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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol to the Covenant, concerning communication No. 2154/2012***

<i>Submitted by:</i>	J.I. (represented by counsel, Mr. Gilles Marini)
<i>Alleged victim:</i>	The author
<i>State party:</i>	France
<i>Date of communication:</i>	30 April 2012 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 5 June 2012 (not issued in document form)
<i>Date of decision:</i>	4 July 2016
<i>Subject matter:</i>	Right to a fair trial; right to an effective remedy
<i>Procedural issues:</i>	Examination of the matter by another international body; exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to an effective remedy; right to a fair trial
<i>Articles of the Covenant:</i>	2 (3) (a) and (b); 14 (1)
<i>Article of the Optional Protocol:</i>	5 (2) (a) and (b)

* Adopted by the Committee at its 117th session (20 June-15 July 2016).

** The following members of the Committee participated in the consideration of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Sarah Cleveland, Mr. Ahmed Amin Fathalla, Mr. Yuji Iwasawa, Ms. Ivana Jelić, Mr. Duncan Laki Muhumuza, Ms. Photini Pazartzis, Mr. Mauro Politi, Sir Nigel Rodley, Mr. Víctor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Mr. Dheerujall Seetulsingh, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval. Pursuant to rule 90 of the Committee's rules of procedure, Mr. Olivier de Frouville, member of the Committee, did not participate in the examination of this communication.

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1.1 The author of the communication is J.I., a French citizen born on 27 May 1947. He claims to be the victim of a violation of his rights under articles 2 (3) (a) and (b) and 14 (1) of the Covenant. He is represented by counsel, Mr. Gilles Marini.

1.2 On 24 September 2012, the Committee, in accordance with rule 97 (3) of its rules of procedure, acting through the Special Rapporteur on new communications and interim measures, decided to consider the admissibility and the merits of the communication separately.

Factual background

2.1 On 22 June 1994, the author sold the assets of the company B., of which he held almost all the shares and chaired the Board of Directors, to company X for 36 million French francs.

2.2 On 19 February 1996, the author, in his capacity as representative of company B. and also as representative of company I., brought criminal indemnification proceedings against an unnamed person before the senior investigating judge of the regional court of Grasse for attempted fraud, forgery and the use of forged documents. According to the author, the fraudulent manoeuvring that surrounded this transfer (improper withdrawal of the advance on the selling price, manipulation of markets disposed of etc.) allowed the buyers to capture the markets disposed of without paying the price — a price that had fallen sharply which would not be paid until 13 years later — whereas company B. would go bankrupt in the meantime and company I. as a whole along with it. On 9 May 1996, company I., put into liquidation, withdrew its complaint and company B. remained the only complainant. Pursuant to a letter rogatory, the investigating judge, Mr. M., ordered an account to be rendered and, on the basis of the report on it, issued on 6 September 1999, several companies were charged with fraud and attempted fraud on the grounds of the circumstances surrounding the conclusion and execution of the contract of sale of company X. According to the report of the expert appointed by the investigating judge, the fraud consisted in reducing the transfer price by 90 per cent.

2.3 In an application dated 16 November 2000 submitted to the investigations division of the court of appeal of Aix-en-Provence, company A., the successor in interest to company X, requested the annulment of the complaint of 19 February 1996, inter alia, on the following grounds: (a) the existence of a previous complaint lodged by company B. on 30 November 1994 with the senior investigating judge of the regional court of Nice for fraud and attempted fraud against company X; (b) the author's lack of standing, as company B. was put into receivership on 1 March 1995 and was subject to an asset disposal plan in a judgment dated 10 May 1995; (c) the fact that the deposit was made by the author, who could not act as representative of company B., which means that the deposit was not made by the party claiming damages; (d) the fact that the order on the appointment of an expert by the investigating judge, Mr. M., and the report that followed were not in conformity with the rules laid down in the Code of Criminal Procedure; and, therefore, the bringing of criminal indemnification proceedings and the indictment should be considered as null and void. Furthermore, the chief clerk of the pretrial chamber of the court of appeal raised a plea ex officio alleging that the transfer of the case from the investigating judge, Mr. S., to Mr. M. was irregular.

2.4 In its judgment of 1 March 2001, the investigations division of the court of appeal of Aix-en-Provence declared all acts taken by the investigating judge, Mr. M., null and void, including the expert report, on the grounds that the investigating judge had been appointed improperly. In fact, another investigating judge was in charge of the case and had been replaced by Mr. M. for reasons that the court of appeal considered unjustified. The court of appeal notes in its judgment that, under article 84 of the Code of Criminal Procedure, a request for the transfer of a case to another investigating judge may be put to the presiding

judge in the interest of the sound administration of justice where a valid application is made by the public prosecutor. In the present case, there was neither an application backed up by reasons requesting the presiding judge to remove the judge to whom the case was initially submitted nor an order of the presiding judge of the court authorizing it. The court of appeal also considered that article 663 of the Code of Criminal Procedure¹ was not applicable in this case, as it involved two judges assigned to the case simultaneously. However, the order did not state any related offence to which Mr. M. might have been assigned to handle or even a person who could be indicted for different offences, as it merely referred to the possible parallels with other case files dealt with by this judge without any further details. The court of appeal therefore considered that the order of 19 January 1998 transferring the case from Mr. S. to Mr. M. was not in keeping with the provisions of either article 84 or article 663 of the Code of Criminal Procedure.

2.5 Pursuant to article 206 of the Code of Criminal Procedure,² the court of appeal also considered that, on account of the annulment of the investigation and therefore the non-existence of an investigation in progress since 19 January 1998, prosecution is barred. The author therefore considers that the annulment of the investigation, which was in no way through his own doing, deprived him of any real means of establishing proof of the criminal manoeuvres of the two companies sued. In addition, the time bar prevented him from pursuing his lawsuit for fraud.

2.6 On 22 February 2005, the author brought charges against the Treasury solicitor — representing the State before civil and commercial courts — before the regional court of Grasse for serious official error of the judicial system³ and claimed 45 million euros in damages. On 13 February 2007, the regional court of Grasse dismissed the author's applications, in particular on the grounds of his lack of standing or interest enabling him to bring legal proceedings. In its judgment, the court notes that when the application was submitted, the author had made clear that he was not acting on behalf of company B., that he was not seeking compensation for harm suffered by the group I. and that he had therefore sued the French State on his own behalf and was seeking compensation for personal harm. The regional court considers that in order for the author to claim

¹ Article 663 of the Code of Criminal Procedure provides that when two investigating judges belonging to the same court or to different courts simultaneously have before them related offences or different offences with which the same person or persons are charged, the public prosecutor may, in the interest of the proper administration of justice and notwithstanding the provisions of articles 43, 52 and 382, request that one of the judges give up jurisdiction to the other. The relinquishment of jurisdiction takes place if the judges agree to it. If they cannot agree, the provisions of article 664, if necessary, are to apply.

Article 664 states that, when a person being charged or a defendant is held in custody in accordance with a decision ordering pretrial detention or by reason of the enforcement of a sentence, the public prosecutor may, in the interest of the proper administration of justice and, in particular, in order to avoid the detainee's being transferred, request the transfer of the proceedings from the investigation or trial court dealing with the case to that of the place of detention. The matter then proceeds as for the settlement of a conflict of jurisdiction.

² Article 206 states that, subject to the provisions of articles 173-1, 174 and 175, the investigation division is to examine the lawfulness of the proceedings that are submitted to it.

If it discovers a ground of nullity, it pronounces the nullity of the instrument vitiated and, if necessary, of all or part of the subsequent proceedings.

After an annulment, it may either transfer the case to itself and proceed pursuant to the conditions set out in articles 201, 202 and 204 or return the case file to the same investigating judge or to another investigating judge in order to continue the investigation.

³ Under article L781-1 of the Judicial Code (now article L141-1), "the State is required to remedy any damage caused by the improper administration of justice. Unless otherwise stipulated, such liability is incurred only in the event of a serious error or a miscarriage of justice".

compensation for personal harm, he would have needed to seek justice in his personal capacity and therefore sue for damages when the case was brought before the senior investigating judge of the regional court of Grasse on 19 February 1996. However, the author has not shown that he duly sued for damages in the disputed proceedings. The regional court points out that the reference to the author's status as a party claiming damages in the heading of the judgment of the court of appeal of 1 March 2001 and the deposit made by the author were an insufficient basis for concluding with certainty that the author was really suing for damages on his own behalf. The fact that he had at the time a legitimate interest in bringing criminal indemnification proceedings was not sufficient grounds for concluding that the author was indeed doing so in his own right. The regional court notes that no document or complaint was submitted by the author in support of his claim.

2.7 In a decision of 29 January 2009, the court of appeal of Aix-en-Provence upheld the judgment delivered by the regional court of Grasse. The court points out that when the author filed a complaint and brought criminal indemnification proceedings before the senior investigating judge of the regional court of Grasse on 19 February 1996, the complaint had been lodged not by the author in his personal capacity but in his capacity as chairperson of the board of directors of company B. and chief executive officer of company I., i.e. as a representative of the two companies. The court adds that, if the author had sued for damages in his personal capacity, he would have had access to the court case file and been able to provide proof of this, which he was not able to do.

2.8 At the same time, the author instituted civil proceedings, through company B., against the companies with which he was at odds over the price set for the sale of assets of company B. These proceedings were brought to a close in a judgment of the court of cassation delivered on 13 December 2011, which found the application to be inadmissible without stating the reasons.

2.9 The author maintains that all the effective domestic remedies available to him have been exhausted, since a special appeal on points of law of the judgment of the court of appeal of Aix-en-Provence of March 2001 could not be made. The jurisprudence of the court of cassation is established: the appointment of an investigating judge is an administrative act of the court whose legality and existence may not be disputed by the parties⁴ and which is not subject to appeal.⁵ Moreover, the investigating court does not have the jurisdiction to commence proceedings for the removal of a judge from a case under article 663 of the Code of Criminal Procedure.⁶ An appeal against this ruling was bound to fail. With this in mind, the author draws attention to the established precedents of the Committee concerning objective opportunities for a remedy to succeed.⁷

2.10 The author cannot be criticized for failing to file an appeal on points of law against the judgment of the court of appeal of Aix-en-Provence of 29 January 2009, since the court of cassation could not form a judgment as to the author's bringing of criminal indemnification proceedings and standing, with the final decision on the facts falling to the trial judge.⁸ The remedy was therefore ineffective.

⁴ The author invokes the judgment of the court of cassation, criminal division, 27 February 2001, Bulletin No. 50.

⁵ Court of cassation, criminal division, 10 July 2002, Bulletin No. 150.

⁶ Court of cassation, criminal division, 31 March 2009 (08-88.226).

⁷ Communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

⁸ The author cites the judgments of the court of cassation, civil division, 19 November 2009, No. 08-19.048, and civil division, 12 April 2012, No. 10-25.406.

2.11 With regard to civil proceedings (see para. 2.8), they cannot be a substitute for criminal proceedings on account of the annulment of the latter and the finding of a time bar for the offence. The annulment of the investigative proceedings delivered a death blow to the evidence gathered during the investigation.

2.12 The author brought the matter to the attention of the European Court of Human Rights on 8 September 2009, which issued a decision on 7 July 2011. The court declared the communication inadmissible for failure to exhaust domestic remedies, as the author had not filed an appeal on points of law. As the decision had been delivered by a single judge, the author considers that it cannot be considered as a matter being examined within the meaning of article 5 (2) (a) of the Optional Protocol. The author challenges the judgment of the Court for the reasons set out above.

The complaint

3.1 The author claims that the annulment of the investigation and pronouncement of the time bar on public prosecution entailed a miscarriage of justice attributable to the State party and therefore violated article 14 (1) of the Covenant. The right to a fair trial was not respected under French judicial administration, which applied substantive and procedural law improperly, thus revealing the bias of the courts concerned. The author considers that the declaration of a limitation on criminal prosecution through the error of judicial administration, as well as the refusal to grant reparation for the damage suffered, are characteristic features of the denial of the right to a remedy, of which he has been a victim under article 2 (3) (a) and (b) of the Covenant.

3.2 The author points out that the investigation division of the court of appeal of Aix-en-Provence also found error of judicial administration in this case, as it annulled the order for the replacement of Mr. S. with Mr. M. on the grounds that this removal of the judge from the case was not in keeping with the requirements of article 663 of the Code of Criminal Procedure. Article 663 implies that two investigating judges are simultaneously considering related offences or different offences with which the same person or persons are charged. However, the order removing the case from the judge did not refer to such a situation but rather mentioned a possible parallel with other case files dealt with by the same judge. The annulment of this order led *de jure* to the annulment of the investigative proceedings taken by Mr. M. and, in doing so, brought about a time bar on public prosecution. The late annulment of the investigative proceedings led directly to the time bar and therefore the denial of legal proceedings owing, moreover, to a mistake of law. This violation is all the more serious by virtue of the fact that it made it impossible for the author to have access to a court with jurisdiction to hear appeals and therefore to an appeal.

