since the company's establishment in 1993.

2.6 During the hearing of 26 January 2001, the ASSEDIC counsel requested a correction to a factual error contained in the summons, replacing "collected unemployment benefits while engaged in gainful employment" with "collected unemployment benefits while engaged in an undeclared activity". The author was not present during the hearing and contends that this correction should not simply have appeared in counsel's submission but should have led the court to declare the summons invalid. A third summons should thus have been drawn up. However, the statute of limitations ruled out that possibility. During the hearing of 25 May 2001, at which the author was not present, ASSEDIC explained for the first time that the author had replied "No" to the question "Are you currently an agent (*mandataire*) of a company, group or association?" in the ASSEDIC form, and that doing so constituted a false statement.[3] However, as neither the author nor his counsel had been informed in advance of the amendments to the charges in the summons, they were unable to prepare a new line of defence. On 22 June 2001, the criminal court dismissed the author's claim invoking the statute of limitations, and gave him a one-month suspended prison sentence and a fine of €65,843 for fraud or making a false statement in order to obtain unemployment benefits.

2.7 The criminal division of the Aix-en-Provence Court of Appeal dismissed the author's appeal on 15 May 2003, and on 17 February 2004 the Court of Cassation dismissed his appeal in cassation. On the assumption that the court had not been apprised, during the criminal trial, of his efforts to find work, the author applied to the Commission for the Review of Criminal Convictions on 7 December 2004 for a review of his case in light of new information, namely a list of 919 job applications. The Commission dismissed his application in its decision of 3 April 2006 on the grounds that, although a British citizen, he had lived long enough in France to understand the meaning of the word *mandataire* ("agent") in the questionnaire he had filled out; his argument was thus "unlikely to raise any doubt as to his guilt".

2.8 The author claims that his wrongful conviction had forced him to reimburse sums he had not received, and he was forced to take out additional loans to pay off his debt.

The complaint

3.1 The author claims a violation of article 14, paragraphs 2, 3 (a) and (b) and 5; article 15, paragraph 1; article 2, paragraph 1; and article 26 of the Covenant. He claims that he was the victim of abuse of criminal procedure, and that he had been convicted of a non-existent offence.

3.2 The author claims that the summons did not clearly set out the exact charges against him. He invokes general comment No. 13,[4] in which the Committee states that "the specific requirements of subparagraph 3 (a) may be met by stating the charge either orally — if later confirmed in writing — or in writing, provided that the information indicates both the law

[3] The French terms "*mandataire*" (agent) and "*gérant*" (manager) being interchangeable, the French authorities maintained that the author completed the ASSEDIC form with intent to deceive.

[4] General comment No. 13 of 12 April 1984 has been replaced by general comment No. 32 of 23 August 2007.

and the alleged general facts on which the charge is based". While the Committee's case law on this matter is sparse, the author deems that a bare charge of "fraud or making a false statement in order to obtain unemployment benefits" fails to meet the requirements set out by the Committee since the officials in question should have provided him with detailed information on the grounds for the charge. However, the author had gathered that the basis of the charge was maintaining gainful employment while collecting unemployment benefits, and it was on that basis that he and his counsel had prepared their defence.

3.3 The author also claims a violation of his right to have adequate time and facilities for the preparation of his defence. He contends that the lack of clarity in the summons misled him and his counsel, preventing them from being able to prepare a suitable defence in time.

3.4 The author contends that, by obliging him to prove that the position of manager was not an obstacle to actively seeking work, the Criminal Court of Grasse violated his right to the presumption of innocence, protected under article 14, paragraph 2, of the Covenant.

3.5 The author claims a violation by the State party of article 14, paragraph 5, insofar as neither the Appeal Court nor the Court of Cassation afforded him the opportunity to air his grievances.

3.6 The author claims a violation by the State party of article 15, paragraph 1, according to which no one shall be held guilty of an offence on account of any act that does not constitute an offence under national law. He had been found guilty of fraud or making a false statement, yet the mere ticking of a box, according to the French case law of the Court of Cassation, is not sufficient to establish such an offence.

3.7 Lastly, the author contends that the treatment he received from the Commission for the Review of Criminal Convictions constitutes a violation by the State party of, it must be assumed, article 26 of the Covenant,[5] amounting as it does to discrimination, which in itself is a violation of article 2, paragraph 1, of the Covenant. In finding that the author's British origins were no excuse for confusing the terms *mandataire* ("agent") and *gérant* ("manager"), the Commission failed to show impartiality. According to the author, no other case of making a false statement tried in French courts had ever been as unfavourable to the accused. All the other cases happened to involve French nationals, which proves discrimination on the basis of nationality by the national court.

