



**International Covenant on  
Civil and Political Rights**

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**Human Rights Committee**

**102<sup>nd</sup> session**

11 to 29 July 2011

**Views**

**Communication No. 1412/2005**

<u>Submitted by:</u>	Aleksandr Butovenko (not represented by counsel)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Ukraine
<u>Date of communication:</u>	28 March 2005 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 29 June 2005 (not issued in document form)
<u>Date of adoption of Views:</u>	19 July 2011

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\* Made public by decision of the Human Rights Committee.

<i>Subject matter:</i>	Sentence of life imprisonment after torture and unfair trial.
<i>Substantive issues:</i>	Effective remedy; no derogation from article 7; torture, cruel, inhuman or degrading treatment or punishment; right to humane treatment and respect for dignity; right to a fair hearing by an independent and impartial tribunal; right to be presumed innocent; right to adequate time and facilities for the preparation of defence; right to be heard in person or through legal assistance; right to obtain the attendance and examination of witnesses; right not to be compelled to testify against oneself or to confess guilt; prohibition of imposition of a heavier penalty than the one that was applicable at the time when the criminal offence was committed; retroactive application of the law with lighter penalty.
<i>Procedural issue:</i>	Lack of substantiation of claims.
<i>Articles of the Covenant:</i>	2; 7; 9, paragraph 1; 10, paragraph 1; 14, paragraphs 1, 2, 3(b), (d), (e) and (g); and 15, paragraph 1
<i>Article of the Optional Protocols:</i>	2

On 19 July 2011, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1412/2005.

[Annex]

## 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 (102<sup>nd</sup> session)**

concerning

#### **Communication No. 1412/2005\*\***

Submitted by: Aleksandr Butovenko (not represented by counsel)

Alleged victim: The author

State party: Ukraine

Date of communication: 28 March 2005 (initial submission)

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

Meeting on 19 July 2011,

Having concluded its consideration of communication No. 1412/2005, submitted to the Human Rights Committee by Mr. Aleksandr Butovenko 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 Mr. Aleksandr Butovenko, a Ukrainian national born in 1975, who is currently serving a life sentence in Ukraine. He claims a violation by Ukraine of his rights under article 2; article 7; article 9, paragraph 1; article 10, paragraph 1; article 14, paragraphs 1, 2, 3(b), (d), (e) and (g); and article 15, paragraph 1, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 25 October 1991. The author is not represented.

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\*\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

**The facts as presented by the author***Inquiry and pre-trial investigation*

2.1 On 24 December 1999, the author on his own initiative came to the district police department of Vasilkov city, where he was arrested on suspicion of having committed a murder of two individuals on 13 December 1999. Shortly thereafter, he was interrogated by the police inquiry officers, in the absence of a lawyer and investigator and without having been explained his rights. During this interrogation, the author described what he knew about the crime in question. He was then placed in a punishment cell of the temporary confinement ward (IVS) located in the same building.

2.2 The author submits that there was no lawful reason for placing him in a punishment cell; moreover, the cell in which he was kept was totally inappropriate for human beings. Despite winter temperatures, there was no glass in the windows and no heating in the cell; as a result, its walls were covered with frost and ice. Cold water was constantly dripping from the faucet and it was impossible to close the tap. There was no bed and bedding in the cell and the author had to sleep on the floor wrapped in his own clothes. He could sleep only for very short periods of time, as he had to frequently stand up and move not to freeze. The author spent three days in this punishment cell from which he was taken for interrogations both during the day and at night.

2.3 The author submits that he was placed in the punishment cell to force him to confess that he was the mastermind and the actual perpetrator of the murder. The interrogations by the police inquiry officers continued in the absence of a lawyer and investigator, and no reports of interrogations were drawn up. The author was subjected to physical and psychological pressure. He was beaten with fists, cables from electric appliances, rubber truncheons and hammers, and kicked. The blows were extremely painful and targeted those bodily parts where the traces were the least visible. The blows on the head were delivered only when the author's head was wrapped in clothes. The police inquiry officers also used suffocating techniques on him. As for the psychological pressure, the author was frequently brought for interrogations, detained in the punishment cell in the above-described conditions, prevented from eating and sleeping and threatened with reprisals against his father and a younger brother. To make the threats real, the inquiry officer would make the author listen to the cries of his brother in the nearby room. The author submits that his brother was released after three days and underwent a medical examination to document the injuries on his body.<sup>1</sup>

2.4 The author submits that, unable to withstand the torture, he had to incriminate himself in the murder. He was then 'passed on' to an investigator of the prosecutor's office for an 'official interrogation'. The author was warned by the police inquiry officers that he should give the same self-incriminating testimony, otherwise the torture would continue as soon as the lawyer and investigator left.

2.5 On 27 December 1999, the author was allowed to see a lawyer for the first time and was interrogated by the investigator as a suspect. He submits that, according to article 107 of the Criminal Procedure Code, the suspects are to be interrogated promptly or at least not later than 24 hours after the arrest.

