



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communications Nos. 3090/2017 and 3091/2017*, **

<i>Communication submitted by:</i>	F.F.
<i>On behalf of:</i>	The author
<i>States parties:</i>	Luxembourg and France
<i>Dates of communication:</i>	27 July 2015 (against Luxembourg) and 29 July 2015 (against France)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 18 May 2018 (not issued in document form)
<i>Date of decision:</i>	6 April 2018
<i>Subject matter:</i>	Arbitrary detention, lack of a remedy
<i>Procedural issue(s):</i>	Substantiation of claims
<i>Substantive issue(s):</i>	Right to a fair trial
<i>Article(s) of the Covenant:</i>	7, 9 (1), (3) and (5), and 14 (1)
<i>Article(s) of the Optional Protocol:</i>	2

1.1 The author of the communication is F.F., a French citizen, born on 16 January 1962. He claims to be the victim of violations by Luxembourg and France of rights enshrined in articles 7, 9 (1), (3) and (5), and 14 (1) of the Covenant. The author is not represented by counsel.

1.2 On 6 November 2017, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided that observations from the States parties were not required to assess the admissibility of the present communication.

* Adopted by the Committee at its 122nd session (12 March–6 April 2018).

** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Ilze Brands Kehris, Ahmed Amin Fathalla, Christof Heyns, Yuji Iwasawa, Ivana Jelić, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval. In accordance with article 90 of the Committee's rules of procedure, Olivier de Frouville did not participate in the consideration of the communications.



Facts as presented by the author

2.1 The author is a professional lawyer. In May 1995 he moved to Luxembourg with his family. He managed a trust company listed in the Luxembourg commercial register. On 16 April 1996, an arrest warrant was issued against him in response to the filing of several complaints concerning breach of trust, fraud and attempted fraud.¹ On 29 October 1996, the investigating judge referred the case to the Criminal Court.

Luxembourg (communication No. 3090/2017)

2.2 On 24 April 1997, the author was summoned in Luxembourg pursuant to an arrest warrant issued on 16 April 1996. The Luxembourg police conducted a search of his home and office, pursuant to an order issued on 23 April 1997 by the Luxembourg investigating judge, with a view to seizing all the files of his Luxembourg trust company as well as documents relating to alleged French criminal charges. The author was placed in pretrial detention for the following offences: fraud, forgery, making use of forged documents and breaching the Act of 5 April 1993 on the financial sector.

2.3 The author alleges that on 24 April 1997 he was placed in incommunicado detention for a month in an individual cell, without the right to exit, for alleged offences perpetrated in the performance of his duties as director of the trust company. On 27 May 1997, when he succeeded in contacting his lawyer, he submitted an application for release, which was rejected on 29 May 1997 by the Luxembourg District Court Chamber on the grounds that the charges were partly liable to a criminal penalty and that there was a risk of flight and concealment of the evidence during the investigation of the case. On 6 June 1997, the Luxembourg Court of Appeal dismissed the author's appeal.

2.4 On 12 June 1997, the Luxembourg District Court dismissed the author's application for release on the grounds that there was serious evidence of guilt, a legally presumed risk of flight and a risk of concealment of evidence, inasmuch as the investigation had not been completed. On 24 June 1997, the Luxembourg Court of Appeal dismissed the author's appeal.

2.5 On 20 June 1997, the Lille public prosecutor submitted a request to the International Criminal Police Organization (INTERPOL) for provisional arrest of the author pending extradition, citing the urgency of the case. On 30 June 1997, a Luxembourg investigating judge issued a provisional arrest warrant against the author² with a view to his extradition to France.

2.6 On 1 July 1997, the Luxembourg District Court dismissed a renewed application from the author for release.

2.7 On 4 November 1997, the author was handed over to the French authorities.

2.8 On 27 March 2002, the author sought compensation for his arbitrary detention, invoking the Act of 30 December 1981 on compensation for unjustified pretrial detention.³ On 22 November 2002, a commission composed of the "president of a division" of the Luxembourg Court of Appeal, a Court lawyer and an executive advisor declared the author's application inadmissible, since he had not benefited from an order or judgment of discharge, he had not been acquitted by a final judicial ruling, and he had not been held in detention after the expiry of the time limit for prosecution. The author refrained from filing an appeal against this ruling within the three-month time limit on the ground that, in his view, it would serve no purpose.