3.3 As regards the decisions of the regional court of Grasse and the court of appeal of Aix-en-Provence, in which reparation for the error made was refused, contrary to the findings of these courts, the author is clearly mentioned in the judgments of the indictment division of the court of Aix-en-Provence of 1 March 2001 as a party claiming damages on his own behalf at the time, with his own lawyer, and also on behalf of company B., mentioned separately, with its own lawyer as well. There is no mistaking the presence of the two distinct parties claiming damages. Furthermore, the author requested the court of appeal to begin an inquiry in order to have this evidence transmitted from the regional court of Grasse, but to no avail. The author therefore claims that the judicial authorities' bad faith is clear.

3.4 The author notes that the annulment of the criminal proceedings in the judgment of the court of Aix-en-Provence of 2001 had made it impossible to use evidence of fraud gathered in this forum (including the expert report on which the indictment is based) for subsequent civil proceedings against company. Therefore, the decisions have not been in the author's favour. The author notes, moreover, that the court of cassation, which, in a

decision of 13 December 2011, had closed the civil proceedings, had declared the appeal non-admissible without giving grounds. Such a procedural approach was said to be unfair, as the complexity of the proceedings should have led to a closer examination of the dispute. The author therefore considers that there has been a violation of the right to a remedy, as guaranteed under article 2 (3) of the Covenant as it pertains to civil proceedings.

State party's observations on admissibility

4.1 On 6 August 2012, the State party challenged the admissibility of the present communication under article 5 (2) (a) and (b) of the Optional Protocol.

4.2 Referring to the facts of the case, the State party notes that, on 19 January 1998, the investigating judge appointed to conduct an investigation into the case in which the author was suing for damages, turned the case over to another investigating judge on the grounds of both the sound administration of justice and article 663 of the Code of Criminal Procedure, which provides for the transfer of a case from one judge to another judge who is examining a related offence or different offence for which the same person or persons are charged. On 1 March 2001, the investigation division of the court of appeal of Aix-en-Provence annulled the relinquishment of jurisdiction order and all subsequent proceedings and established a time bar on public prosecution. It ruled that the order was not in keeping with any of the public policy provisions under the Code of Criminal Procedure regulating the relinquishment of proceedings for the purpose of the sound administration of justice. The existence of a related offence or offence by the same persons charged with different acts was not at all established. As it considered that no official investigative proceedings to interrupt the running of the limitation had been instituted since 19 January 1998, it established a limitation on public prosecution. The author lodged no appeal against this judgment.

4.3 On 22 February 2005, the author sued the French State, through the Treasury solicitor, in the regional court of Grasse. He sought its conviction for serious official error of the judicial system. On 13 February 2007, the court declared his suit inadmissible for lack of standing. On 29 January 2009, the court of appeal of Aix-en-Provence upheld the judgment, finding that the author lacked the standing and capacity to sue, as he was unable to justify intervening in a personal capacity in the criminal proceedings. It noted that he claimed to have been personally concerned as a shareholder in a company with an interest in the assets of company B. It added that he considered himself to be in a position of a party claiming damages and he maintained, without providing grounds, that he had been one. Here, too, the author lodged no appeal against this judgment.

4.4 On 8 September 2009, the author brought the matter to the attention of the European Court of Human Rights, which rejected his application in a decision dated 7 July 2011, delivered by a single judge, for failure to exhaust domestic remedies.

4.5 Under article 5 (2) (a) of the Optional Protocol, a matter may not be considered by the Committee if the same matter is being examined under another procedure of international investigation or settlement. Furthermore, at the time of its accession to the Optional Protocol, the State party entered a reservation, under which it is not within the competence of the Committee to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement.

4.6 The State party maintains that the author's communication is identical to application No. 5985/09, rejected by the European Court of Human Rights, as it concerns the same author, the same facts and the same substantive rights. The author believes it can be argued that the court did not examine the case within the meaning of the stipulations of that reservation. He falls back on a decision delivered by the Committee in the case of

Lemercier v. France.⁹ However, the author's communication is different from the *Lemercier v. France* case. In that case, the court had considered that the communication was late and therefore inadmissible within the meaning of article 35 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the European Convention on Human Rights), under which the Court may only deal with a matter within a period of six months from the date on which a final domestic judicial decision is taken. As the Optional Protocol does not impose any limitation for proceedings, the Committee therefore considered that, by rejecting the application because of its lateness, the Court could not be regarded as having examined the same case.

