



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-first session
5 July - 30 July 2004

VIEWS

Communication No. 904/2000

Submitted by: Constant Joseph François van Marcke (represented by counsel, Dirk van Belle, Dauginet & Co, a law firm in Antwerpen)

Alleged victim: The author

State party: Belgium

Date of communication: 31 January 1999 (initial submission)

Document references: Special Rapporteur's rule 91 decision, transmitted to the State party on 5 June 2000 (not issued in document form)

Date of adoption of Views: 7 July 2004

On 7 July 2004, the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 904/2000. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

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

Eighty-first session

concerning

Communication No. 904/2000**

Submitted by: Constant Joseph François van Marcke (represented by
counsel, Dirk van Belle, Dauginet & Co, a law firm in
Antwerpen)

Alleged victim: The author

State party: Belgium

Date of communication: 31 January 1999 (initial submission)

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

Meeting on 7 July 2004,

Having concluded its consideration of communication No. 904/2000, submitted to the
Human Rights Committee by Constant Joseph François van Marcke 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. The author of the communication is Constant Joseph François van Marcke, a Belgian citizen,
born on 1 March 1928. He claims to be a victim of violations by Belgium of article 14,
paragraphs 1 and 3(g), of the Covenant. He is represented by Dauginet & Co, a law firm in
Antwerp.

** The following members of the Committee participated in the examination of the present
communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco
Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr.
Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan
Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The facts as submitted by the author

2.1 In July 1988, a former employee filed a complaint against the author, who was the managing director of *N.V. Interprovinciale stoombootdiensten Flandria*, a shipping company, for fiscal fraud and evasion of income tax. As a result, the Public Prosecutor ordered a preliminary enquiry. Later, on 22 June 1989, the Public Prosecutor ordered the collection of information from the Tax Control Office. The information collected from the Tax Control Office was reflected in police protocol No. 17.375 of 17 November 1989. In the protocol, mention was made of a conversation with a tax officer, who had inquired into the taxes paid by the company in 1987 and 1988, and whose report was annexed to the protocol. According to the author, this was done in violation of article 350 of the Income Tax Code in force at the time, which provided that tax officials could only be heard as witnesses in criminal matters and which prohibited their active participation in a criminal inquiry.. On 26 February 1990, the same tax officer reported to the Public Prosecutor breaches of the tax code committed by officers in the company.

2.2 On 18 June 1990, after completing the preliminary inquiry, the Public Prosecutor laid charges of forgery and fraud against the author and several co-accused. On 19 June 1990, the author was arrested and questioned by the police. According to the author, the Prosecution was waiting for the outcome of the investigation by the Tax Control Office into the tax payments of the company. The Tax Control Office's report was sent to the Judge in charge of the case on 1 April 1992. The case against the author was then referred for trial at the Court of First Instance in Antwerp.

2.3 By judgement of 30 June 1995, the author was convicted of forgery and fraud. On 28 June 1996, the Court of Appeal confirmed the judgement of first instance and sentenced him to a suspended sentence of two years' imprisonment and a fine of 500,000 BEF.

2.4 In its judgement, the Court of Appeal rejected the author's request that the criminal proceedings for fiscal fraud be declared inadmissible or subsidiarily that the tax inspector's 1989 report be removed from the criminal file. It confirmed the finding of the Court of First Instance that the penal inquiry was not initiated because of that report but because of a complaint filed by a former employee. Since the elements of fiscal fraud had been notified to the prosecutor before the tax control report was communicated to him, the Court found that there was no reason to declare the criminal proceedings inadmissible or to remove the report from the file. The Court also rejected the other claims made by the author in relation to alleged violations of the right to fair trial as non-substantiated. In particular, the Court rejected the claim that the tax-inspector had been involved in the criminal inquiry in any way and concluded that the cooperation of the tax officials with the penal inquiry had in no way violated the author's rights.

2.5 On 15 April 1997, the Court of Cassation rejected the author's further appeal. With this, all domestic remedies are said to have been exhausted.

2.6 The author petitioned the European Commission of Human Rights. On 19 January 1998, the Commission rejected the author's application as inadmissible.

The complaint

3.1 The author claims that he is a victim of a violation of article 14, paragraph 1, of the Covenant, because of irregularities in the preliminary enquiry: the author alleges that the Prosecution relied on an investigation conducted by the tax inspector in violation of article 350 of the Income Tax Code in force at the time, which provided that tax officials could only be heard as witnesses in criminal matters and which prohibited their active participation in a criminal inquiry. According to the author, the judicial authorities waited for the outcome of the investigation conducted by the inspector of the Tax Control Office before bringing him to trial, and the information provided by the tax inspector was used in the preliminary inquiry against him and formed the main basis for his conviction. Consequently, the author claims that the preliminary inquiry and the trial against him were not impartial, in violation of article 14, paragraph 1, of the Covenant. With regard to the finding of the court that the tax inspector had not been involved in the criminal inquiry the author argues that nevertheless there was an appearance of partiality which in itself constitutes a violation of article 14 (1). Moreover, the author alleges that the participation of the tax inspector in the preliminary inquiry against him violated the confidentiality of the preliminary inquiry.