State party's observations

4.1 In a note verbale dated 4 February 2008, the State party contested the admissibility of the communication on grounds of non-exhaustion of domestic remedies. Referring to the facts as submitted by the author, the State party points out that, following the ASSEDIC decision to suspend its degressive single unemployment benefit and request the reimbursement of the sums the claimant had received from 28 February 1996 to 29 October 1997, the author had brought the case before the Joint Committee of ASSEDIC, yet he fails to produce the ruling the Committee is said to have rendered.

4.2 The State party argues that domestic remedies have not been exhausted in this case. Citing the Committee's case law,[6] the State party emphasizes that the author must first set out his claim before the national courts "in substance", before bringing it to the Committee. Indeed, before individuals can assert a State party's failure to apply the law, they must first invoke the law in question before national courts, to give the State the opportunity to remedy the contentious situation itself.

[5] The author does not refer explicitly to article 26 of the Covenant.

[6] Communication No. 661/1995, *Triboulet v. France*, Views adopted on 19 August 1997; communication No. 1118/2002, *Deperraz v. France*, Views adopted on 10 May 2005.

4.3 In the present case, the State party contends that there is nothing to show that the author has brought his claims before national courts. Yet, the rights supposedly disregarded were and are protected, and thus fully justiciable in the domestic courts.

4.4 The ruling of the Criminal Court of Grasse, which takes up the procedural plea and the author's arguments, makes no mention of any allegation of omissions on the part of the French authorities, as the author claims before the Committee. The State party further notes that the author did not bring these claims before the Aix-en-Provence Court of Appeal because the Court had declared the appeal inadmissible, a situation for which the author himself was to blame for failing to lodge his appeal within the deadline, a fact he does not mention in his communication. Nor did he bring these claims before the Court of Cassation or the Review Commission. The author should have been able to bring his claims before national courts, since he was assisted by counsel at every stage of the proceedings. The State party thus concludes that, as the author has not invoked the alleged claims of violations of the Covenant even in substance, before national courts, he has not given French officials the opportunity to redress them.

Author's comments on the State party's submission

5.1 On 23 May 2008, the author argued that he could not have claimed violations of article 14, paragraphs 2, 3 (a) and (b); article 15, paragraph 1; article 2, paragraph 1; and, it is assumed, article 26 of the Covenant, before they had taken place. The irregularities in question are alleged to have occurred in the Criminal Court of Grasse and the Review Commission. While it would have been appropriate, as the State party notes, for the author to invoke these irregularities in his appeal, he had been deprived of the opportunity to do so, since the Aix-en-Provence Court of Appeal had declared the appeal inadmissible.

5.2 The author deems that he is not to blame for this situation. In fact, he had not been represented by his counsel during the hearing before the Criminal Court on 25 May 2001, contrary to what is stated in the ruling of 22 June 2001. Since the author was not represented by his initial counsel, but by another who was not properly authorized to represent him, the 10-day deadline for lodging an appeal under domestic law could only begin to run from the time of notification of the judgement to the author.[7] Yet, as the author never received such notification, he considers that the 10-day period never started running. Moreover, since the Criminal Court of Grasse did not indicate in its judgement that the author had not been represented by counsel, the Aix-en-Provence Court of Appeal had no choice but to declare the appeal inadmissible. The Court of Cassation subsequently confirmed the Court of Appeal's dismissal based on this same erroneous assumption.

5.3 To clarify his lawyer's role in this matter, the author contends that his counsel was not present at the hearing of 25 May 2001 before the Criminal Court of Grasse and neglected to submit to the judge the documents attesting to the author's job search, which the author believes constitute crucial evidence for his case. This professional negligence, for which the author instituted civil proceedings, was recognized by the Aix-en-Provence

[7] The author cites article 498 of the Code of Criminal Procedure, which states that, "the time-limit for appeal runs only from the service of the judgement, however this was carried out [...], for any party not present or represented at the hearing when the judgement was handed down, but only where such party or representative was not notified of the day when the judgement would be handed down". The author adds that a recent amendment to article 498 of the Code of Criminal Procedure (made subsequent to the situation described in the present case) explicitly accorded protection which had been implicit at the time of the alleged offence. According to this amendment, "the time-limit for appeal runs only from the service of the judgement, however this was carried out […], for any defendant tried in their absence but in the presence of an advocate to conduct their defence, and where the advocate has no representation order signed by the defendant".