4.7 In this case, the Court rejected the author's request on the grounds that it had not exhausted the domestic remedies as required by article 35 (1) of the European Convention on Human Rights. This ground for inadmissibility based on the exhaustion of domestic remedies requirement set out in article 35 (1) of the Convention is similar in content and scope to the ground provided for under article 5 (2) (a) of the Optional Protocol. While in previous decisions the Committee, admittedly, has found that a decision of inadmissibility on the part of the court for procedural reasons was not the same as a review within the meaning of the reservation to the Protocol, there is good reason in this case to consider that the review by the court was done within the meaning of the reservation to the Protocol insofar as the application was analysed by that other international court according to rules similar to those under the Protocol.

4.8 As regards article 5 (2) (b), the State party points out that the author of a communication must first argue the merits of his or her claim in domestic courts before submitting it to the Committee. That is not the case here. The author has not filed any application for judicial review of the court decisions that he criticizes, whereas such appeals constitute effective remedies.

4.9 As regards the first proceedings involving the lawfulness of a time bar for public prosecution (see paras. 2.4, 2.5 and 2.9 above), the author asserts that the removal of the investigating judge from the case was not open to challenge and therefore annulment, even though it had in fact been annulled by the investigation division of the court of appeal. The State party therefore considers the author's assessment to be erroneous. One may therefore well ask why, in the light of this application of the law that he challenges, the author did not refer the disputed decision to the court of cassation. The State party refers to the Committee's jurisprudence that mere doubts as to whether proceedings will succeed are not sufficient to justify the author's non-exhaustion of domestic remedies.

4.10 The author subsequently chose to file a civil claim under article L141-1 of the Judicial Code, by which the State could be convicted for serious official error of the judicial system (see paras. 2.6 and 2.10). It was also up to him to exhaust the remedies provided for in this second proceeding. According to the author, the appeal on points of law was not, in this forum, an effective remedy, as the court of cassation cannot assess the justification for his standing. However, here too, the author's assessment is not correct. The court of cassation's inability to assess the justification for his standing holds only if the author confines himself to criticizing the application by the trial judges of the internal rules of procedure, namely, in this case, the assessment of standing regardless of whether it is in keeping with the provisions of the Covenant or the European Convention on Human Rights. The same does not apply if the judge indulges in an arbitrary interpretation inconsistent with the Covenant. A claim of this kind may be made in order to remedy an alleged violation by superior courts.

⁹ See communication No. 1228/2003, *Lemercier v. France*, decision adopted on 27 March 2006.

4.11 The State party considers that, in this case, the second situation applies, as the author claims that there was a lack of access to the court and a lack of impartiality on the part of the domestic courts. The court of cassation clearly considers that even a final decision on the facts by trial judges must not ignore the right of access to a court.¹⁰ It thus strictly monitors compliance with this fundamental requirement. Furthermore, with regard to the claim regarding the lack of impartiality, if the assessment of standing showed the existence of bias against a party, there would then be a claim that could validly be submitted to the court of cassation, whether the bias resulted from a distortion of the facts, of which the court is, in any event, the judge, or terms used by the trial judge,¹¹ or a lack of grounds or insufficient grounds. Under these circumstances, the author is not justified in claiming that he was not able to submit to the court of cassation the complaints that he is presenting to the Committee, as effective remedies were available to him in order to defend them before the domestic courts.

Author's comments on the State party's observations

5.1 On 10 September 2012, the author submitted his comments on the State party's observations on the admissibility of the communication.

5.2 With regard to the first admissibility challenge raised by the State party, the author said that the European Court of Human Rights did not examine the case within the meaning of either article 5 (2) (a) of the Protocol or the reservation entered by France. In the *Lemercier v. France* case, the Committee had rejected the State party's arguments, since it would be tantamount to applying the State party's reservation to any communication which had been referred to the European Court of Human Rights and had received a reply from it of any kind.

5.3 In this case, the court rejected the author's request on the grounds that he had not exhausted domestic remedies. It should be pointed out that the decision in question, dated 7 July 2011, taken by a single judge, is incompatible with the court's jurisprudence, under which the exhaustion of domestic remedies is more a golden rule than a principle set in stone that is to be enforced with some flexibility and without excessive formalities. The court gave a decision in accordance with Protocol No. 14, when it was hearing a petition dated 8 September 2009. The decision came *ex parte*, without an examination of admissibility, and, according to the author, was made in defiance of the court's own jurisprudence relating to effective remedies. This is at variance with the fact that a panel of the court considered another, somewhat earlier application than the one submitted by the author on the matter of the exhaustion of domestic remedies, concerning a small fine.