2.9 On 7 January 2013, the Minister of Justice dismissed the application for compensation, pursuant to the Act of 30 December 1981, for unjustified pretrial detention.

¹ In a final judgment handed down on 19 May 1995, the author was convicted of illegally engaging in activities as a real-estate agent.

² The warrant specifies that the author was detained at Schressig Prison, and charged with offences defined under Luxembourg law as breach of trust, fraud, attempted fraud and issuance of an uncovered cheque.

³ The author notes that article 2 of the Act actually specifies only three cases in which compensation may be granted: acquittal, discharge and statutory limitation.

The Minister did not share the author's view that his pretrial detention had taken place in exceptional circumstances and that it had entailed abnormal damages. The Minister pointed out that the author had been held in pretrial detention in Luxembourg from 30 June 1997 in response to an extradition request from France and that he had then been convicted in France. The ruling had offered the author the possibility of filing a claim against the State, within three months, before the district courts, but he had failed to do so.

2.10 On 4 January 2013, the author wrote a letter to the Luxembourg Minister of Justice complaining that there was no procedure whereby the State of Luxembourg could be compelled to request a State to which it has granted extradition and a request for arrest pending extradition to provide compensation for arbitrary detention in its territory pursuant to article 9 of the Covenant. According to the author, the letter has remained unanswered to date.⁴

France (communication No. 3091/2017)

2.11 On 4 November 1997, the author was taken to the border and presented to a prosecutor who was authorized solely to verify his identity before incarcerating him in Metz remand prison. On 7 November 1997, the author was transferred to Loos-lès-Lille remand prison. On 10 November 1997, Lille Regional Court confirmed the arrest warrant of 16 April 1996 and ordered the continued detention of the author. On 28 November 1997, however, the Douai Court of Appeal, noting that the author had no criminal record and had afforded evidence of a fixed abode and a stable family situation, concluded that there were adequate guarantees of his appearance before the courts and ordered his release.

2.12 On 16 October 1998, the Lille Criminal Court convicted the author of having deceived various people and sentenced him to one month's imprisonment. On 20 December 2001, the Douai Court of Appeal acquitted the author on seven counts, but convicted him of attempted fraud and sentenced him to a six-month suspended term of imprisonment. The court also ruled that it was for the author to raise the plea alleging the unlawfulness of the request for remand detention pending extradition and declared the plea inadmissible. In addition, the court ruled that the excessive duration of proceedings could not render them void. Lastly, the court found that the author had waived — irrevocably and even though he was assisted by counsel — the principle of speciality enshrined in article 66 (1) of the Schengen Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the gradual abolition of checks at their common borders of 19 June 1990, the application of which the French courts are not required to monitor with regard to the requested State. On 27 November 2002, the Court of Cassation dismissed the author's appeal against the judgment of 20 December 2001.

2.13 On 3 November 2003, the Douai Court of Appeal dismissed the author's application for compensation for the damages suffered as a result of his detention from 30 June 1997 to 28 November 1997, on the grounds that he had been convicted of offences in respect of which an arrest warrant had been issued and executed and that he had not been discharged.⁵ On 11 June 2004, the National Commission on Compensation for Detention dismissed the author's appeal. It considered that, since the author had been convicted of attempted fraud, an offence explicitly mentioned in the arrest warrant and that could be invoked to justify the pretrial detention, the lawfulness of the detention was of little importance.

2.14 On 22 October 2008, the Paris Regional Court dismissed the author's application for compensation for the damage caused by the faulty operation of the judicial system, in particular the fact that the decision concerning his detention was taken more than 72 hours after his arrival at the remand prison following his extradition, whereas article 133 of the Code of Criminal Procedure sets a 24-hour time limit. On 23 March 2010, the Paris Court

⁴ The author considers that the absence of a reply amounts to rejection and confirms that there are no legal provisions in Luxembourg requiring a requesting State to provide compensation for an arbitrary request for detention pending extradition, in accordance with article 9 (5) of the Covenant.