Court of Appeal in its ruling of 29 April 2008. The author's counsel, Ms. Cohen-Seat, appealed to the Court of Appeal against the ruling of the Regional Court of Grasse of 12 June 2007, which had found in favour of the author in civil proceedings against his counsel for professional negligence, instituted on 26 January 2006.

5.4 Notwithstanding the Committee's case law by which any breach or inaction on the part of counsel cannot be ascribed to the State party,[8] the author notes that, in the present case, the difficulties he encountered in attempting to exhaust domestic remedies could in fact be ascribed to the State party as well as to counsel. The civil division of the Aix-en-Provence Court of Appeal clearly recognized that the author's conviction was the result of both negligence on the part of counsel and miscarriage of justice. The Court of Appeal indeed held that, with regard to the substantive nullity of the ASSEDIC summons, this was "not just a purely factual error, but a matter which went to the very heart of the definition of the offence, insofar as J. O. should have been given the opportunity to prepare his defence on an informed basis".

5.5 As to the legality of the criminal conviction, the Court of Appeal stated that "simply replying 'no' to the question whether he was currently an agent of a company" was not sufficient to constitute fraud. Consequently, it was up to ASSEDIC to prove that the author's position as manager prevented him from looking for full-time work. In the view of both the author and the Court of Civil Appeal, by reversing the burden of proof, the Criminal Court of Grasse violated the principle of the presumption of innocence.

5.6 The author refutes the State party's argument that he could have asserted his right to a fair trial before the Review Commission. The Commission procedure[9] does not allow for that. The Commission's role is limited to determining whether new elements have come to light during the proceedings which would warrant reconsideration by the trial court. It is not the Commission's role to find procedural irregularities. Consequently, the author could not avoid first lodging his claims of violations of the Covenant before the Committee rather than first lodging them before national courts.

5.7 Since the author was materially unable to contest the procedural irregularities committed by the Criminal Court of Grasse or the violations committed by the Review Commission, he asks the Committee to include in his claims a violation of article 14, paragraph 5, of the Covenant.

Decision on admissibility

6.1 On 7 October 2009, at its ninety-seventh session, the Committee considered the admissibility of the communication.

6.2 The Committee noted the State party's argument that the communication was inadmissible for non-exhaustion of domestic remedies. It further noted that, according to the State party, the non-exhaustion of domestic remedies was due to the author's own inaction in failing to lodge an appeal within the time established in domestic law and that the appeal in cassation was not open to the author for the same reason. The Committee noted the State party's argument that the rights which had allegedly been disregarded had been and still were protected by the Covenant and that the ruling of the Criminal Court of Grasse made no mention of any allegation of omissions on the part of the French authorities.

[8] Communication No. 433/90, *A.P.A. v. Spain*, Views adopted on 25 March 1994.

[9] Article 622 of the Code of Criminal Procedure.

6.3 The Committee noted the author's argument that he could not have claimed violations of the Covenant before they took place; and that the omissions on the part of the Criminal Court of Grasse and the Review Commission could not at any stage have been subject to appeal. The Committee further noted the author's claim that the difficulties he had encountered in attempting to exhaust domestic remedies could in fact be ascribed to the State party as well as to counsel; and that, in the author's civil claim against his counsel (see paragraph 5.3 above), the civil division of the Aix-en-Provence Court of Appeal had clearly recognized that the author's conviction had been the result of both negligence on the part of counsel and miscarriage of justice. The Court of Appeal had indeed held that, with regard to the substantive nullity of the ASSEDIC summons, it was "not just a purely factual error, but a matter which went to the very heart of the definition of the offence, insofar as J. O. should have been given the opportunity to prepare his defence on an informed basis".

6.4 The Committee noted in that regard that the State party had not commented on the ruling of the civil division of the Aix-en-Provence Court of Appeal even though that Court had established that the non-exhaustion of domestic remedies could be attributed not only to the author's counsel but also to the criminal courts. In those circumstances and in the absence of a counter-argument from the State party on that specific matter, the Committee found the communication admissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.5 As to the alleged discrimination against the author under article 26 of the Covenant, the Committee did not find the author's claim that the Review Commission had discriminated against him on grounds of nationality sufficiently substantiated for purposes of admissibility. The Committee thus considered that part of the communication inadmissible under article 2 of the Optional Protocol.