3.2 Further, the author argues that his right to equal access to information has been violated, because the Court of Appeal refused to have the fiscal file added to the criminal file, although the results of the judicial inquiry were based on or had originated in the conclusions of the fiscal inquiry. The author claims that the Public Prosecutor had access to the fiscal file for information, and that he decided on that basis which investigation to order to obtain evidence against the author. The author acknowledges that he had access to the fiscal file during the fiscal inquiry against him, but argues that norms of fair trial require that the Court also should have had full access to all information used by the Prosecution.

3.3 Finally, the author claims that his right to remain silent as protected by article 14, paragraph 3(g) was violated. He explains that as a tax payer he had the obligation to provide correct information on his fiscal situation during the tax control inquiry which took place after the criminal complaint had already been filed against him. He was obliged to provide an answer to all questions asked by the tax administration at the risk of incriminating himself. If he would have refused to cooperate, he would have been subject to fiscal or penal sanctions. Consequently, the author cooperated fully with the tax authorities and provided information. The author states that "even though the results of this fiscal inquiry were not directly used as evidence in the criminal proceedings against the defendant, the results of this obligation to cooperate have contributed at least indirectly to the petitioner's conviction." The author argues that this constitutes a breach of his right to remain silent, as the use of his formal right to remain silent during the criminal proceedings had become illusory because of the information he had earlier provided to the tax authorities and since the tax inspector's report was used in the preliminary inquiry against him. In this context, the author refers to the ECHR judgement in the Saunderson case (17 December 1996).

The State party's submission on admissibility and merits

4.1 By submission of 5 December 2000, the State party refers to the decision by the European Commission of Human Rights, dated 19 January 1998, declaring the author's petition inadmissible on the basis that there was no appearance of a violation. The State party emphasizes that the European Commission entered into the merits of the author's complaint and did not reject it for procedural reasons or *ratione materiae*. In particular, the State party states that the jurisprudence of the European system shows that the right to fair trial includes the right to remain silent, and that the rights applied by the European Commission are thus the same as those contained in the Covenant. The State party argues therefore that since the same matter has already been examined by the European Commission on Human Rights, the communication is inadmissible under article 5, paragraph 2(a) of the Optional Protocol.

4.2 The State party further refers to the Committee's jurisprudence on the matter of exhaustion of domestic remedies, according to which the author should raise the substance of his complaint before the domestic instances. In this context, the State party notes that in his cassation appeal the author did not raise the question of violation of article 14 of the Covenant. The State party refers to the grounds of cassation introduced on behalf of the author, which refer to article 6, paragraph 1, of the European Convention on Human Rights and article 149 of the Constitution (obligation to provide reasoning for judgements). The State party argues therefore that the claims raised in the present communication were not brought before the domestic courts and that the communication should therefore be inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

4.3 On the merits, the State party states that the file shows that the author's right under article 14, paragraph 1, to a public hearing by a competent, independent and impartial tribunal established by law, has been fully guaranteed. In respect of the author's allegation that article 350 of the Income Tax Code was violated, the State party argues that it is for the domestic courts to interpret the national laws and to review their application, and that the Committee is not competent to decide on a possible violation of domestic law which is not also a violation of the Covenant. In this context, the State party notes that the right to a confidential preliminary investigation is not included in article 14 of the Covenant nor in article 6 of the European Convention.

4.4 Concerning the author's claim that he did not have a fair trial, the State party refers to the findings of the European Commission in the author's case, which considered that the author had had full opportunity to present all his arguments before the domestic courts, in particular concerning the alleged active participation of the tax inspector. In the opinion of the European Commission, the fact that the author disagrees with the court's conclusions in this respect does not in itself show that the trial against him was unfair. The State party fully shares the views expressed by the European Commission.

Author's comments

5.1 By letter of 14 June 2001, the author comments on the State party's observations in respect of the admissibility of the communication. In reply to the State party's argument that the

communication is inadmissible under article 5, paragraph 2(a), of the Optional Protocol, the author points out that the European Commission of Human Rights rejected his application by decision of 19 January 1998 and that the matter is thus no longer being examined under another procedure of international investigation or settlement. He further notes that the State party has entered no reservation to exclude the Committee's competence in matters that already have been decided by another such procedure. The author concludes therefore that his communication is admissible.

5.2 In reply to the State party's argument that the communication is inadmissible because of non-exhaustion of domestic remedies, the author argues that he raised before the courts the substantive rights protected by article 14 of the Covenant, and that he has exhausted all available remedies in this respect. He refers to the Committee's jurisprudence, according to which a petitioner should raise the substantive rights protected by the Covenant but need not do so by reference to specific articles of the Covenant. He concludes therefore that he has fulfilled the admissibility requirement of article 5, paragraph 2(b), of the Optional Protocol.

5.3 By letter of 28 June 2001, the author provides comments on the State party's observations on the merits of his communication. With respect to the State party's argument that the Committee is not in a position to review the interpretation and application of domestic law, the author argues that he has invoked article 350 of the Tax Code to argue that the cooperation of the tax inspector in the criminal procedure created at least an impression of active participation leading to a violation of his right to an impartial and fair hearing. The author further states that the Court of Cassation has based its judgement in his case solely on the interpretation of domestic law and has not tested the interpretation against international norms of fair trial. He argues that it is up to the Committee to decide whether the domestic authorities acted in compliance with the Covenant in this respect.

The Committee's admissibility considerations

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has noted the State's party's objection to the admissibility of the communication under article 5, paragraph 2(a) of the Optional Protocol. The Committee observes in this respect that the author's application to the European Commission of Human Rights concerning the same matter was declared inadmissible by the Commission on 19 January 1998 and is thus no longer being examined. In the absence of a reservation by the State party which would exclude the Committee's competence to consider communications that have already been examined by another procedure of international investigation or settlement, the Committee concludes that there is no obstacle to the admissibility of the communication under article 5, paragraph 2(a) of the Optional Protocol.

6.3 The Committee has also noted the State party's objection to the admissibility of the communication for failure to exhaust domestic remedies because the author failed to invoke

article 14 of the Covenant before the domestic courts. In this context, the Committee recalls its jurisprudence that for purposes of the Optional Protocol, the author of the communication must raise the substantive rights of the Covenant before the domestic instances, but need not refer to the specific articles.

6.4 The Committee notes that the author did not raise the issue of the alleged violation of his right to remain silent in his domestic appeals. This part of the communication relating to an alleged violation of article 14, paragraph 3(g) is therefore inadmissible under article 5, paragraph 2(b) of the Optional Protocol.

6.5 Noting that the author argued his domestic appeal on the basis of an alleged violation of his right to be heard by an impartial and independent tribunal and on an alleged violation of his right to equal access to information, the Committee considers that the author has exhausted domestic remedies in respect of these remaining claims.

7. The Committee therefore decides that the communication is admissible in so far as it raises issues under article 14, paragraph 1, of the Covenant.

The Committee's consideration of the merits

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

8.2 With regard to the author's allegation that the tax inspector participated actively in the preliminary inquiry and that his reports were used in the criminal case against him, in violation of article 14, paragraph 1 of the Covenant, the Committee notes that the courts rejected the author's claim in this respect and found on the facts that there was no active participation of any tax officials in the criminal case. As established by the Committee's jurisprudence, the Committee is generally not in a position to review the evaluation of facts by the domestic courts. The information before the Committee and the arguments advanced by the author do not show that the Courts' evaluation of the facts was manifestly arbitrary or amounted to a denial of justice. The author has further argued that the appearance of bias in itself constitutes a violation of article 14, paragraph 1, of the Covenant, even if the tax inspector did not participate actively in the criminal case against him. While acknowledging that in certain circumstances the appearance of bias may be such as to violate the right to a fair hearing by an independent and impartial tribunal, the Committee finds that in the present case the facts do not amount to a violation of article 14, paragraph 1 of the Covenant.

8.3 With regard to the author's claim that his right to equal access to information was violated by the courts' refusal to add the fiscal file to the criminal file, the Committee notes that the Court and the author had access to all documents used in the criminal case against him, and that the fiscal file did not constitute the basis of the prosecutor's case before the courts. The fact that information supplied by the fiscal authorities alerted the prosecutor to lines of inquiry for independent investigations did not require that the fiscal file be made part of the prosecution's

case.. The Committee observes that the right to a fair hearing contained in article 14, paragraph 1, does not in itself require that the prosecution bring before the court all information it reviewed in preparation of a criminal case, unless the failure to make the information available to the courts and the accused would amount to a denial of justice, such as by withholding exonerating evidence. The Committee notes that the author has made no claim that anything contained in the fiscal file would have been exculpatory. In the circumstances of the instant case, the Committee finds that the information before it does not show that the refusal of the courts to join the fiscal file to the criminal case hampered the author's right to defence or otherwise amounted to a violation of his right to fair hearing.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of the International Covenant on Civil and Political Rights.

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