⁵ According to articles 149 and 150 of the Code of Criminal Procedure, full compensation for the moral and material damage suffered is awarded, upon request, to a person whose term of remand in custody is ended by a decision to terminate the proceedings, a discharge decision or a final acquittal decision.

of Appeal endorsed the Regional Court's judgment, ruling that the author had failed to exhaust the remedies available to him under the law, and that the claim that his arrest was the result of gross negligence on the part of the State was unjustified.⁶ With regard to the conditions governing his continued remand in custody, the Court of Appeal did not contest the fact that the author was not interrogated within 24 hours of his arrest. It pointed out, however, that the provisions of article 133 of the Code of Criminal Procedure that set the time limit were not applicable at the material time. On 20 June 2012, the Court of Cassation dismissed the author's appeal, based on the Judicial Code, claiming compensation for damage caused by the improper administration of justice. The Court noted that, at the time of his arrest and when he appeared before the Criminal Court, the author had failed to exercise all available legal remedies in order to establish the alleged unlawfulness of his arrest. It found, in addition, that the divergent assessments of the court of first instance and the Court of Appeal as to the advisability of maintaining him in custody demonstrated the effectiveness of the principle of two-tier proceedings, which offered redress for alleged maladministration of justice.

Proceedings before the European Court of Human Rights

2.15 On 12 April 2001, the author filed a complaint against France with the European Court of Human Rights. Invoking article 6 (1) of the European Convention on Human Rights, he complained that he had not received a fair and public hearing before the Court of Cassation (see the end of paragraph 2.12 above).

2.16 Invoking article 5 (1) of the Convention, he complained of the arbitrary nature of his detention between June and November 1997. He argued first that, given the duration of the criminal proceedings, the request for remand detention pending extradition could not be based on urgency and that this procedural defect rendered the subsequent detention arbitrary. Secondly, he argued that his detention from 4 November 1997, the date on which he was turned over to the French authorities, until 10 November 1997, the day of the criminal court hearing, was legally permissible for a maximum of four days. Lastly, the author argued that the decision by the Lille Criminal Court on 10 November 1997 to maintain him in detention violated domestic law. Claiming that he had been denied the possibility of applying for compensation for the damage caused by his detention, the author requested compensation under article 5 (5) of the Convention.

2.17 Invoking article 6 (1) of the Convention, the author complained of the inequity of the decisions taken during the legal proceedings. He questioned their grounds, argued that the courts had not taken his arguments into account and had not responded to them, and challenged their assessment of the facts. He also complained about the duration of the criminal proceedings.

2.18 The author also claimed that article 13 of the Convention had been violated inasmuch as he had been denied an effective remedy in the form of compensation for the damages he had suffered as a result of the alleged violations of the Convention.

2.19 In a partial decision on admissibility delivered on 18 March 2003, the European Court dismissed the complaint against his alleged arbitrary detention as late, and concluded that the complaints concerning compensation for detention-related damages and the inequity of the decisions were manifestly ill-founded inasmuch as the author had been given the opportunity to present his arguments to the criminal courts, which had responded by handing down rulings that contained the requisite statement of grounds. The Court also ruled that the author had failed to exhaust domestic remedies in respect of his complaint concerning the duration of the proceedings at issue, and that the complaint based on article 13 was manifestly unfounded, since the author had not filed any complaint to which article 13 was applicable.

2.20 By a judgment of 2 November 2004, the European Court declared manifestly unfounded the author's complaint concerning the impossibility of obtaining compensation

⁶ The Court also held that the request for arrest stemmed solely from the arrest warrant and that responsibility for deciding whether it should be granted lay with the authority that received the request, so that the author's attempt to assign responsibility to the French State was unfounded.

and concerning the decision by the Court of Cassation to deny him access to a court to obtain compensation for the damages suffered as a result of remand detention, notwithstanding seven acquittals and the absence of any prison sentence. The European Court held that the author had been given the option of filing an application to the Court of Appeal, and subsequently to the National Commission on Compensation for Detention, for compensation for damages suffered from remand detention, and that he had exercised that option. As the author complained that he had not been compensated, the European Court took it that he was criticizing the implementation of domestic law by the national authorities and concluded, since it had found no evidence of arbitrariness in the proceedings, that there were no grounds to challenge the assessment of the national courts, which are primarily responsible for interpreting and implementing domestic legislation.