6.6 As to the allegations of violations under article 14, paragraphs 2, 3 (a) and (b) and 5; article 15, paragraph 1; and article 2, paragraph 1; the Committee found that the author had sufficiently substantiated his claims for purposes of admissibility.

State party's observations on the merits

7.1 On 21 May 2008, the State party submitted its preliminary observations on the merits, which it subsequently asked the Committee to disregard since the Committee had decided to consider the admissibility of the communication separately from the merits. On 25 May 2010, the State party informed the Committee that, since the communication had been declared admissible, it would be grateful if the Committee would transmit those observations to the author.

7.2 In its preliminary observations on the merits, the State party first of all disputes the claim that the author was not given sufficient time to prepare his defence. The file shows that the author was aware of the summons on 25 January 2001, when he sent a fax appointing counsel to represent him, saying that he could not attend the hearing owing to his professional obligations and the distance between the court and his current location. The summons had been served on 27 September 2000, and the hearing was scheduled for 26 January 2001, four months after the summons had been served, in accordance with article 552 of the Code of Criminal Procedure. The author claims that he had been residing outside France for two years and therefore could not have known about the summons. The State party notes that when the author contested the legality of the summons, at no point did he invoke his change of address as a reason. The State party points out that under article 392-1 of the Code of Criminal Procedure, the court must first determine the sum that the civil party must deposit with the court office to guarantee the payment of any civil fine. The first hearing therefore concerns only the deposit, not the merits of the case. Between the time of the deposit hearing on 26 January 2001 and the hearing on the merits on 25 May 2001, the author had a four-month period to prepare his defence. Furthermore, the author's counsel

never mentioned the alleged lack of time at the hearing on 25 May 2001, even though she did submit a written defence. The State party stresses that if this aspect had posed a problem for counsel, it would have been mentioned in the statement of defence, which was not the case.

7.3 As to the alleged violation of article 14, paragraph 3, of the Covenant, the State party points out that that provision guarantees that every individual accused of an offence is informed promptly and in detail in a language which they understand of the nature and cause of the charge against them.[10] In the present case, the author had been summoned on 27 September 2000 to appear before the Criminal Court of Grasse at the hearing of 26 January 2001, at the request of the Alpes Maritimes branch of ASSEDIC. The accusation is clearly outlined in the summons, as is the legal basis for the criminal proceedings: "[the author] collected unemployment benefit while engaged in undeclared gainful employment from 28 February 1996 to 31 October 1997. Specifically, by fraudulent means [the author] improperly obtained unemployment benefits in the amount of X francs from the Alpes Maritimes branch of ASSEDIC. Accordingly, these acts constitute an offence of fraud or making a false statement to obtain unemployment benefits, which is a punishable offence under article L. 365-1 of the Labour Code". The State party therefore considers the author's allegation on that matter to be unfounded.

7.4 With regard to the legal status of the offence, the State party cites article L. 365-1 of the French Labour Code in force from 21 December 1993 to 1 January 2002, which states that "anyone found guilty of fraud or making a false statement for the purpose of wrongfully obtaining, helping someone obtain, or attempting to help someone obtain unemployment benefits or the benefits referred to in article L. 322-4 shall be subject to 2 months' imprisonment and/or a fine of 25,000 francs, without prejudice to any penalties arising under other applicable laws. The court may also order the restitution of the sums improperly obtained". The criminal division of the Court of Cassation stated in its decision of 27 February 1996 that "anyone who engages in an activity, even unpaid, that prevents them from taking positive steps to seek work has fraudulently obtained unemployment benefits". The State party adds that while French law no longer calls for imprisonment as punishment for such acts, they are still defined as an offence under article L. 5429-1 of the Labour Code, which states that "unless the act is found to constitute the offence of fraud as defined and punished under articles 313-1 and 313-3 of the Criminal Code, the act of obtaining or attempting to obtain by fraudulent means the unemployment benefits defined in this Code, including the flat-rate benefit established by article L. 5425-3, is punishable by a fine of €4,000. The act of helping or attempting to help someone obtain the aforementioned benefits by fraudulent means is liable to the same penalty". The State party thereby concludes that the charges against the author did in fact constitute an offence and that there is therefore no violation of article 15, paragraph 1, of the Covenant.

7.5 Regarding the author's claims under article 2, paragraph 1, of the Covenant, the State party expresses serious doubts about the author's inability to understand the French language to the extent that he could not distinguish between the terms *mandataire* ("agent") and *gérant* ("manager"). The author worked in France as an accounting and financial director for an insurance and reinsurance broker in a French branch of a British company. Furthermore, the other documents submitted by the author show that he has a perfect command of French. For example, his employment contract, written in French, had been signed on 4 March 1994 with the added handwritten note "*lu et approuvé*" (read and approved).