5.4 As for the issue of the time frame for the submission of a case to the court, the issue of exhaustion of domestic remedies is a procedural matter. Article 35 (1) of the European Convention on Human Rights addresses the question of both exhaustion of remedies and the late submission of a case. However, the Committee held that the time frame for an appeal is only a procedural matter. That being so, the exhaustion of domestic remedies, like the submission of a case to the court, is a procedural matter. The European Court of Human Rights, therefore, did not consider the matter within the meaning of article 5 (2) (a) of the Optional Protocol insofar as the decision dated 7 July 2011 covered only a procedural matter.

5.5 Moreover, the author points out that the rule concerning the exhaustion of domestic remedies was observed. On 29 January 2009, the court of appeal of Aix-en-Provence rejected his claim for compensation by the State for the harm caused as a result of error of

¹⁰ Second civil division, 7 July 2011, appeal No. 10-21.885; and second civil division, 10 March 2011, appeal No. 10-15.936.

¹¹ Second civil division, 14 September 2006, appeal No. 04-20.524, Bulletin 2006, II, No. 222.

judicial administration. The author cannot be criticized for failing to file a special appeal on points of law to the court of cassation. In fact, the court of cassation could not assess the author's bringing of criminal indemnification proceedings and standing, with the final decision on the facts falling to the trial judge.¹²

5.6 The jurisprudence referred to by the State party in its observations relates only to the relevance of the lawsuit and not legal standing. There is no doubt that, in the light of the jurisprudence in question, the relevance of the lawsuit is for the trial court to assess in the same way as legal standing. The appeal on points of law against the judgment of 29 January 2009 was therefore a formal and ineffective remedy.

5.7 In addition, by annulling the criminal procedure because of a simple procedural issue (the appointment of an investigating judge) and declaring a time bar for the offence and, by the same token, for public prosecution, the judgment of 1 March 2001 by the court of appeal of Aix-en-Provence could no longer be submitted to the court of cassation for censure. According to the established precedents of the court of cassation, the manner in which an investigating judge is appointed constitutes a court administration process whose lawfulness and existence the parties may neither debate nor challenge.¹³ Moreover, the investigating court does not have the jurisdiction to begin proceedings for the removal of a judge from a case under article 663 of the Code of Criminal Procedure.¹⁴ An appeal on points of order is therefore destined to fail. However, the rule on the exhaustion of domestic remedies does not apply to appeals that have no chance of succeeding. The author adds that he is exempted from uncertain domestic remedies in cases of well-established jurisprudence or the absence of favourable jurisprudence. The author therefore considers that, in this case, his communication is admissible.

5.8 The author points out that the subject matter of the domestic remedies was fraud, of which he was the victim and which led to his financial ruin. The annulment of the criminal proceedings and the declaration of the time bar on public prosecution delivered a death blow to the evidence gathered during the investigation, with the proof in writing, including the expert report, annulled. Consequently, 20 years later, the author is still the victim of these events and was not able to obtain reparation. The European Court of Human Rights recognized that the rule on the exhaustion of domestic remedies was not absolute and also takes into account the legal and political context in which the remedies provided for in theory in the legal system in question are placed. The author considers that, given the excessive delay in the proceedings and the bad faith of judicial administration of the State party — which, considering the economic clout of the parties involved, did not hesitate to exclude the evidence of fraud committed to the detriment of the author and his companies — an appeal against the judgment of 29 January 2009 by the court of appeal would have been inappropriate and ineffective.

5.9 On 3 March 2015, the author notes the extremely slow progress of the proceedings before the indictment in the initial proceedings (complaint of fraud) of company A. In fact, before Mr. M. was appointed as investigating judge, it had taken one year between the filing of the complaint and the first appointment of an investigating judge. Four successive appointments of investigating judges followed before Mr. M. was ultimately assigned to the case. By considering the appointment of Judge M. as a violation of the Code of Criminal Procedure, the French judicial system put an end to any prosecution of those responsible for the fraud through the excessive and consequent application of legal and procedural rules for an illegitimate purpose. For the author, the series of decisions shows that the time bar,

¹² Court of Cassation, civil division, judgment of 12 April 2012, No. 10-25.406.