2.21 However, the European Court found that there had been a violation of article 6 (1) of the Convention in connection with the author's complaint that he had been denied adversarial proceedings before the Court of Cassation, since the reporting judge's report had not been communicated, although it had been submitted to the Advocate General.

2.22 Following this finding of a violation by the European Court, the author submitted an application to the commission responsible for reviewing criminal court decisions for a review of the appeal against the judgment handed down by the Douai Court of Appeal. On 18 January 2006, the Court of Cassation dismissed the application on the ground that the Court of Appeal had justified its decision to convict the author of attempted fraud.

2.23 Referring to the proceedings before the European Court, the author argues that the Court refrained from considering the arbitrary and inappropriate nature of the detention and had dismissed the complaint on a procedural ground, namely failure to respect the six-month time limit for submission of the complaint.

The complaint

Luxembourg

3.1 The author alleges that his period of detention from 24 April to 30 June 1997 has been denied by the Luxembourg authorities. He further alleges that an application for release cannot be filed with the Luxembourg Court of Cassation during an investigation because, pursuant to the Act of 17 June 1987 on the abolition of the assize court and modifying jurisdiction and procedures for the investigation and trial of offences, such an application is prohibited prior to a judgment on the merits by article 416 of the Code of Criminal Procedure. Hence he was unable to submit an application for release to the Luxembourg courts with effect from 30 June 1997, the date of the author's detention pending extradition in response to the request from France and was required instead to apply to the French courts.

3.2 Invoking the Committee's general comment No. 35 (2014) on liberty and security of person, the author alleges that he was subjected to arbitrary detention in Luxembourg from 24 April to 4 November 1997 in violation of article 9 (3) of the Covenant. He claims that the Luxembourg Ministry of Justice denies the period of detention from 24 April to 30 June 1997 (see para. 2.9). He maintains that he was imprisoned without access to a judgment or at least to dismissal proceedings, in violation of article 9 (1) of the Covenant.

3.3 The author further claims that the arrest warrant issued on 30 June 1997 fails to meet the requirements of article 9 (1) of the Covenant, as interpreted by the Committee in its general comment No. 35: the arrest warrant defined urgency in an impersonal and general manner; the risk-related grounds were unreasonable; the gravity of the alleged acts was an arbitrary ground; and the risk of flight was non-existent, since the author's family and his companies were in the territory of Luxembourg.

3.4 The author also contests the fact that all foreigners who are subject to a request for extradition are automatically detained in Luxembourg when a State submits such a request and calls for their placement in detention. Therefore, he submits that the detention on grounds of extradition was neither fair nor appropriate within the meaning of article 9 of the Covenant.

3.5 Lastly, the author argues that Luxembourg failed to provide compensation for his arbitrary detention, as required by article 9 (5) of the Covenant, because the right to compensation for arbitrary detention does not exist under Luxembourg law. Although article 1 of the Act of 30 December 1981 recognizes the possibility of arbitrary detention in contravention of article 5 of the European Convention — equivalent to article 9 of the Covenant — article 1 should not be interpreted in a general sense because the title of the Act does not refer to compensation for arbitrary detention but to compensation in case of unjustified pretrial detention. It follows that article 1 should be interpreted on the basis of article 2 of the same Act, which specifies the three cases that entitle a person to compensation: discharge; acquittal; and detention after the expiry of the time limit for prosecution. Owing to the negligence of the Luxembourg authorities, the author was not tried and the investigation procedure concerning the alleged charges in Luxembourg was not completed. The author cannot therefore obtain compensation under domestic law for his arbitrary detention within the meaning of article 9 of the Covenant.