[10] The State party cites communication No. 16/1977, *Mbenge v. Zaire*, Views adopted on 25 March 1983.

7.6 Regarding the obligation to notify an individual of a judgement handed down in absentia, the State party points out that the criminal division of the Court of Cassation rejected the appeal on the grounds that the contested judgement had correctly applied articles 411, paragraphs 1 and 2,[11] and article 498 of the Code of Criminal Procedure.[12] The Court of Cassation stated that "the authorization that the defendant addressed to the court granted his counsel the authority to represent him at each hearing to which the case was assigned, unless the defendant appeared in person before the court, until a judgement was pronounced". It also said that "when a defendant is represented by counsel, the deadline for lodging an appeal is counted from the moment the decision is pronounced". The State party considers this position to be in full conformity with the Court of Cassation's case law regarding the validity of an authorization for counsel to represent a defendant and regarding compliance with the *audi alteram partem* rule when a judgement is pronounced in the absence of a defendant and the defence has been heard. The criminal division of the Court of Cassation has repeatedly pointed out that "counsel is invested with a general right to assist and represent without having to prove that they have a specific authority to act, and that this appointment of judicial representation is valid for the duration of the legal proceedings".[13] Secondly, the Court has repeatedly judged that, when the counsel of an absent defendant has been heard, "the appeal must be lodged within 10 days after the judgement is pronounced".[14] The State party thereby concludes that the author's claim is unfounded.

7.7 In its additional submission dated 7 May 2010, the State party pointed out that the Committee had asked the State party in its 7 October 2009 decision on admissibility to comment on the ruling of the civil division of the Aix-en-Provence Court of Appeal, which had found a miscarriage of justice on the part of the criminal courts. The State party notes that the Aix-en-Provence Court of Appeal's decision of 29 April 2008, which dealt exclusively with the professional responsibility of the author's counsel, had in no way held the criminal courts responsible for the failure to exhaust domestic remedies. When the

[11] Article 411 of the Code of Criminal Procedure in force at the time of the events in question stipulates that "the defendant accused of an offence punishable by a fine or by less than two years' imprisonment may, by means of a letter sent to the president and which will be attached to the case file, request to be tried *in absentia*.

The same applies in the case of private prosecution by the civil party, regardless of the duration of the penalty incurred.

In both cases the defendant's counsel shall be heard.

However, if the court considers it necessary that the defendant appear in person, the district prosecutor then issues a new summons to the defendant to appear at a hearing on a date set by the court.

Any defendant who does not answer this summons may be tried adversarially.

The defendant shall also be tried adversarially in the case set out in the first paragraph of this article".

[12] Article 498 of the Code of Criminal Procedure in force at the time of the events in question stipulates that "except in the case described in article 505, the appeal shall be lodged within 10 days after the judgement is pronounced. However, the time-limit for appeal runs only from the service of the judgement, however this was carried out: (1) for any party not present or represented at the hearing when the judgement was handed down, but only where such party or representative was not notified of the day when the judgement would be handed down; (2) for any party who requested to be tried *in absentia* under the conditions set forth in article 411, paragraph 1; (3) for any party who did not appear, under the conditions set forth in article 411, paragraph 4. The same applies in the cases set forth in articles 410 and 494-1".

[13] The State party cites the decision of the criminal division of the Court of Cassation dated 27 October 1999.

[14] Court of Cassation, criminal division, decision of 27 November 1978.

Court of Appeal indicated on page 6 of its decision that the failure to apply to have the summons set aside on 26 June 2000 or 25 May 2001, together with the lack of a possibility of appeal, had twice deprived the author of any reasonable prospect of having it set aside, both omissions were attributed to the author's counsel, not the criminal courts. Indeed, the Court of Appeal found that it was counsel's error that had deprived the author of any chance of acquittal and that it was appropriate to award damages.

7.8 The State party stresses that at no point is it stated that the criminal court failed to meet its obligations in respect of the manner in which the author was notified of its judgement. In other words, while it is true that the Court of Appeal's decision criticizes the decision of the criminal court, it does so only to demonstrate counsel's professional responsibility, as she alone was responsible for not having sought to have the summons set aside, as she could — and, according to the Court of Appeal, should — have done, and for not giving her client the possibility of appealing within the time allowed. The State party thus concludes that the criminal courts bear no responsibility for the failure to exhaust domestic remedies.