¹³ Court of Cassation, criminal division, 27 February 2011, Bulletin No. 50.

¹⁴ Court of Cassation, criminal division, 31 March 2009, 08.88.226.

which was imposed after Mr. M. was removed from the case for a minor irregularity, was the goal being pursued and not the ultimate consequence of an irregularity.

5.10 Concerning the issue of the time bar on its own, the author refers to a leading case before the European Court of Human Rights, in which it considered that “the delay with which the prosecution authorities dealt with the case file, which led to a time bar for the offences covered and, as a result, the impossibility for the applicant to obtain a ruling on his application for compensation, deprived him of the right of access to a court”.¹⁵ This jurisprudence applies to the case, since the time bar, coupled with the annulment of the procedural acts, not only dashed any hope that the author had to establish the criminal nature of the acts of which he was the victim but also prevented him from using evidence gathered during the investigation in another forum.¹⁶

5.11 The author notes that he attempted to obtain justice on other fronts, above all with a court of arbitration, which settled the case by setting a price for the disposal of assets of former company B. equivalent to one third of its value. For the author, this is owing to the fact that all documents that could establish the real value of his company had been destroyed with the time bar on criminal proceedings for fraud (see, in particular, paras. 2.1-2.5 above). Another claim for damages in civil proceedings against company A. also ended in failure. Furthermore, as mentioned earlier, the author also instituted proceedings against the French State for serious official error of the judicial system.

5.12 All the appeals brought have failed. Concerning fraud, the author considers that the appeal on points of law was futile, as has been pointed out. The proceedings concerning the receiving of stolen property ended in a decision of non-admissibility of the court of cassation for which no reasons were given; the decision of the court of appeal of 3 March 2005 in connection with arbitral proceedings could not be appealed against; the claim for damages in civil proceedings against company A. ended in a decision of non-admissibility delivered by the court of cassation; and a proceeding involving the transferees’ debts was thrown out by the court of cassation.

5.13 As regards the claim against the State, the author considers that an appeal before the court of cassation had no prospect for success, since only the evaluation of facts by the trial judges was involved and the court of cassation has no jurisdiction in the matter. This is because the regional court of Grasse and subsequently the court of appeal of Aix-en-Provence had considered that the author lacked standing, even though the author’s name and home address appeared on the complaint for fraud (see para. 2.7 above). The name of his own lawyer, Mr. Verges, was also mentioned while company B. was mentioned separately. Having to contend with the State’s position, the author made a request in his submission to the court of appeal of Aix-en-Provence for an inquiry to be undertaken in order to have his application for criminal indemnification proceedings handed over for inspection. The Treasury solicitor could have transmitted this evidence. However, the court dismissed this request on the grounds that the Treasury would not have access to the criminal case file. This argument is not relevant since, on one hand, the Treasury solicitor represents the State as a whole, including ministries, before courts of justice (Act No. 55-366 of 3 April 1955, art. 38) and, on the other, he had brought evidence in the proceedings

¹⁵ Judgment in *Anagnostopoulos v. Greece*, No. 54589/00, para. 32. The author also refers to the judgments in *Kutić v. Croatia*, No. 48778/99 and *Gousis v. Greece*, No. 8863/03.

¹⁶ In the author’s further comments, he mentions that, besides the initial complaint for fraud, he subsequently filed a complaint against company A. for receiving stolen property and that the investigating judge in this case refused to launch an investigation on the grounds that the offence of receiving stolen property was not established and it was up to the author to give evidence of the existence of such an offence.

from this same source. The author therefore considers that, here, the evaluation of the facts alone is at issue, which cannot be reviewed by the court of cassation.

5.14 The author calls attention to the fact that the alleged violation of article 6 of the European Convention on Human Rights is not, by itself, grounds for an appeal before the court of cassation as the State party mentions. It is only through cases involving an appeal on points of law, which come within the purview of the court of cassation, and in support of such cases that the right of access to a court is taken into account, if necessary. In this case, neither the statement of reasoning of the court of appeal nor its evaluation of the facts could be the subject of an appeal. The author notes that during the proceedings he mentioned that he was acting only as a third party, to which the court of appeal replied that he could not be acting as such, as he was a party claiming damages in criminal proceedings. The author considers, therefore, that everything was done to prevent him from having access to a court.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must, in accordance with rule 93 of its rules of procedure, decide whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party challenges the admissibility of the communication under article 5 (2) (a) of the Optional Protocol since, under the reservation entered by the State party to this provision, the same matter has already been examined by the European Court of Human Rights. The Committee notes the author's claim that the Court rejected the author's request with a single judge sitting and did not rule on a procedural issue, namely the question of the exhaustion of domestic remedies under article 35 (1) of the European Convention on Human Rights, and that it cannot involve, therefore, an examination within the meaning of article 5 (2) (a) of the Optional Protocol.