2.6 The author submits that he was introduced to a lawyer, Mr. L.K., by the investigator shortly before the interrogation. It was not explained to him whether he was expected to pay for this lawyer's services. He told the lawyer that he was subjected to beatings to make

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<sup>1</sup> A copy of the medical certificate dated 29 December 1999 and issued in the name of the author's brother, Mr. V.B., is available on file.

him confess and showed the lawyer visible injuries on his body. The lawyer, however, refused to request a medical examination and advised the author to say what the inquiry officers wanted him to say, otherwise they would continue beating him until he gave the 'necessary' testimony to the investigator in the lawyer's presence. The author states that he was so shocked by the lawyer's advice and felt so powerless, that he could not tell the truth to the investigator and repeated what he was instructed to say by the inquiry officers and the lawyer. Shortly thereafter, he was transferred from the punishment cell to an ordinary cell.

2.7 The author states that the ordinary cell was much warmer and he was finally able to sleep and eat. Only half of the ordinary cells in the IVS had metal beds, therefore, in the remaining cells the inmates had to sleep on the floor. No bedding was provided, in some cells inmates were distributed a few dirty stinking mattresses and, in the absence of such mattresses, inmates had to wrap themselves in their own clothes. More than ten inmates at a time were kept in a cell that was meant for 2-3 persons, there was no other furniture in the cell, and the lighting and the fresh air supply was insufficient. While being detained in the IVS, the author was not taken for an outdoor walk even once; he was not allowed to see his family members and to exchange correspondence with them. The author submits that it was unthinkable to complain about the beatings to which he had been subjected, and the conditions of detention and to renounce the services of the lawyer, Mr. L.K., while he was detained in the IVS, as it would have been 'equal to a suicide'.

2.8 On 11 January 2000, the author was transferred to the Kiev detention centre (SIZO). He submits that, according to the law,<sup>2</sup> he was supposed to be transferred to the SIZO within three days but he had to remain in the IVS for 19 days for the marks of beatings to disappear.

2.9 On 17 February 2000, the author requested a meeting with the Head of the SIZO, described the beatings to which he had been subjected in the IVS of Vasilkov city and requested not to be transferred back to that IVS. On 17 February 2000, the author submitted a written complaint to the Kiev Regional Prosecutor's Office, describing the 'unlawful investigation methods' to which he was subjected in the IVS of Vasilkov city, and stating that his co-accused, Mr. R.K., had committed suicide in that place of detention as a result of torture.

2.10 On 22 February 2000, the author was transferred back to the IVS of Vasilkov city and he seriously feared for his life while being transported there from the SIZO. This time, however, he was not subjected to beatings and remained in the IVS until 21 March 2000. As before, the author was not taken outdoors even once; he was not allowed to see his family members or to exchange correspondence with them.

2.11 On 10 March 2000, a senior assistant of the Vasilkov Inter-District Prosecutor questioned the investigator in charge of the author's criminal case and a number of officers of the IVS of Vasilkov city, who stated that the author had not been subjected to any physical pressure, had not requested medical assistance and had not complained about the police inquiry officers. When questioned by the senior assistant of the Vasilkov Inter-District Prosecutor, the author described the place, methods and duration of the beatings to which he had been subjected. Although he did not know the names of the officers who beat him and could not name them, the author confirmed that he would be able to recognise them. No further actions, however, were undertaken by the senior assistant of the Vasilkov Inter-District Prosecutor. There was no confrontation with the officers who had allegedly beaten the author, no medical examination was carried out and no cellmates were

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<sup>2</sup> Reference is made to article 155, part 4, of the Criminal Procedure Code.

questioned who could have attested that he had been subjected to beatings. Instead, on 10 March 2000, the senior assistant of the Vasilkov Inter-District Prosecutor took a decision not to initiate criminal proceedings with regard to the unlawful actions of the police inquiry officers.

2.12 On 21 March 2000, the author was transferred to the Kiev SIZO. On an unspecified date, the author renounced the services of the lawyer, Mr. L.K., and requested his parents to hire another lawyer who subsequently represented him at the remaining period of the pre-trial investigation and in court. In the presence of a new lawyer, the author retracted his self-incriminating testimony obtained under physical and psychological pressure and effectively in the absence of a lawyer, and repeated his initial testimony given orally at the time of his arrest.

*Death in custody of the co-accused*

2.13 The author's co-accused, Mr. R.K., was arrested by the police inquiry officers at home on the same day as the author, i.e. 24 December 1999, and brought to the district police department of Vasilkov city. On the same day, he allegedly confessed, in writing, to have committed the murder in question and stated that the author was the mastermind and the actual perpetrator of the murder. On 1 January 2000, Mr. R.K. died in custody. The author submits that he does not believe in the official version that Mr. R.K. had committed suicide and argues that it was used to cover up the interrogation methods used on him.

