



**International Covenant on  
Civil and Political Rights**

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**Human Rights Committee**

**Communication No. 2097/2011**

**Views adopted by the Committee at its 111<sup>th</sup> session  
(7-25 July 2014)**

*Submitted by:* [REDACTED] (represented by counsel Willem H. Jebbink)

*Alleged victim:* The author

*State party:* The Netherlands

*Date of communication:* 2 February 2011 (initial submission)

*Document references:* Special Rapporteur's rule 97 decision, transmitted to the State party on 13 September 2011 (not issued in document form)

*Date of adoption of Views:* 24 July 2014

*Subject matter:* Conduct of criminal proceedings

*Procedural issues:* --

*Substantive issues:* Right to appeal criminal conviction and sentence; right to adequate facilities for preparation of a criminal defence in appellate proceedings; right to an effective remedy

*Articles of the Covenant:* Articles 2, paragraph 3; 14, paragraph 5

*Article of the Optional Protocol:* --

## 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 (111th session)**

concerning

#### **Communication No. 2097/2011\***

*Submitted by:* [REDACTED] (represented by counsel Willem Hendrik Jebbink)

*Alleged victim:* The author

*State party:* The Netherlands

*Date of communication:* 2 February 2011 (initial submission)

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

*Meeting on 24 July 2014,*

*Having concluded* its consideration of communication No. 2097/2011 submitted to the Human Rights Committee on behalf of Mr. [REDACTED] 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 [REDACTED], a national of the Netherlands born in [REDACTED]. He submits that by failing to allow him to exercise his right to appeal a criminal conviction and sentence in a meaningful way, the Netherlands violated his rights under article 14, paragraph 5 of the International Covenant on Civil and Political Rights ("the Covenant"). He also maintains that the remedy proposed by the Netherlands is ineffective under article 2, paragraph 3, of the Covenant. He is represented by counsel, Mr. Willem Hendrik Jebbink.

#### **The facts as submitted by the author**

2.1 On 23 July 2007, the author was summoned to appear before the District Court of Arnhem on 28 August 2007 on suspicion of assaulting an on-duty police officer or obstruction of legitimate actions carried out by a police officer, and of not complying with

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\* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Christine Chanet, Yuji Iwasawa, Walter Kälin, Zonke Zanele Majodina, Gerald L. Neuman, Sir Nigel Rodley, Víctor Manuel Rodríguez Rescia, Fabián Omar Salvioli, Dheerujall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili, Margo Waterval and Andrei Paul Zlătescu.

an order to identify himself. Under Dutch law, the charge of assault is an indictable offense, and the charge of not complying with an order to identify oneself is a misdemeanour.<sup>1</sup> On 28 August 2007, the hearing was delayed until 10 October 2007 to allow the author the opportunity to read the case file, which he had not received before the August hearing date.

2.2 The author was not assisted by a defence attorney during the hearings. Immediately after the case was tried, the Police Court judge pronounced an oral judgment. The author was convicted and ordered to pay fines of 170 Euros for assaulting a police officer and 50 Euros for not complying with an order to identify himself. In the oral judgment, no reasoning on the basis of evidence was given for the conviction. The judgment was solely recorded in a so-called note of an oral judgment.<sup>2</sup> The law provides that in such a case, the judge may confine himself to a so-called abridged judgment (*verkort vonnis*), which does not need to be supplemented with evidence or a statement listing the items of evidence, and a trial transcript is not required to be produced.<sup>3</sup>

2.3 The parliamentary history of the process of drafting Article 410a of the Dutch Code of Criminal Procedure states expressly that, in cases such as the author's, no supplementation will take place with evidence on which the decision was based in the first instance or with a transcript of the trial in the first instance, neither upon pronouncing the judgment nor after lodging an appeal. This rule was motivated by an effort to save costs.<sup>4</sup>

2.4 On 10 October 2007, the author was convicted of violating Articles 300, 304, and 447e of the Dutch Criminal Code.<sup>5</sup> He filed an appeal of the judgment on the same date.

<sup>1</sup> The author cites Articles 300, 304, 180 and/or 184 of the Dutch Criminal Code (*Wetboek van Strafrecht*).

<sup>2</sup> The author refers to 410a of the Dutch Code of Criminal Procedure, which reads as follows: "If it is possible to appeal and the appeal has been lodged against a judgment concerning exclusively one or more summary offences or indictable offences which are, according to the statutory description, punishable by a prison sentence not exceeding four years, and whereby no other punishment or order has been imposed than a fine not exceeding – or when two or more fines have been imposed in the judgment, fines to a combined maximum – of 500 Euros, the appeal which has been lodged will only be heard in court if the President deems this to be necessary in the interests of a proper administration of justice."