7.9 The State party further points out that the Court of Appeal found that the author's counsel, in failing to meet her professional obligations, was to blame for depriving the author of any real prospect of avoiding conviction. The author had received compensation from the Court in this regard, as his counsel had been ordered to pay €60,000 in damages.

Author's comments

8.1 In his comments dated 5 July 2010, the author rejects the State party's argument that the Court of Appeal's decision on 29 April 2008 dealt exclusively with the professional responsibility of the author's counsel. He considers that in order to evaluate the consequences of counsel's negligence, the Court of Appeal was obliged to consider the author's guilt and thus imagine the outcome of the proceedings if the author had been able to appeal his conviction. It is in that context that the Court of Appeal concluded that the author had not committed the offence of which he was accused, that it confirmed his counsel's negligence and that it underlined the criminal court's failure to apply French criminal law. The author repeats that the Court's finding of an omission on the part of the criminal court, which resulted in failure to apply domestic criminal law and thus a violation of the Covenant, was an integral part of the Court of Appeal's decision of 29 April 2008. The author refers to his comments on that issue in paragraphs 5.4 and 5.5. He explains that he does not consider that responsibility is shared by the courts in all cases of counsel negligence, but in the present case the omissions of the criminal court were sufficiently serious to conclude that the failure to exhaust domestic remedies was also attributable to the State party authorities. Given the manifest errors highlighted by the civil division of the Court of Appeal, the author doubts that the State party is sincere when it asserts that the criminal courts bear no responsibility for the failure to exhaust domestic remedies.

8.2 The author further notes that the State party did not answer his point that the criminal court's judgement of 22 June 2001 did not mention the fact that Ms. Cohen-Seat, the author's counsel, was not present at the hearing on 25 May 2001. In such circumstances, the 10-day time limit for appealing the decision can only begin to run from the time of notification of the judgement to the author, yet, since the author never received a notification, the appeal lodged on 3 September 2001 was in time. Even though the criminal court was aware that the author was not represented by his initial counsel at the hearing, it failed to mention that fact in its decision, as it should have done, so the author did not have proof of the change of counsel at the hearing on 25 May 2001 until November 2006, when he was given access to his file at the Criminal Court of Grasse. The criminal court's decision should have included this information about the change of counsel. The author notes that the State party gave no comment or clarification regarding this claim.

8.3 Regarding the compensation the author received in the civil courts, where his counsel was ordered to pay €60,000 in damages for professional negligence, the author points out that this sum corresponds to the amount he received in unemployment benefits from 1996 to 1997 and was forced to pay back when he was convicted by the criminal court on 22 June 2001. This sum cannot be considered compensation for his wrongful conviction. The author considers that a civil court decision cannot be considered an effective remedy within the meaning of article 2, paragraph 3, of the Covenant. The author remains guilty in the eyes of the French justice system, following legal proceedings that did not apply the Covenant guarantees. This wrongful conviction continues to prevent the author from working as a qualified accountant, thereby jeopardizing his ability to provide for his family.

8.4 As to his claims under article 14, paragraph 3 (a), of the Covenant, the author complains that the State party simply quotes the summons, which states that "Mr. O. collected unemployment benefit while engaged in undeclared gainful employment from 28 February 1996 to 31 October 1997." As the author previously stated in his initial submission, that summons does not reflect reality because he had never received remuneration as manager of Riviera Communications (see para. 2.4). The State party did not comment on this discrepancy, confining itself to arguing that the author had been "clearly" informed of the charges against him. The issue is not the clarity, but the accuracy, of the charges. The author stresses that the charges in the summons, while clear, did not reflect the actual accusations against him. The author again refers to his claim under article 14, paragraph 3 (a) as set out as part of the complaint, in paragraph 3.2 of this communication, and to which the State party has given no response. To support his argument, the author refers to the case law of the European Court of Human Rights in the case of *Pélissier and Sassi v. France*, in which the Court considered that "particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him". The Court goes on to say that "the Convention affords the defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterization given to those acts, ... [which should] be detailed".[15] The Court emphasizes that "in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterization that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair".[16]

8.5 Regarding his claim under article 14, paragraph 3 (b), the author refers to his initial argument and repeats that the alleged violation derives from the fact that he was not informed of the real factual basis of the charges against him, which were explained in detail only at the hearing. The State party's arguments on this point are therefore not relevant.

8.6 Regarding article 15, paragraph 1, the author points out that the State party misquotes the Court of Cassation's decision in the case of X ... René of 27 February 1996. That decision states that "even though the defendant's work during the period in question [...] was performed on a voluntary basis, the fact that it was full-time [...] still made it impossible for him to look for other work". The Court concluded that "the trial courts determined that the defendant engaged in an activity that did not allow him to take positive steps to look for work". This decision suggests that the authorities must also prove that the defendant's voluntary work precludes him from actively looking for a job, yet in the present case, both the prosecution and the criminal court failed to ascertain, as they should have done, whether the author's voluntary work prevented him from actively looking for work.

[15] *Pélissier v. France*, application No. 25444/94, judgement of 25 March 1999 (Grand Chamber), para. 51.

[16] Ibid., para. 52.

In his complaint (para. 3.7), the author said that, in similar cases of false statements made for the purpose of obtaining unemployment benefits, the Commission for the Review of Criminal Convictions had considered that the false statements in question were not blatant enough to warrant the defendant being unable to receive the aforementioned unemployment benefits. Neither this comparison made by the author nor his related claims have been countered by the State party.

8.7 The author reiterates his arguments concerning article 2, paragraph 1, in particular regarding the differential treatment he suffered.

8.8 The author points out that the State party did not comment on his claims under article 14, paragraphs 2 and 5, even though the Committee declared them admissible. The author maintains his previous arguments regarding those provisions.

8.9 On 26 November 2010, the author submitted additional comments to the effect that on 1 April 2010 he had petitioned the Minister of Justice under article 620 of the Code of Criminal Procedure to order the Procurator-General of the Court of Cassation to ask the criminal division of the Court of Cassation to set aside the rulings of the Criminal Court of Grasse, dated 22 June 2001, and of the Aix-en-Provence Court of Appeal, dated 15 May 2003, as contrary to French law. That petition was based on the arguments the author had previously submitted to the Committee. The Minister of Justice rejected the request on 15 October 2010. The author stresses that such a petition does not conflict with the Committee's decision on admissibility of 7 October 2009 insofar as the remedy provided by article 620 of the Code of Criminal Procedure cannot be considered as an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. In his comments, the author also explains that he submitted not one but two requests for revision, the second following the judgement pronounced in the civil proceedings of the Aix-en-Provence Court of Appeal on 29 April 2008. In this second request, the author argued that the Court of Appeal's 2008 decision addressed not only the negligence of the author's counsel but also the miscarriage of justice by the Criminal Court of Grasse, and that consequently the criminal proceedings should be reviewed in the light of the civil court's findings. The second request for revision was rejected on 29 September 2009. A careful reading of the second rejection by the Commission for the Review of Criminal Convictions led the author to conclude that the evidence submitted in support of his request for revision was sufficient to merit new criminal proceedings.

Consideration of the merits

9.1 The Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes the author's allegation under article 14, paragraph 3 (a), in which he claims that the summons dated 27 September 2000 contained an error that the criminal courts could not consider as a simple "factual error", in stating that the author was accused of having collected unemployment benefit while engaged in "undeclared gainful employment". The author considers that the error failed to reflect the actual accusations and charges against him. The Committee recalls its general comment No. 32 on article 14,[17] which guarantees the right of all persons charged with a criminal offence to be informed promptly and in detail of the nature and cause of the charge against them. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally — if later confirmed in writing — or in writing, provided that the information indicates both the law

[17] CCPR/C/GC/32, para. 31.

and the alleged general facts on which the charge is based.[18] It must therefore be determined whether, in the present case, the summons dated 27 September 2000 meets the requirements of article 14, paragraph 3 (a), of the Covenant. The Committee is of the view that the State party has not clarified this point, as it simply reproduced the wording of the summons of 27 September 2000 without providing the necessary explanation.

9.3 The Committee therefore decided to examine the content of the summons, a copy of which was provided by the author. It notes first of all that the summons dated 27 September 2000 (that is, before it was amended by the criminal court at the hearing of 26 January 2001) is contained in a six-page document that specifies the offence and the applicable legal provisions as well as the allegations of fact. Those allegations state that the author registered as a jobseeker on 31 January 1996; that he had received unemployment benefits from 28 February 1996 to 31 October 1997; that the author had stated that he had been fully unemployed since 31 December 1995; that the file had been reviewed following an application by the author for employment under a cooperation agreement between the unemployment insurance and a private company; and that it had then come to light that the author had held a managerial position with Riviera Communications since the company's foundation on 21 October 1993. The summons further states that, in light of this activity, which was unpaid but also had not been declared at the proper time, the author's file had been submitted to the Joint Committee of ASSEDIC, which had decided that this activity was incompatible with the status of jobseeker. The Committee notes that it is only after this long statement of the facts that the contested passage appears, and it refers to gainful employment rather than undeclared activity. It must be said that the summons from which the Committee has cited the relevant passages does not seem confusing, despite the factual error highlighted by the author. The Committee therefore concludes that article 14, paragraph 3 (a), has not been violated in the present case.