6.3 The Committee must establish whether the decision of the Court constitutes an "examination" of "the same matter" as the one that is before it. It notes that, in this case, the matter does indeed involve the same author, the same facts and the same substantive rights. As to whether the Court began an examination of the communication within the meaning of article 5 (2) (a) of the Optional Protocol, the Committee draws attention to its jurisprudence that an inadmissibility decision which entailed an at least implicit consideration of the merits of a complaint amounts to an "examination" for the purposes of article 5 (2) (a) of the Optional Protocol. However, the Committee has held that a finding of inadmissibility for purely procedural reasons, without addressing the merits of a case, does not amount to an "examination" for the purposes of admissibility.¹⁷ In this instance, the decision of the Court was procedural in nature, as it found that the author had not exhausted domestic remedies. Accordingly, the Committee considers that, in this case, the same matter has not been "examined" under another procedure of international investigation or settlement and that the communication is not inadmissible under article 5 (2) (a) of the Optional Protocol.

6.4 The Committee notes that the State party challenged the admissibility of the communication for non-exhaustion of domestic remedies, because the author has not first argued the merits of his claim in the domestic courts before bringing it to the Committee, and doing so through an appeal on points of law. The Committee notes the author's claim that the appeal on points of law against both the judgment of the court of appeal of Aix-en-Provence of 1 March 2001 concerning the time bar on criminal prosecution and its

¹⁷ See, in particular, communication No. 1446/2006, *Wdowiak v. Poland*, decision of 31 October 2006, para. 6.2.

judgment of 29 January 2009 for serious official error of the judicial system was bound to fail.

6.5 The Committee draws attention to its established precedents to the effect that mere doubts as to whether proceedings will succeed are not sufficient to justify the author's non-exhaustion of domestic remedies.¹⁸

6.6 As regards the first proceedings, the Committee notes that, according to the State party, the order removing the investigating judge from the case was open to challenge and therefore annulment, since it was indeed annulled by the investigation division of the court of appeal and the judgment could therefore be subject to an appeal on points of law. The Committee notes the author's reply to the effect that, according to the established precedents of the court of cassation, the manner in which an investigating judge of a given case is appointed constitutes a court administration process that does not affect the rights of the parties, who may not challenge its lawfulness and existence (Court of cassation, criminal division, 27 February 2001, Bulletin No. 50). While noting the author's argument that the court of cassation has an established position regarding judicial administrative acts such as an order of appointment or removal of an investigating judge in a specific case, the Committee also notes that, in this case, the author rather complains about the fact that the annulment of such an order led automatically to a time bar on criminal proceedings of which he was a direct victim; furthermore, the author did not appeal against the annulment. Therefore, the author has not exhausted all available domestic remedies in accordance with article 5 (2) (b) of the Optional Protocol.

6.7 Despite the possibility that an appeal on points of law against the judgment of the court of appeal of Aix-en-Provence of 1 March 2001 would have no likelihood of succeeding because of the prospect for a strict application of criminal procedure by the court of cassation, the author has nevertheless failed to show that an appeal against the judgment of the court of appeal as part of a claim for damages in civil proceedings (second set of proceedings) would therefore have been futile. This set of proceedings was intended to highlight the fact of a miscarriage of justice, which the author considered himself to be the victim, in violation of article 14 of the Covenant. However, the author has not shown that the judgment of the court of appeal, which decided merely to reject the author's claim for lack of standing, could not be subject to an appeal on points of law so that the court of cassation could rule on his status as victim and the issue of his access to a court. The Committee considers that it has not been demonstrated that the appeal on points of law, in the context of the second set of proceedings, was futile or ineffective under article 5 (2) (b) of the Optional Protocol.

7. The Committee therefore decides:

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

(b) That this decision shall be transmitted to the author of the communication and to the State party.

¹⁸ See communication No. 1789/2008, *G.E. v. Germany*, decision adopted on 26 March 2012, para. 7.4.