<sup>3</sup> The author cites articles 365a, 378, and 378 of the Dutch Code of Criminal Procedure, which, in relevant part, read as follows. Article 365a: "1. As long as an ordinary remedy has not been sought, it will be sufficient to pronounce an abridged judgment. 2. An abridged judgment against which an ordinary remedy has been sought will be supplemented with the evidence [...] or [...] a statement listing the items of evidence unless it concerns [...] a judgment as referred to in Article 410a, first paragraph. [...]" Article 378: "2. The judgment will be noted in the trial transcript [...] in the event that an ordinary remedy has been sought against the judgment, unless [...] a judgment is concerned as referred to in Article 410a, first paragraph [...]" Article 378a: "1. Subject to the provisions of Article 378, second paragraph [...], drawing up a trial transcript will be dispensed with and the judgment will be noted on a document to be attached to the duplicate of the summons within two times twenty-four hours. [...]. 2. [...] The annotation will state in any case: 1. The name of the police court judge, the date of the judgment and the circumstances whether it was a judgment in default of appearance of a judgment in a defended action; 2. If a conviction has been pronounced, the offence constituted by the facts found; 3. The punishment or order imposed, and the statutory provisions on which this punishment or order is based."

<sup>4</sup> The author cites a transcript of the Lower House of the Dutch Parliament, session year 2005-2006, 30 320, no. 3, p. 46-47.

<sup>5</sup> The author cites the Dutch Criminal Code as stating the following. Article 300: "1. Physical abuse is punishable by a term of imprisonment of not more than two years or a fine of the fourth category." Article 304: "The terms of imprisonment prescribed in articles 300-303 may be increased by one-third in the following cases: (...) (2) where the serious offence is committed against a public servant during or in connection with the lawful execution of his duties [...]" Article 180: "A person who by an act

Immediately thereafter, the author was summoned to a hearing in appeal, at 28 February 2008. Also on 10 October 2007, the author submitted a statement which contained the grounds of appeal against the judgment. The author was not able to base this statement on a reasoned judgment in writing, as he was never in possession of such a judgment. Nevertheless, the author was required by law to submit the statement.<sup>6</sup>

2.5 In a decision dated 8 January 2008, the Court of Appeal in Arnhem determined that the author's appeal would not be considered, as the interests of proper administration of justice did not require the case to be heard on appeal. The following reasons were given: "The President considers that the reasons to appeal, brought forward by the appellant, even if they were correct, reasonably do not necessarily have to lead to other considerations in appeal. After examination, it did not occur to the President that it is in the interests of a proper administration of justice to bring the case before the court of appeal, so that an examination of the case in appeal shall not take place." The Court of Appeal based this decision on the statement submitted and on the case documents, in accordance with Dutch law.<sup>7</sup>

2.6 According to Article 410a, paragraph 7 of the Dutch Code of Criminal Procedure, it is not possible to lodge an appeal in cassation against the decision of the Court of Appeal.<sup>8</sup> The summons for the hearing in appeal was withdrawn by the public prosecutor on 9

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of violence or by threat of violence resists a public servant in the lawful execution of his duties or any persons who assist that public servant in so doing pursuant to a legal obligation or provide assistance at his request is guilty of resisting a public servant and is liable to a term of imprisonment of not more than one year or a fine of the third category." Article 184: "1. Both a person who intentionally fails to comply with an order issued or a formal request made, by virtue of a legal requirement, by a public servant charged with any supervisory task or by a public servant charged with the detection or investigation of criminal offences or who has been authorized to detect or investigate criminal offences, and a person who intentionally prevents, obstructs or thwarts any action undertaken by such public servants to enforce a legal requirement, are liable to a term of imprisonment of not more than three months or a fine of the second category." Article 447e: "A person who fails to comply with an order to show his identification card for inspection, as required through article 2 of the Identification Act will be punished with a fine of the second category."

<sup>6</sup> The author cites Article 410, paragraph 4 of the Dutch Code of Criminal Procedure, which reads as follows: "If the defendant does not submit a statement as referred to in the first paragraph, he must, within fourteen days after lodging the appeal against a judgment of the Court as referred to in Article 410a, first paragraph, submit a statement at the registry of the Court that pronounced the judgment, stating the reasons for lodging the appeal. This obligation does not exist in the event as described in Article 410a, second paragraph."

<sup>7</sup> The author cites Article 410a of the Dutch Code of Criminal Procedure, which provides in relevant part: "1. If it is possible to appeal, and the appeal has been lodged against a judgment concerning exclusively one or more summary offences or indictable offences which are, according to the statutory description, punishable by a prison sentence not exceeding four years, and whereby no other punishment or order has been imposed than a fine not exceeding – or when two or more fines have been imposed in the judgment, fines to a combined maximum – of 500 Euro, the appeal which has been lodged will only be heard in court if the president deems this to be necessary in the interests of a proper administration of justice. [...] 3. If the president finds, on the basis of the statement submitted and the case documents, amongst which the abridged judgment or the annotation of the judgment, that it is in the interests of a proper administration of justice to hear the case on appeal, he will order that the case will be brought before the court of appeal pursuant to Article 412. 4. Otherwise, the president will determine by means of a reasoned decision that the appeal will not be considered. This decision is deemed to be a decision on a remedy as referred to in Article 557, first paragraph."

<sup>8</sup> Article 410a, paragraph 7, of the Dutch Code of Criminal Procedure reads as follows: "In the case, as referred to in the fourth paragraph, it is not possible to lodge an appeal in cassation against the judgment to which the decision of the President pertains."

January 2008. Based on the Committee's Views in *Mennen v. The Netherlands*,<sup>9</sup> the author requested the President of the Court of Appeal in Arnhem at to revise the decision of 8 January 2008 and grant the author leave to appeal. The President refused to do so, as stated in letters dated 13 and 23 December 2010.

### The complaint

3.1 The author asserts that his right to have his case heard in two instances, as set forth in article 14, paragraph 5 of the Covenant, was violated because he was not able to exercise his right to appeal in a meaningful way. The author submits that under Dutch law, he is entitled to appeal or apply for leave to appeal before the Court of Appeal.<sup>10</sup> He asserts that because the law did not require the Police Court judge to draft a duly reasoned, written judgment, or to produce a trial transcript, he was denied access to these documents both in the first and second instances and, as such, was unable to exercise his right to appeal in a meaningful way.

3.2 The author further asserts that his rights under article 14, paragraph 5 of the Covenant were violated because the higher tribunal that denied his application for leave to appeal did not conduct a full review of the conviction and sentence issued by the court of first instance.<sup>11</sup> The author maintains that the State party was required to ensure that the higher tribunal deciding upon the application for leave to appeal carried out a substantive assessment of the conviction and sentence, both on a factual and a legal basis. The author argues that in his case, such a substantive assessment did not take place, because the higher tribunal did not possess a properly motivated judgment of the court of first instance (in particular, a statement of the evidence used was absent). The author further submits that the higher tribunal did not have a transcript of the first instance trial, and therefore could not re-evaluate the evidence on which his conviction was based. The author maintains that in interpreting article 14, paragraph 5 of the Covenant, the Committee has considered the meticulousness with which the higher court examines the assessment of evidence by the first instance,<sup>12</sup> and has also looked to whether the higher tribunal issues a decision

<sup>9</sup> Communication No. 1797/2008, *Thomas Wilhelmus Henricus Mennen v. The Netherlands*, Views adopted on 27 July 2010.

<sup>10</sup> The author cites the Dutch Code of Criminal Procedure.

<sup>11</sup> The author cites general comment no. 32 [90] (27 July 2007), paras. 48, 49; communication No. 662/1995, *Lumley v. Jamaica*, Views adopted on 31 March 1999, para. 7.5 (stating that under article 14, paragraph 5 of the Covenant, the State party should provide a convicted person with access to the judgments and documents necessary to enjoy the effective exercise of the right to appeal, and finding that because a transcript was not made available to the author, the State party had violated article 14, paragraph 5 of the Covenant); communication No. 920/2000, *Lovell v. Australia*, Views adopted 24 March 2004, para. 7.3 (stating that a system not allowing for automatic right to appeal may still be in conformity with article 14, paragraph 5 of the Covenant, "as long as the examination of an application for leave to appeal entails a full review, that is, both on the basis of the evidence and of the law, of the conviction and sentence and as long as the procedure allows for due consideration of the nature of the case."); communication no. 903/2000, *Van Hulst v. The Netherlands*, Views adopted on 1 November 2004, para. 6.4 ("[w]here domestic law provides for several instances of appeal, a convicted person must have effective access to all of them. To ensure the effective use of this right, the convicted person is entitled to have access to duly reasoned, written judgments in the trial court and at least in the court of first appeal."); communication No. 230/1987, *Raphael Henry v. Jamaica*, Views adopted on 1 November 1991, para. 8.4; communication No. 709/1995, *Everton Bailey v. Jamaica*, Views adopted on 21 July 1996.

<sup>12</sup> The author cites communication No. 1059/2002, *Carvallo Villar v. Spain*, inadmissibility decision of 28 October 2005, para. 9.5 ("With regard to the alleged violation of article 14, paragraph 5, it is clear from the judgment of the Supreme Court that the Court looked very closely at the Provincial Court's assessment of the evidence. In this regard, the Supreme Court considered that the evidence against the

explaining in detail why the evidence used in the first instance was sufficient.<sup>13</sup> The author submits that according to the Committee's jurisprudence, if an appeal does not result in reassessment of the circumstances that caused the court of first instance to convict the defendant, article 14, paragraph 5 of the Covenant has been violated.<sup>14</sup> The author also refers to the Committee's Views in *Mennen v. The Netherlands* as providing relevant authority.<sup>15</sup>

3.3 The author submits that no domestic remedies are available to him at this stage.<sup>16</sup> He requests three remedies: a full review of the criminal case against him, clearing of his reputation, and damages for the violations of his human rights and for reputational harm.

#### **The State party's observations on the admissibility and the merits of the communication**

4.1 In its submission dated 13 March 2012, the State party accepts that a violation of article 14, paragraph 5 of the Covenant occurred in the author's case, in that the author did not have his conviction and sentence reviewed by a higher tribunal as those terms are understood in the Covenant. The State party notes that the issues in the author's case are largely the same as those in *Mennen v. the Netherlands*, where the Committee found a violation of article 14, paragraph 5 of the Covenant.<sup>17</sup> In order to compensate the author for the violation, the State party is willing to pay the author the amount of 1,000 Euros for any immaterial damage incurred and to reimburse any costs of legal assistance made with a view to the present proceedings before the Committee, insofar as they are actually and necessarily incurred and are reasonable as to quantum.

4.2 However, the State party also considers that there is no basis in domestic law for the author's request for a full review of the criminal case against him. The Views of the treaty bodies do not appear in the limitative list of criteria set forth in article 457 of the Code of Criminal Procedure and therefore do not provide a basis for reopening a final judgment. Although the State party accepts that a violation of the right to a fair trial occurred, there is nothing to suggest that the outcome of domestic proceedings itself was flawed. The State party refers to a letter of the Dutch Minister of Security and Justice to the Council for the Judiciary dated 1 September 2011, following on the Committee's Views in *Mennen* and pointing out that, in certain cases, a more proactive investigative stance is necessary on the part of the court hearing an application for leave to appeal. The minister specifically requested the Council for the Judiciary to bring his letter to the attention of the courts.

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author was sufficient to set aside the presumption of innocence."); communication no. 1094/2002, *Jesús Herrera Sousa v. Spain*, Inadmissibility decision of 27 March 2006, para. 6.3; *Mario Conde Conde v. Spain*, communication No. 1325/2004 (31 October 2006), para. 6.4.

<sup>13</sup> The author cites communication No. 1387/2005, *Laureano Oubiña Piñeiro v. Spain*, Views adopted on 25 July 2006, para. 6.2; communication No. 1399/2005, *Luis Cuartero Casado v. Spain*, Inadmissibility decision of 25 July 2005, para. 4.4; communication No. 1156/2003, *Rafael Pérez Escolar v. Spain*, Views adopted on 28 March 2006, para. 11.3; communication No. 1305/2004, *Victor Villamón Ventura v. Spain*, Inadmissibility decision of 31 October 2006, para. 6.6; communication No. 1389/2005, *Luis Bertelli Gálvez v. Spain*, Inadmissibility decision of 25 July 2005, para. 4.5.

<sup>14</sup> The author cites communication no. 986/2001, *Joseph Semey v. Spain*, Views adopted on 30 July 2003, para. 9.1.

<sup>15</sup> Communication No. 1797/2008, *Thomas Wilhelmus Henricus Mennen v. The Netherlands*, Views adopted on 27 July 2010, paras. 8.2-8.4, 9.

<sup>16</sup> The author cites Dutch Code of Criminal Procedure, article 410, para. 7.

<sup>17</sup> Communication No. 1797/2008, *Thomas Wilhelmus Henricus Mennen v. The Netherlands*, Views adopted on 27 July 2010.

### Author's comments on the State party's submission

5.1 On 28 October 2013, the author submitted his comments on the State party's submission. The author argues that the State party's offer of financial compensation does not provide him with an effective remedy because the State party has not allowed review of his conviction and sentence by a higher tribunal, and has not proposed to clear the author's criminal conviction and restore his reputation. The author requests that the Committee instruct the Court of Appeal to revise the leave to appeal decision rendered in his case.

5.2 The author cites the Committee's Views in *Mennen*: "The Committee invites the State party to review the relevant legislation with a view to aligning it with the requirements of article 14, paragraph 5, of the Covenant. The State party is also under an obligation to take measures to prevent similar violations in the future." The author asserts that the State party has not complied with this request because it has not taken any steps to prevent similar violations, and has not even undertaken an initiative to align the national Code of criminal procedure with the Committee's Views in *Mennen*. The author requests the reopening of his leave to appeal proceedings, and access to the Dutch Supreme Court. The author also disputes the State party's observation that in certain cases, the court hearing an application for leave to appeal takes "a more proactive investigative stance." The author maintains that hearings in such cases do not take place in practice, and are not provided for by law. Finally, the author expresses concern about the "apparent immediate influence" that the Minister of Security and Justice has in decisions relating to leave to appeal, and maintains that the judiciary should be independent of the executive and legislative branches of government under the Covenant.<sup>18</sup>

### Issues and proceedings before the Committee

#### *Consideration of admissibility*

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement.

6.3 The Committee recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5, paragraph 2 (b), of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are *de facto* available to the author.<sup>19</sup> The Committee notes that it is not disputed that the author has exhausted all available domestic remedies and therefore considers that this requirement has been met.

6.4 The Committee considers that the author has sufficiently substantiated his allegations under article 14, paragraph 5, and article 2, paragraph 3, of the Covenant and therefore proceeds to their consideration on the merits.

<sup>18</sup> The author cites general comment No. 32 [92], par. III.

<sup>19</sup> See communication No. 1003/2001, *P.L. v. Germany*, Inadmissibility decision of 22 October 2003, para. 6.5; communication No. 433/1990, *A.P.A. v. Spain*, Inadmissibility decision of 25 March 1994, para. 6.2.



*Consideration of the merits*

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

7.2 The Committee observes the author's uncontested assertion that he has been unable to exercise his right to appeal under article 14, paragraph 5, in an effective and meaningful way. The Committee recalls that the right to have one's conviction reviewed requires that the convicted person is entitled to have access to a duly reasoned, written judgement of the trial court, and to other documents, such as trial transcripts, necessary to enjoy the effective exercise of the right to appeal.<sup>20</sup> In the absence of a motivated judgment, a trial transcript or even a list of the evidence used, the author was, therefore, not provided in the circumstances of this case with the facilities necessary for the proper preparation of his appeal.

7.3 The Committee further notes that the State party has accepted that a violation of article 14, paragraph 5, of the Covenant occurred because the Court of Appeal denied his application for leave to appeal with the motivation that a hearing of the appeal was not in the interests of the proper administration of justice. The Committee considers that article 14, paragraph 5, of the Covenant requires a review by a higher tribunal of a criminal conviction and sentence.<sup>21</sup> Such review, in the context of a decision regarding a leave to appeal, must be examined on its merits, taking into consideration the evidence presented before the first instance judge, and the conduct of the trial on the basis of the legal provisions applicable to the case in question.<sup>22</sup>

7.4 Accordingly, in these specific circumstances, the Committee finds that the right to appeal of the author under article 14, paragraph 5, of the Covenant has been violated, due to the failure of the State party to provide adequate facilities for the preparation of his appeal and conditions for a genuine review of his case by a higher tribunal.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violation of article 14, paragraph 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The Committee takes note of the author's assertion that the financial compensation of 1,000 Euros proposed by the State party does not constitute an effective remedy because it does not provide for a review of the criminal sentence and conviction adopted against the author, and it does not remedy the harm to his reputation. The Committee considers that in this case, an effective remedy will allow a review of the author's conviction and sentence by a higher tribunal, or implementation of other appropriate measures capable of removing the adverse effects caused to the author, together with adequate compensation. The Committee also considers that the State party should bring the relevant legal framework into conformity with the

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<sup>20</sup> General comment No. 32, *Article 14, Right to equality before courts and tribunals and to fair trial*, para. 49.

<sup>21</sup> See communication No. 1797/2008, *Thomas Wilhelmus Henricus Mennen v. The Netherlands*, Views adopted on 27 July 2010, para. 8.3.

<sup>22</sup> Communication No. 1797/2008, *Thomas Wilhelmus Henricus Mennen v. The Netherlands*, Views adopted on 27 July 2010, para. 8.3.



requirements of article 14, paragraph 5, of the Covenant.<sup>23</sup> The State party is also under an obligation to prevent similar violations in the future.

10. By becoming a party to the Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and, pursuant to article 2 of the Covenant, the State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. In this respect, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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<sup>23</sup> See communication No. 1797/2008, *Thomas Wilhelmus Henricus Mennen v. The Netherlands*, Views adopted on 27 July 2010, para. 10.