9.4 Regarding the complaints concerning article 14, paragraph 3 (b), the Committee notes that the factual error in the summons had been pointed out by ASSEDIC and then amended by the criminal court at the hearing on 26 January 2001, four months prior to the hearing on the merits of the case. The Committee concludes that, if the author was not given an appropriate defence, the responsibility rests with his counsel, who did not use the time available to prepare a defence. The Committee concludes that the facts before it do not show any violation of article 14, paragraph 3 (b), of the Covenant.

9.5 Concerning the claim under article 14, paragraph 2, the Committee notes the author's argument that it was up to ASSEDIC to prove that the managerial position he held prohibited him from looking for full-time work, and that by reversing the burden of proof the Criminal Court of Grasse violated the principle of the presumption of innocence. The Committee notes the State party's argument that the author was accused of fraud or making a false statement in order to obtain unemployment benefits and that the charges against the author therefore constituted an offence under article L. 365-1 of the French Labour Code. The Committee notes that in its judgement of 22 June 2001, the criminal court stated that in his ASSEDIC application of 31 January 1996, the author had replied "No" to the question "Are you currently an agent (*mandataire*) of a company, group or association?"; that under articles L. 351 et seq. of the Labour Code, in order to receive unemployment benefits, it is necessary to have been unemployed and to be engaged in a full-time, effective job search; that the author has not proved that during the period in question, his position as manager of Riviera Communication allowed him to engage in a full-time, effective job search; and that consequently he must have been aware that his sworn statement on 31 January 1996 had been false.

[18] See also communication No. 16/1977, *Mbenge v. Zaire*, Views adopted on 25 March 1983, para. 14.1.

9.6 The Committee recalls its general comment No. 32 on article 14,[19] which states that the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.[20] In this case, it is undeniable that the author was not given a proper defence owing to his lawyer's lack of diligence. Nor has it been denied that during the hearing of 25 May 2001, the author was represented not by his counsel, but by another who was not authorized to do so; and that it was during this hearing that the content of the summons to appear before the court, and thus of the charges against the author, was explained in detail. At this hearing, the criminal court simply stated that the author had failed to prove that he had not violated articles L. 351 et seq. of the Labour Code, without offering any evidence in support of this accusation. In view of the limited opportunity for defence available to the author, the Committee considers that the State party's courts placed a disproportionate burden of proof on the author and did not prove beyond a reasonable doubt that he was guilty of the offences of which he was accused. The Committee therefore considers that the State party has violated article 14, paragraph 2.

9.7 As to the author's claims under article 14, paragraph 5, the Committee considers that failure to notify the author of the ruling in first instance, when he had not been represented by the counsel who was authorized to do so, denied him his right of appeal. The Committee concludes that the facts before it reveal a violation of article 14, paragraph 5, of the Covenant.

9.8 Regarding the author's claim that article 15, paragraph 1, of the Covenant was violated because the alleged false statements were not sufficiently blatant to establish an offence under French criminal law, the Committee notes that the act of which the author was convicted, namely fraud, in fact constituted a criminal offence under the French Criminal Code at the time the act was committed.[21] The Committee therefore considers that article 15, paragraph 1, of the Covenant was not violated in the present case.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses a violation by the State party of article 14, paragraphs 2 and 5 of the Covenant, in conjunction with article 2 of the Covenant.

11. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the State party is under an obligation to provide the author with an effective remedy, including a review of his criminal conviction and appropriate compensation. The State party is also under an obligation to ensure that similar violations do not occur in the future.

12. Bearing in mind that, by becoming 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 or not 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 guarantee an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[19] CCPR/C/GC/32, para. 30.

[20] General comment No. 32 on the right to equality before courts and tribunals and to a fair trial.

[21] See communication No. 1157/2003 *Patrick Coleman v. Australia*, Views adopted on 17 July 2006, para. 6.4.

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