3.6 With regard to the alleged violation of article 7 of the Covenant, the author considers that the arbitrary detention without legal grounds of the father of three young children, as well as the lack of compensation, is an inhuman and degrading act. With regard to article 14 (1) of the Covenant, the author states that he was denied access to a fair trial and to a court that would examine the criminal charges laid against him.

France

3.7 The author claims that the judgment handed down on 18 January 2006 by the Court of Cassation demonstrates that there is no independent, specific and effective procedure in France for providing compensation for unreasonable and unnecessary detention within the meaning of article 9 of the Covenant.

3.8 The author also challenges the decision issued by the Court of Cassation on 20 June 2012, describing it as arbitrary and as entailing a denial of justice, since the release of a detainee does not compensate for the time spent in detention.

3.9 Invoking article 9 of the Covenant, the author argues that the request by the French judicial authorities for placement in detention was inappropriate, unreasonable, unforeseeable and unnecessary. He points out that he had been living in Luxembourg since May 1995 and had therefore not absconded. At the time, however, the mere fact that a person was abroad justified under domestic law the request to the authorities of the host State for provisional arrest.⁷ The request for arrest was based only in general terms on articles 2 and 16 of the European Convention on Extradition, which refer to urgency without specifying the circumstances giving rise to the alleged urgency. Submission of a request for the detention of a father of three young children, without prior investigation and without issuing an international arrest warrant, seems both inappropriate and unforeseeable.

3.10 The author then claims that his detention in France from 4 to 28 November 1997 was arbitrary. He was denied access to a judge to rule on his detention on being handed over to France, and he had to wait from 4 until 10 November 1997 for the lawfulness of his detention to be examined. As the author arrived at Loos-lès-Lille remand prison on 7 November 1997, a judge should have automatically ruled on his detention by 8 November 1997 rather than on 10 November 1997 in response to his request to the prison registry. The seven-day period that passed before the author gained access to a competent judge to review his detention is not “prompt” but arbitrary within the meaning of article 9 (3) of the Covenant.⁸

3.11 Invoking general comment No. 35, the author also argues that the decision to extend his detention handed down on 10 November 1997 is neither legally sound nor necessary within the meaning of article 9 of the Covenant.

⁷ The author claims that it took the French Court of Cassation until January 2017 to apply the Committee’s jurisprudence on the proportionality of a request to detain an individual who had left to live abroad.

⁸ The author notes that the Committee sets a reasonable time limit of 48 hours in paragraph 33 of general comment No. 35.

3.12 Lastly, he claims that the lack of compensation for his unlawful, arbitrary and inappropriate detention contravenes article 9 (5) of the Covenant. The author argues that there is no effective and efficient procedure in France for obtaining compensation for unreasonable or arbitrary detention within the meaning of article 9 of the Covenant. He also considers that the devastation he suffered during the period of arbitrary detention and the lack of redress violate the rights safeguarded under article 7 of the Covenant. Furthermore, the two cases of denial of justice when the request for compensation for arbitrary and unlawful detention was reviewed violate article 14 (1) of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

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

4.2 The Committee has ascertained, in accordance with article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

4.3 The Committee considers that the author's claims under article 9 (1), (3) and (5) and under article 14 (1) of the Covenant concern the assessment by the courts of the two States parties of the facts and evidence during the proceedings initiated by the author. The Committee notes that it is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.⁹ The Committee notes that the author has failed to demonstrate that such shortcomings existed in the conduct of the proceedings in this case. Accordingly, the Committee considers that the author's claims under article 9 (1), (3) and (5) and under article 14 (1) of the Covenant are inadmissible pursuant to article 2 of the Optional Protocol.

4.4 The Committee further notes the author's claim that his alleged arbitrary detention and lack of compensation violated his rights under article 7 of the Covenant, thereby constituting inhuman and degrading treatment. It considers, however, that the author has not adequately substantiated this complaint for the purposes of admissibility. Accordingly, it declares the author's claims under article 7 of the Covenant inadmissible pursuant to article 2 of the Optional Protocol.

5. The Committee therefore decides:

(a) That the communications are inadmissible under article 2 of the Optional Protocol;

(b) That the present decision will be communicated to the States parties and to the author of the communication.

⁹ The Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial.