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Human Rights Committee

Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning Communication No.2362/2014**

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| <i>Submitted by:</i> | S. L. (represented by counsel, Mr. Johannes Jeremias Weldam) |
| <i>Alleged victim:</i> | The author |
| <i>State Party:</i> | Netherlands |
| <i>Date of communication:</i> | 27 January 2014 |
| <i>Document references:</i> | Special Rapporteur's rule 97 decision, transmitted to the State party on 21 March 2014 (not issued in document form) |
| <i>Date of adoption of Views:</i> | 18 July 2017 |
| <i>Subject matter:</i> | Compulsory DNA profiling of child in conflict with the law |
| <i>Procedural issues:</i> | <i>Litis pendens</i> , non-exhaustion of domestic remedies, insufficient substantiation of claims |
| <i>Substantive issues:</i> | Arbitrary or unlawful interference with privacy, due process guarantees for children in conflict with the law |
| <i>Articles of the Covenant:</i> | 2 (3), 14 (3) (e), 14 (4) and 17 |
| <i>Articles of the Optional Protocol:</i> | 2, 5 (2) (a), 5 (2) (b) |

* Adopted by the Committee at its 120th session (3 – 28 July 2017).

** The following members of the Committee participated in the examination of the present communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval. The text of three individual opinions by Committee members, Olivier de Frouville, José Manuel Santos Pais, Yuval Shany is annexed to the present Views.

1.1 The author of the communication is S. L., a Dutch national born in 1994. He claims to be victim of a violation of articles 14, paragraphs 3 e) and 4; and 17 of the Covenant. He is represented. The Optional Protocol entered into force for the State party on 11 March 1979.

1.2 On 6 June 2014, the Committee, acting through its Special Rapporteur on New Communications and Interim measures, decided to reject the State party's request to consider the admissibility of the communication separately from the merits.

The facts as presented by the author

2.1 On 26 March 2009, the Children's Judge of the District Court of Utrecht convicted the author for committing an "indecent act with a person younger than 16 years old"¹ and for making a false bomb alert² and sentenced him to 14 days of suspended detention in a centre for children in conflict with the law, with a probationary period of two years, and to 30 hours of community service or, alternatively, 15 days' imprisonment. On 14 May 2009, the District Public Prosecutor ordered that the author's DNA profile be taken. This order was based on article 2 (1) of the Dutch DNA Testing (Convicted Persons) Act (the "DNA Testing Act"), which requires the public prosecutor at the court that has rendered the judgement at first instance to order a sample of cellular material to be taken from a person who has been convicted of an offence for which pre-trial detention may be imposed or an offence carrying a statutory maximum prison sentence of at least four years.³ Section 1(c) of the Act includes within the term "convicted person" penalties of detention in a young offender institution or an alternative sanction.

2.2 On 15 July 2009, a mouth swab was taken from the author to determine his DNA profile and enter it into the DNA databank.

2.3. On 20 October 2009, the author lodged an objection⁴ with the District Court of Utrecht against the determining and processing of his DNA profile. The author claimed that when his DNA material was collected he had not been asked whether he objected to the material being collected by an investigating officer instead of a doctor or nurse and had not been given a copy of the DNA collection report. He also argued that, given the special nature of his offence and the special circumstances in which the crime was perpetrated, his case fell within the exception provided by article 2 (1) b) of the DNA Testing Act. According to this provision, no order for DNA sample collection will be made if, "in view of the nature of the offence or the special circumstances under which it was committed, it may reasonably be assumed that the determination and processing of the DNA profile will not be of significance for the prevention, detection, prosecution and trial of criminal offences committed by the person in question."

2.4 On 26 January 2010, the Utrecht District Court declared the author's objection to be unfounded. The Court considered that the official DNA collection report reflected that the author had not opposed to the DNA material being collected by a designated official. As to the exception under article 2 (1) (b) of the DNA Testing Act, the Court considered that neither the crimes for which the author had been convicted –both of which fell within the scope of the DNA Testing Act- nor the circumstances in which these crimes were committed –his age and the fact that he was a first-time offender- justified the application of the said exception.

¹ According to the author's objection filed on 20 October 2009 with the Utrecht District Court, the author swept a hand into a female's swimsuit at a public pool.

² These criminal offenses are punished under articles 247 and 142 a) of the Dutch Criminal Code respectively, with a maximum penalty of six years' and four years' imprisonment respectively.

³ These offences are listed in article 67 of the Dutch Code of Criminal Procedure.

⁴ Under article 7 (1) of the DNA Testing (Convicted Persons) Act, an objection may be lodged with the district court against the determining and processing of a DNA profile and within 14 days from the date on which the tissue sample was taken.

2.5 On 16 June 2010, the author filed a complaint with the European Court of Human Rights, alleging a violation of his rights under articles 6 (fair trial guarantees) and 8 (right to private and family life) of the European Convention on Human Rights and article 3 of the Convention on the Rights of the Child (best interest of the child). On 2 May 2013, the Court found the complaint to be inadmissible.⁵

The complaint

3.1 The author argues that he was subjected to an arbitrary interference in his private life, in violation of article 17 of the Covenant. The DNA Testing Act does not enable the public prosecutor to balance the various interests at stake. The grounds for applying the exception provided by article 2 (1) b) of the Act are not assessed unless an objection is lodged. Such objections can be filed within 14 days from the taking of the DNA sample, and refer to the determination and processing of the DNA profile but not to the actual taking of the sample.

3.2 The author claims that the State authorities didn't take into account his best interest given that he was still a child at the time of ordering and taking the DNA sample, in violation of article 14, paragraph 4 of the Covenant, according to which, in the case of children in conflict with the law, the criminal procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. His age was not considered when weighing the interests at stake in practicing a DNA test.

3.3 The author further claims that his DNA sample was not taken by medical staff but by a forensic police officer. According to national regulations, the taking of a DNA sample by someone other than a doctor or nurse is only possible if the applicant gives his explicit permission. The author was neither asked whether he consented to the DNA sample being taken by an investigating officer nor informed about the possibility to object. As a child, he could not have been expected to be aware of this possibility without being informed. Also, he and his legal representative should have been informed of his rights and his representative should have signed the report.

3.4 The author argues that the District Court did not take into account his interest as a child when considering his objection to his DNA determination and processing. The Court also attached insufficient value to the author's statement that he had not consented to his DNA material being taken by an investigating officer and did not allow him to question the investigating officer who took his DNA, in violation of article 14, paragraph 3 e) of the Covenant.

State party's observations on admissibility

4.1 In its submissions dated 2 May 2014, the State party claims that the communication is inadmissible for non-exhaustion of domestic remedies. The author has not raised before national courts his argument based on article 17 of the Covenant that objections to DNA testing can only refer to the determining and processing of DNA material but not to the actual taking of the material.

4.2 The State party also objects to the admissibility of the communication, on the grounds that the matter has already been examined by the European Court of Human Rights and been declared inadmissible. While recognizing that admissibility criteria under the European Convention of Human Rights and the Optional Protocol are not identical, the State party requests that the Committee take this decision into account. Should the Committee come to a conclusion different from that of the Court, the State party would be confronted with contradictory rulings by two supervisory bodies on identical issues. A finding by the Committee that the communication is admissible or even well-founded would be extremely difficult to reconcile with the Court's conclusions.

⁵ The decision by the Court, sitting in a single-judge formation was communicated to the author by letter dated 10 May 2013, which reads: "In the light of all the material in its possession and in so far as the matters complained of are within its competence, the Court found that the admissibility criteria set out in Articles 34 and 35 of the Convention have not been with (*sic*)".

Author's comments on the State party's observations on admissibility

5.1 On 4 June 2014, the author acknowledges that he did not raise his claim regarding the limited scope of objections under the DNA Testing Act in his objection filed with the Utrecht District Court. However, bringing this claim in the context of these court proceedings would have been ineffective, because well-established national case-law has already determined that the fact that objections can only be filed against the DNA determining and processing but not against the actual taking of DNA is compatible with the Covenant.

5.2 With regard to the European Court of Human Rights' decision of 2 May 2013, the author claims that this decision lacks reasoning and, therefore, it does not establish on what basis the complaint was deemed inadmissible. Additionally, while provisions contained in the Covenant and the European Convention on Human Rights are similar, the Committee's supervisory functions under the Optional Protocol would be frustrated if it had to conform itself to the judgments of the European Court of Human Rights.

State party's observations on the merits

6.1 In its submissions of 7 October 2014, the State party notes that the right to respect for privacy is recognised under Dutch law but is not absolute. As has already been interpreted by the Committee, interferences may be allowed provided that these are lawful, proportional and reasonable, and that they comply with the provisions, aims and objectives of the Covenant.⁶ The national legislation in place complies with these criteria.

6.2 The aim of the DNA Testing Act is to assist in the prevention, investigation and prosecution of offences committed by convicted persons. DNA testing is a highly effective instrument that has contributed substantially to law enforcement in recent years. The collection of DNA material under this Act therefore serves a legitimate purpose –the investigation of criminal offences- and protects the rights and freedoms of others such as the victims of serious violent and sexual offences. There is no investigative tool available that can achieve similar results. It is therefore an appropriate and necessary measure in a democratic society. Also, the author may obtain a certain benefit from the inclusion of his DNA profile in the national database in that he may be rapidly eliminated from the list of persons suspected of a crime in the investigation of which DNA material has been found.⁷

6.3 The Act also establishes a proportional measure as it ensures a minimal interference by limiting its practice to persons who have been imposed a custodial sentence, juvenile detention order or alternative sanction for offences of such gravity that pre-trial detention may be imposed. DNA material cannot be collected for less serious criminal offences or for penalties consisting in a fine. According to article 2 (1) b) of the Act, tissue samples may not be collected, even for serious offences, when it can reasonably be supposed that the determining and processing of the DNA profile cannot be of relevance to the prevention, investigation and prosecution of criminal offences committed by the convicted person. Compliance with this requirement can be monitored by the courts. Yet, in the interest of effectiveness, it is only in exceptional cases that this provision applies, including cases where it is actually impossible for the person to reoffend (for eg. in case of bodily injury). This requires an objectively verifiable circumstance. In this regard, mere repentance or a promise on the part of the convicted person is not enough. The Act provides for a –limited-weighing of interests by the public prosecutor before issuing the DNA collection order. In the present case, the public prosecutor did not find that the exception was applicable and he was therefore obliged to issue the order against the author.

6.4 Under the DNA Testing Act, the convicted person can lodge an objection with the district court against the determining and processing of his/her DNA profile. No DNA profile can be determined while an objection is pending against the determining and

⁶ The State party cites the Committee's General Comment No. 16: Article 17 (Right to privacy).

⁷ The author cites the European Court of Human Rights' judgment in *Van der Velden v The Netherlands*, of 7 December 2006.

processing of such profile. The Act does not contemplate a remedy against the collection as such of a tissue sample. The rationale behind this is that the person subjected to the Act is mainly affected by having his/her DNA determined and processed, and not by the mere collection of his/her DNA. Against this background, no specific legal remedy was provided for objecting to the DNA collection. However, the person may lodge a civil-law injunction challenging the collection of DNA material. In the present case, the author could have applied to an interim relief judge for an injunction prohibiting the collection of a tissue sample on the grounds that by obtaining a sample for the purpose of DNA testing the State would be committing an unlawful act.

6.5 The DNA sample is obtained in a manner that sufficiently takes into consideration the interests of the individual concerned. The DNA collection involves a very minor interference with the personal integrity; cells are obtained from the inside of the cheek using a mouth swab. This method is useful and effective in the investigation of criminal offences and the individual concerned suffers no adverse consequences from the method used, as long as he/she does not commit any future offences. Both the cellular material and the DNA profile are codified and stored anonymously. This serves both for adults and children.⁸

6.6 In the present case, the interference with the author's right to privacy was lawful. There was a statutory basis for the DNA collection since the offences for which he was convicted fell within the scope of the DNA Testing Act, the measure served a legitimate aim and there were safeguards in place to ensure that the interference was proportionate.

6.7 With regard to the author's claim under article 14, paragraph 3e) of the Covenant, the State party notes that this provision refers to the right to examine and propose witnesses and applies in the context of criminal proceedings against the individual and not, such as in the present case, in the context of the proceeding consisting in examining the objection to the DNA determination and processing. The investigation officer keeps a record of the actions and the information that has come to his attention, which makes it possible to check whether he acted according to the law. The official record is drawn up under oath so, in principle, it can and must be assumed that it is accurate. The author has failed to show how questioning the investigating officer could be of relevance to his case, especially considering that this officer was not required by the DNA Testing Act to explicitly inform the author that he could object to a DNA sample being collected.

6.8 With regard to the author's claims under article 14, paragraph 4 of the Covenant, the State party notes that the DNA Testing Act does not apply to children below age 12 –legal responsibility age-. The Act does not distinguish between children and adults because there is no reason to make a legal distinction between them for the purpose of preventing, investigating and prosecuting criminal offences. Therefore, the Act is not contrary to children's interest.⁹ On the contrary, processing DNA profiles of convicted children increases the chances of arresting them with regards to other offences and can therefore contribute to the social rehabilitation of these children.¹⁰ It would not be in the children's interest to make an exception to the applicability of the DNA Testing Act and this exception does not derive from the Convention on the Rights of the Child. However, the public prosecutor does have the possibility of weighing the interests involved before ordering a tissue sample, based on the exception contained in the DNA Testing Act, and

⁸ The State party cites the European Court of Human Rights' judgment in *W v Netherlands*, of 20 January 2009, where the Court was satisfied that the Dutch DNA Testing Act "contained appropriate safeguards against blanket and indiscriminate retention of DNA records" given that DNA can only be taken from persons convicted of an offence of a certain gravity, and that "the DNA records can only be retained for a prescribed period of time that is dependent on the length of the statutory maximum sentence that can be imposed for the offence that has been committed."

⁹ *Ibid.*

¹⁰ The State party cites the advisory opinion of the Advocate General at the Supreme Court, in the sense that the storing of DNA profile "need not impede the convicted child's social development and his reintegration into society (...)"

district courts can examine whether this assessment was correct.¹¹ This does not mean that, in an individual case involving a minor, a court cannot declare well founded an objection to the determining and processing of a DNA profile. There are examples in the jurisprudence where the court held, after assessing an objection to the determining and processing of DNA, that in the case at hand this measure could not be relevant to the aims of the Act. However, in the author's case, the Utrecht District Court found that neither the facts nor the circumstances under which the offence was committed could justify the application of the exception contained in article 2 (1) b) of the DNA Testing Act.

6.9 Regarding the author's claims on the manner in which the samples were collected, the State party argues that under the DNA Testing Act, tissue samples must be collected by a physician or nurse. However, article 3 (3) of the DNA Testing (Criminal Cases) Decree establishes that "Provided the convicted person does not object, samples of cheek cells or hair follicles may be collected from a convicted person by an investigating officer designated for this purpose by the public prosecutor [...] who meets the requirements laid down by ministerial order." The DNA Testing (Criminal Cases) Order (article 8) establishes that the requirements referred to above are that the investigation officer: i) must have successfully completed a course on DNA collection provided by the Criminal Investigation College and certified by the Police Examination Centre, and ii) must not be involved in the investigation for which the sample is being taken. Article 4 of the DNA Testing (Criminal Cases) Decree establishes that the DNA collection must be conducted in the presence of an investigating officer who draws up an official report. If the collection was conducted by a person other than a physician or a nurse, the report should state that the convicted person did not object to that effect.

6.10 The convicted person is not required by law to sign the official report on DNA collection. This is based on the fact that the investigating officer signs the report under oath and is therefore presumed in principle to be correct. The State party sees no reason to make it legally compulsory for a child or his/her legal representative to sign the official report. Also, the author has failed to explain how his interest would have been affected by failing to sign the report. Finally, although not required by law, the parent or legal representatives of a convicted child and his/her counsel receive a copy of the order requesting the DNA collection and an informative brochure explaining that the offender has the right to object to the determination of his/her DNA profile. The brochure also explains that the DNA may be collected by a specially trained investigating officer.

Author's comments on the State party's observations on the merits

7.1 On 17 December 2014, the author challenges the State party's allegation that the storing of DNA material has no negative consequences for him unless he reoffends. He notes that, once the material is stored, it is subject to potential mismanagement. In a study ordered by the Minister of Justice and Security in 2011, 1,700 mistakes in documents of the Netherlands Forensic Institute (NFI) were found between 1997 and 2010, accounting for 1.3% of the total investigations.

7.2 The author challenges the State party's argument that article 14 of the Covenant is not applicable in the context of the objection procedure against the DNA determination and processing. This procedure is inextricably linked to the main criminal proceeding, which resulted in the author's conviction. The DNA testing order was based on this conviction. The DNA procedure should be regarded as equivalent to the phases of investigation and prosecution. Questioning the investigating officer was relevant to demonstrate that the author was not asked whether he had any objections to the DNA test being practiced by someone other than a physician or nurse. The author also disputes that the investigating officer is not obliged to explicitly inform the convicted person of his/her right to object to the DNA being taken by a non-medical person. The DNA Testing Act requires that the

¹¹ The State party cites a decision by the Hertogenbosch District Court of 14 November 2008, involving a 16 year old convict, where the court found that the criminal offence could be regarded as a "single youthful indiscretion" and the collection of DNA material could not be of relevance to the aims of the Act."

convicted person be specifically asked whether he/she wants to object. It would otherwise be meaningless to provide for such a possibility if tacit consent were simply assumed, especially in the case of children. A child cannot be expected to know his rights unless he/she is informed.

7.3 While the author acknowledges that national law does not require that the convicted person sign the official report on DNA testing, he argues that this signature should be required based on the Covenant as this would ensure that the person is informed of his/her right to object. If the convicted person is a child, then his/her legal representative should sign the report.

7.4 The DNA Testing Act does not distinguish between adults and children, as recognised by the State party, and in practice the weighing of interests –including the interest of the child– does not take place before an order requesting DNA testing is issued. This weighing of interest only takes place if the affected person objects to the DNA determination and processing.

7.5 The author disputes the State party's statement that a brochure is in practice sent together with the DNA testing order in case where the convicted person is a child.

7.6 The author notes that the meticulousness of the sample-taking by a person who is not a doctor or nurse cannot be guaranteed, and that the risk of errors increases with the lack of expertise of the person performing the DNA test.

7.7 The author requests that his DNA profile be removed from the DNA databank and to receive financial compensation as reparation for the violation of his rights and to cover the cost of legal assistance.¹² He also notes that he is open to a friendly settlement.

State party's additional observations

8.1 On 8 April 2015, the State party reiterates its arguments related to the examination of the case by the European Court of Human Rights.

8.2 With regard to the author's statements concerning the errors in DNA investigations, the State party notes that the Netherlands Forensic Institute is an institution accredited to perform DNA tests and is subject to yearly controls of its work quality. The control system includes the registration of anomalies, which vary from technical problems to human errors or contamination, none of which had any repercussions under criminal law.¹³ The corrective measures taken to address anomalies are also registered. The number of notifications (1,900) rose in the referred period 1997-2010 simply because of the increase in the number of DNA analyses every year and the use of increasingly sensitive equipment.

8.3 As to the author's claim that no weighing of interests takes place when ordering, collecting and processing DNA material, let alone the interests of the child, the State party notes that the public prosecutor's order to collect the author's DNA material was based on the judgment by the children's judge at the Utrecht District Court. The author's conviction fulfilled the criteria set out in article 1 c) of the DNA Testing Act. In response to the author's objection to the processing of his DNA sample, the District Court assessed whether the exception provided by article 2 (1) (b) of the DNA Testing Act was applicable but found that the circumstances of the case did not provide any grounds to apply the exception. The District Court's task was to review the public prosecutor's actions and ensure proportionate application of the Act. This course of events illustrates how the criteria set out in the DNA Testing Act assist in striking a balance between the effectiveness of the investigation and the proportionality of the collection and processing of DNA material from convicted persons, including children.

¹² The author notes that the legal assistance in this procedure is financed by the State party and that his personal contribution was €100 for the proceedings before the European Court of Human Rights and €129 for the proceedings before the Committee.

¹³ The State party cites the follow-up study by the Public Prosecutor Service. (Parliamentary papers, House of Representatives 2011-12, 33 000 VI, no. 71).

Issues and proceedings before the Committee

Consideration of admissibility

9.1 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.

9.2 The Committee takes note of the State party's argument that the same case had already been considered and declared inadmissible by the European Court of Human Rights. However, the Committee observes that, the case is no longer pending before such Court. In light of the foregoing, the Committee considers that there is no obstacle to the admissibility of communication under article 5, paragraph 2 a) of the Optional Protocol.

9.3 The Committee takes note of the State party's argument that domestic remedies were not exhausted because the author failed to raise his claim regarding the limited scope of the objections under the DNA Testing Act, and in particular, the fact that such objections can only be filed once the DNA has already been taken. The Committee also notes the author's uncontested argument that bringing this claim in the context of the objection proceedings would have been ineffective because it has already been determined by well-established case-law that the limited scope of the objections under the DNA Testing Act is compatible with the Covenant. Therefore, the Committee considers that there is no obstacle to the admissibility of communication under article 5, paragraph 2 b) of the Optional Protocol.

9.4 The Committee takes note of the author's allegations under article 14, paragraph 3e) of the Covenant that the District Court of Utrecht did not attach sufficient value to the author's statement regarding his lack of consent to his DNA material being taken by an investigating officer, and that it did not allow the author to question the investigation officer. However, the Committee considers that the author has failed to explain why he considered it damaging for him that the DNA material was taken by an investigating officer. Accordingly, the Committee considers that the author has not sufficiently substantiated this claim for the purposes of admissibility and declares the claim inadmissible under article 2 of the Optional Protocol.

9.5 The Committee considers that the author has sufficiently substantiated his claims under articles 14, paragraph 4; and 17 of the Covenant for purposes of admissibility. As no other issues concerning admissibility arise, the Committee declares the communication admissible insofar as it appears to raise issues under articles 14, paragraph 4; and 17 of the Covenant, and proceeds to its examination on the merits.

Consideration of the merits

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

10.2 The Committee takes note of the author's argument that his subsection to DNA testing constituted an arbitrary interference in his private life, in violation of article 17 of the Covenant. He alleges, in particular, that neither his age nor the nature of the crime for which he was convicted were taken into account by the public prosecutor when ordering his DNA testing; that DNA testing orders are issued automatically, without an assessment of the individual circumstances of each case; and that the scope for filing an objection does not include the actual taking of the sample.

10.3 The Committee considers that the collection of DNA material for the purpose of analysing and storing the collected material into a database which could be used in the future for criminal investigation purposes is sufficiently intrusive as to constitute "interference" in the author's private life under article 17 of the Covenant.¹⁴ The issue thus

¹⁴ The Committee also concurs with the following analysis by the European Court of Human Rights in the case of *S and Marper v the United Kingdom*, judgement by the Grand Chamber, 4 December 2008, para. 72-73: "72. (...) In addition to the highly personal nature of cellular samples, the Court

arises whether or not such interference was arbitrary or unlawful under article 17 of the Covenant.

10.4 The Committee notes the State party's position that DNA testing regulated by the DNA Testing Act serves a legitimate purpose, namely, the investigation, prosecution and trial of serious criminal offences and the protection of the rights of others, including potential victims of violent or sexual crimes; that it is proportional, given that it ensures a minimal interference by being practiced in the least invasive way; is stored anonymously for a limited period of time; is limited to persons convicted for crimes of a certain gravity; and is necessary in a democratic society, given that there is no other equally effective tool in preventing and investigating such crimes.

10.5 The Committee recalls that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.¹⁵ The notion of arbitrariness includes elements of inappropriateness, injustice, lack of predictability and due process of law¹⁶, as well as elements of reasonableness, necessity and proportionality.¹⁷ Even though, in society, the protection of privacy is necessarily relative, the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society as understood under the Covenant.¹⁸ Even with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis.¹⁹

10.6 While the State party has provided explanations as to the content and general application of the DNA Testing Act, it has not indicated why it was necessary, in light of the State party's stated legitimate aim, to subject the author to compulsory DNA testing considering the nature of his criminal acts.

10.7 The Committee notes the author's statement that under the DNA Testing Act, DNA testing orders are issued automatically for persons who have been imposed a custodial sentence, juvenile detention order or alternative sanction for offences of such gravity that pre-trial detention may be imposed. The State party has admitted that the Act only provides for limited weighing of interests by the public prosecutor before issuing the DNA collection order. The Committee also notes that, even though exceptions to DNA testing do exist under article 2(1)b, these are very narrowly construed and do not include, for instance, consideration for the age of the offender, as acknowledged by the State party. According to the State party (par. 6.3), article 2(1)(b) of the Act would apply in exceptional cases, for instance in cases where it is actually impossible for the person to reoffend (for eg. in case of bodily injury).

10.8 The Committee also notes that the Act does not contemplate a remedy against the collection of a tissue sample, but only against the determining and processing of a person's DNA profile. The State party alleges that the person may lodge a civil-law injunction

notes that they contain much sensitive information about an individual, including information about his or her health. Moreover, samples contain a unique genetic code of great relevance to both the individual and his relatives. (...) 73. Given the nature and the amount of personal information contained in cellular samples, their retention *per se* must be regarded as interfering with the right to respect for the private lives of the individuals concerned. (...)"

¹⁵ See the Committee's General Comment No. 16: Article 17 (Right to privacy), para. 4. See also *S and Marper, op. cit.*, para. 107: "The core principles of data protection require the retention of data to be proportionate in relation to the purposes of collection and insist on limited periods of storage" (para. 107)

¹⁶ See, inter alia, the Committee's General Comment No. 35 (2014) on liberty and security of person, para. 12, and Communications No. 2009/2010, *Ilyasov v Kazakhstan*, Views adopted on 23 July 2014, para. 7.4, and No. 2081/2011, *D.T. v Canada*, Views of 15 July 2016, para. 7.6.

¹⁷ See the Committee's General Comment No. 35, para. 12.

¹⁸ See Committee's General Comment N°16, para. 7.

¹⁹ *Ibid.*, para. 8.

challenging the collection of DNA material, on the grounds that by obtaining a sample for the purpose of DNA testing the State would be committing an unlawful act. But the State Party has not demonstrated that such a remedy would be effective, taking into account in particular, that the collection of samples is “lawful” under domestic law. The Committee also notes that there is no appeal available against a court decision rejecting the objection on the processing of a person’s DNA profile.

10.9 The Committee notes the State party’s position that the DNA collection involves a very minor interference with a person’s privacy because both the cellular material and the DNA profile are codified and stored anonymously. However, the Committee also notes that the material and profile are kept for 30 years in case of serious offences, and 20 years for less serious offenses.

10.10 Finally, the Committee notes the State party’s position that the Act does not distinguish between children and adults because there is no reason to make a legal distinction between them for the purpose of preventing, investigating and prosecuting criminal offenses and that, therefore, the Act is not contrary to the best interest of the child. The Committee however considers that children differ from adults in their physical and psychological development, and their emotional and educational needs.²⁰ As provided for, among others, in articles 24, and 14, paragraph 4 of the Covenant, State parties have the obligation to take special measures of protection.²¹ In particular, in all decisions taken within the context of the administration of juvenile justice, the best interest of the child should be a primary consideration.²² Specific attention should be given to the need for the protection of children’s privacy at criminal trials.²³ As explained by the author, his age was never taken into consideration, including throughout the process of collection of the DNA samples, where he was not informed of the possibility to object to the sample being collected by a police officer, and was not offered the possibility to be accompanied by a legal representative.

10.11 Accordingly, the Committee finds that, although lawful, the interference in the author’s privacy was not proportionate to the legitimate aim of prevention and investigation of serious crimes. Therefore, the Committee concludes that such interference was arbitrary, in violation of article 17 of the Covenant.

10.12 Having concluded that, in the present case, there has been a violation of article 17, the Committee decides not to separately examine the author’s claims under article 14, paragraph 4, of the Covenant.

11 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 amount to a violation of article 17 of the Covenant.

12 In accordance with article 2(3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. In the present case, the State party is under an obligation *inter alia* to provide the author with adequate compensation. The State party is also under an obligation to prevent similar violations in the future.

13 Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has

²⁰ See the Committee on the Rights of the Child’s General Comment N°10 : *Children’s Rights in Juvenile Justice* (2007), para. 10, and its Concluding Observations on the Netherland’s fourth periodic report, adopted on 5 June 2015, paras. 58 and 59, where the Committee expressed concern about DNA testing of children in conflict with the law, and recommended that the State party “Eliminate the practice of DNA testing of children in conflict with the law and erase the criminal record of children who are acquitted or have finished their sentence ».

²¹ See the Human Rights Committee General Comment N°17 : Article 24 (1989) ; and communication N°2107/2011, *Vyacheslav Berezhnoy v. Russian Federation*, Views of 28 October 2016, para. 9.7.

²² General Comment N°10 : *Children’s Rights in Juvenile Justice* (2007), para. 10.

²³ See the European Court of Human Rights’ judgement in case *S. and Marper v. The United Kingdom*, *op. cit.*, para. 124.

been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy where a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views, to have them translated into the official language of the State party and widely distributed.

Annex :

Original : French

Opinion individuelle concordante de M. Olivier de Frouville

1. J'appuie le raisonnement détaillé du Comité dans cette affaire et sa conclusion quant à une violation de l'article 17 du Pacte. L'analyse ADN ouvre de nombreuses perspectives en termes de prévention et de répression du crime que l'on ne saurait négliger. Mais on ne peut pas non plus ignorer les dangers que cette technique fait peser sur les libertés. Le Pacte et les normes de droits de l'Homme en général exigent des États qu'ils fassent preuve de discernement et de nuance en la matière.

2. Les décideurs publics peuvent être tentés, sous la pression de l'opinion publique, d'étendre la collecte d'échantillons d'ADN à un cercle toujours plus large de personnes. La loi en vigueur aux Pays-Bas, en cause dans cette affaire, suit visiblement cette pente dangereuse par son champ d'application très large, qui s'étend à toute personne condamnée pour une infraction susceptible de donner lieu à un placement en détention provisoire ou pour une infraction emportant une peine maximale de quatre ans de prison au moins. Outre le fait que la loi ne prend pas en compte l'âge des personnes condamnées et n'accorde donc pas aux mineurs la protection qui leur est due, de tels critères sont en eux-mêmes inadéquats et rendent la loi per se contraire à l'article 17 du Pacte. Ceci est particulièrement vrai lorsque, comme ici, l'éventail des peines est extrêmement large, allant de quelques jours d'emprisonnement avec sursis, comme c'était le cas en l'espèce, à quatre ans d'emprisonnement ferme. Autrement dit, la collecte d'ADN ne peut être fonction de la peine maximale encourue. Elle ne se justifie qu'en lien avec certaines infractions graves, qui donnent elles-mêmes lieu à de lourdes condamnations, particulièrement dans les cas de récidives. Le prélèvement ne peut pas non plus être automatique, ou quasi-automatique, mais doit pouvoir faire l'objet d'une décision judiciaire, une fois la condamnation confirmée en dernière instance, et une telle décision doit pouvoir elle-même faire l'objet de recours.

3. Comme l'a rappelé la Cour européenne dans un arrêt récent, « de tels dispositifs ne sauraient être mis en œuvre dans une logique excessive de maximalisation des informations qui y sont placées et de la durée de leur conservation. En effet, sans le respect d'une nécessaire proportionnalité au regard des objectifs légitimes qui leur sont attribués, les avantages qu'ils apportent seraient obérés par les atteintes graves qu'ils causeraient aux droits et libertés que les États doivent assurer en vertu de la Convention aux personnes placées sous leur juridiction. »²⁴

4. La prévention et la répression du crime sont des buts légitimes dans toute société démocratique. Mais ils ne peuvent être atteints au prix de la mise en place d'un État de surveillance et de contrôle. L'idéal d'une société sans crime relève par essence d'une idéologie totalitaire.

²⁴ Cour européenne des droits de l'homme, *Aycaguer c. France*, 22 juin 2017, n° 8806/12, note M.C. de Montecler, *AJDA* 2017, p. 1311 et le commentaire de V. Gautron, *AJ pénal*, 2017, p. 391.

Annex :

Original : English

Individual Opinion of Mr. José Santos Pais (partly concurring, partly dissenting)

1. I fully share the reasoning by the majority of the Committee, that the State party violated the author's rights under article 17 of the Covenant. However, I believe the same reasoning should have led to also finding a violation of the author's rights under article 14(4) of the Covenant.

2. The Committee considered that the collection of DNA material for the purpose of analysing and storing the collected material into a database which could be used in the future for criminal investigation purposes is sufficiently intrusive as to constitute "interference" in the author's private life (para 10.3). It further recalled that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances (para 10.5).

3. The Committee also noted that while the State party has provided explanations as to the content and general application of the DNA Testing Act, it has not indicated why it was necessary, in light of the State party's stated legitimate aim, to subject the author to compulsory DNA testing considering the nature of his criminal acts (para 10.6).

4. The facts, as stated in the file, reveal that the author was convicted, on 26 March 2009, when he was only 15 years old, for committing an "indecent act with a person younger than 16 years old" (the author allegedly swept a hand into a female's swimsuit at a public pool) and for making a false bomb alert. As a result, he was sentenced to 14 days of suspended detention in a centre for children in conflict with the law, with a probationary period of two years, and to 30 hours of community service or, alternatively, 15 days' imprisonment (para 2.1).

5. In my perspective, the above criminal acts, of minor gravity, only reveal the immaturity of the author, which may also account for the light penalty imposed on him.

6. However, according to article 2 (1) of the Dutch "DNA Testing Act", the public prosecutor is to order a sample of cellular material to be taken from a person who has been convicted of an offence subject to pre-trial detention or carrying a statutory maximum prison sentence of no less than four years (para 2.1). The Act thus does not take into account the exact nature of the criminal facts, but only of the mere possibility of imposing pre-trial detention and of the maximum length of the prison sentence that can be imposed for the offence. Of particular significance, the fact that the collection of DNA is a direct and almost automatic consequence of the criminal file.

7. The State party acknowledges, in this respect, that the Act does not distinguish between children and adults and applies to all children over 12 years of age (para 6.8).

The aim of the DNA Testing Act is to assist in the prevention, investigation and prosecution of offences committed by convicted persons and so the collection of DNA material serves a legitimate purpose – the investigation of criminal offences- and protects the rights and freedoms of others such as the victims of serious violent and sexual offences (para 6.2). Which is hardly the case of the author, since his offence is of a minor gravity.

8. The State party further recognizes that although tissue samples may not be collected, even for serious offences, it is only in exceptional cases, including cases where it is actually impossible for the person to reoffend. And there is only limited weighing of interests by the public prosecutor before issuing the DNA collection order (para 6.3).

9. The convicted person can lodge an objection with the district court against the determining and processing of his/her DNA profile, but the Act does not contemplate a remedy against the collection as such of a tissue sample (para 6.4).

10. The State party finally recognizes it is not legally compulsory for a child or his/her legal representative to sign the official report on DNA collection and that although it is not required by law, the parent or legal representatives of a convicted child and his/her counsel may receive a copy of the order requesting the DNA collection and an informative brochure

explaining that the offender has the right to object to the determination of his/her DNA profile (para 6.10).

11. I am therefore of the view the State party did neither take into due consideration the age of the author nor the minor gravity of his offence, in the process leading up to the decision to collect his DNA samples, nor the fact he was a first-time offender. And during the collection of the DNA samples, a direct and almost automatic result of the criminal proceedings, the author, a child of only 15 years of age, was not even informed of the possibility to object to the sample being collected by a police officer, or of the possibility to be accompanied by a legal representative (para 10.10).

12. I fully join the Committee's reasoning that children differ from adults in their physical and psychological development, and their emotional and educational needs. And that, as provided for, among others, in article 14, paragraph 4 of the Covenant, State parties have the obligation to take special measures of protection. In particular, in all decisions taken within the context of the administration of juvenile justice, the best interest of the child should be a primary consideration (para 10:10). Which the State party manifestly failed to do in the present case.

Annex :

Original : English

Individual Opinion of Mr. Yuval Shany (partly concurring, partly dissenting)

1. I regret not being able to fully share the reasoning offered by the majority of the Committee, underlying its finding that the State party violated the author's rights under article 17 of the Covenant.

2. I fully support the proposition that the best interests of the child should be a primary consideration in the administration of juvenile justice and that due weight should be given to the special physical, psychological, emotional and education needs of children (para. 10.10). I am therefore of the view that the State party should have afforded the author special measures of protection during the process of collecting his DNA sample, including ensuring his ability to object to the collection of the sample by a police officer and his right to be accompanied during the collection by a legal representative. I accept that the State party appears to have failed to meet this 'special protection' standard – the State did not rebut the author's claim that neither he nor his legal representative were informed of his right to object to the collection of the DNA sample by a police office - and that, as a result, the application to the author of a mouth swab in order to collect the sample may have resulted, in the circumstances of the case, in a violation of article 17 of the Covenant.

3. I am, however, unpersuaded by the holding by the majority that the very decision to collect and store the author's DNA sample fell short of the above mentioned 'special protection' standard due to the author.

4. Although the Dutch DNA Testing Act does not distinguish between juvenile and adult offenders, such a distinction is inherent in its application: Since it applies to offenders who been convicted of a serious offence (entailing a maximum penalty of no less than four years), and with regard to whom a sentence involving a deprivation of liberty had been imposed, it only applies to juvenile offenders whose conduct was deemed by the juvenile court to be sufficiently serious to warrant deprivation of liberty under the legal standards applied by juvenile justice system. It has not been alleged to us that the age of the author was not given due consideration by the juvenile court in determining the author's sentence (which appears to have been a lenient one), and – by extension – in determining the applicability of the DNA Testing Act to him.

5. Furthermore, the author has not been able to refute the State party's claim (para. 6.8) that domestic courts can sustain objections to the collection of DNA samples of juvenile offenders based on their age and the circumstances of the offence, and have done so in the past. It is also uncontested that a domestic court has considered whether the age of the author constituted an exceptional circumstance warranting an exemption from the application of the Act and came to the conclusion that it did not (para. 2.4).

6. I am therefore unable to accept the majority's holding that the age of the author was not taken into consideration by the State authorities in the process leading up to the decision to collect his DNA samples.

7. In addition, no information had been provided to us that should cause us to question the holding of the European Court of Human Rights, according to which the DNA database retained by the Netherlands contains adequate privacy safeguards (the database comprises of encoded data stored anonymously and used only to resolve future crimes), even when applied to minors. 1

8. As a result, I do not consider it established that the balance struck by the State party in the particular circumstances of the case between the need to protect the public from recidivist criminals and the need to afford minors special privacy protections commensurate with their age was unreasonable. Thus, I do not support the conclusion of the Committee that the very decision to collect from the author DNA samples violated his rights article 17 of the Covenant.

¹ W v Netherlands, ECtHR decision of 20 January 2009.