2.14 The author submits that, according to the report of 1 January 2000, the only injury found on the body of Mr. R.K. was a constriction mark on his neck. An internal investigation into the death of Mr. R.K. was carried out on 4 January 2000. A report of this internal investigation referred to the report of 1 January 2000 and concluded that Mr. R.K. was not subjected to any physical or psychological pressure by the police inquiry officers while being detained in the IVS. The author states that, according to the forensic medical report of the Kiev Regional Bureau of Forensic Medical Examination of 3 January 2000, there were numerous bodily injuries, such as scratches and bruises, on the body of Mr. R.K.; these injuries were inflicted by blunt objects at least 4-7 days before the death of Mr. R.K. and were unrelated to the cause of the death. The author argues that the injuries in question were in fact the marks of beatings by the police inquiry officers, since on the day of his death, Mr. R.K. had already been in detention for 8 days.

2.15 The author refers to a handwriting examination report of 14 June 2001 ordered by the author's mother, according to which the text of the 'confession' written by Mr. R.K. on 24 December 1999, as well as of his interrogation report, were written by Mr. R.K. in co-authorship and as dictated by someone with more developed writing and speaking skills than Mr. R.K. and with well-developed skills of collecting and documenting information of probative value. According to the same report, the above-mentioned documents were written by Mr. R.K. in a state of stress, which might have been caused, *inter alia*, by an extreme situation, psychological threats, serious sickness or physical pain. The author claims that, according to the report, the testimony of Mr. R.K. in the part implicating the author in the murder had been dictated to Mr. R.K. by the police inquiry officers.

2.16 The author submits that Mr. R.K. was planning to feign a suicide in order to be brought to the hospital and to undergo a medical examination to document the injuries on his body. He claims that Mr. R.K. was still alive when he was found on 1 January 2000 and that he was 'finished off' by the police inquiry officers to cover up the interrogation methods used by them.

*Preliminary consideration of the criminal case*<sup>3</sup>

2.17 On 27 August 2000, the pre-trial investigation was completed and the author's criminal case was transmitted to the court. On 15 September 2000, the Kiev Regional Court conducted a preliminary consideration of the author's criminal case and resolved that there were no grounds for dismissing or suspending proceedings, the indictment corresponded to the facts of the case and was drawn up in compliance with the Criminal Procedure Code and the measures of restraint imposed on the author (placement in custody) should remain.

2.18 Only a judge of the Kiev Regional Court, two assessors and a prosecutor took part in the preliminary hearing. The author submits that, although the court effectively considers the criminal case in full, i.e. on points of law and on the merits, the Criminal Procedure Code does not allow for the participation of either the accused or his/her lawyer in the preliminary hearing. According to article 239 of the Criminal Procedure Code, the prosecutor has a right to take part in the preliminary hearings and the prosecutor did participate in the preliminary hearing of his criminal case. The author adds that, whereas article 252 of the Criminal Procedure Code gave a right to the prosecutor to make an objection against the court ruling issued at the end of the preliminary hearings, the author himself was not even provided with a copy of that ruling and, therefore, could not appeal it.

*Proceedings in trial court*

2.19 On 3 October 2000, the first public hearing of the author's criminal case by the Kiev Regional Court took place. The trial chamber included the same judge and two assessors who conducted a preliminary consideration of the author's criminal case on 15 September 2000. In court, the author and the other co-accused, Mr. A.K. and Mr. G.D., stated on numerous occasions that they were subjected to unlawful investigation methods, i.e. torture, by the police inquiry officers at the pre-trial investigation. The author also drew the court's attention to the contradictions between the conclusions of the internal investigation and the forensic medical report in relation to the death in custody of Mr. R.K.

2.20 On 16 October 2000, the Kiev Regional Court issued a ruling, requesting the Kiev Regional Prosecutor's Office to conduct an additional investigation into the injuries on the body of Mr. R.K. that, according to the forensic medical report, were unrelated to the cause of his death. The Kiev Regional Prosecutor commissioned with the requested additional investigation the same investigator who was in charge of the author's criminal case and drew up the report of 1 January 2000. On 31 October 2000, this investigator took a decision not to initiate criminal proceedings with regard to the death in custody of Mr. R.K. The author submits that, unsurprisingly, the additional investigation was conducted in a biased and superficial manner, was based on the materials of the internal investigation of 4 January 2000 and did not provide any explanations with regard to the circumstances that led to the appearance of numerous bodily injuries on the body of Mr. R.K. while he was in custody.

2.21 The Kiev Regional Court continued to consider the author's case as soon as it received the conclusions of the additional investigation and dismissed all the motions that were submitted by the author and his lawyer with the aim to exclude the inculpatory evidence that was obtained unlawfully and in violation of article 62 of the Constitution, including the 'confession' written by Mr. R.K. on 24 December 1999. The Court stated that the evidence was obtained in full compliance with all requirements of the criminal procedure law. A challenge to the court submitted by the author's lawyer was also dismissed.

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<sup>3</sup> According to the Criminal Procedure Code of Ukraine (chapter 23), the first stage of the proceedings in trial court is a preliminary consideration of the criminal case.

2.22 On 21 December 2000, the Kiev Regional Court convicted the author on counts of robbery with violence (article 142, part 3, of the 1960 Criminal Code) and premeditated murder under aggravated circumstances (article 93, clauses (a), (d), (f), (g) and (k)). He was sentenced to life imprisonment, and the seizure of his property. The Kiev Regional Court heard witness testimonies of five police inquiry officers. These officers testified that they had not drawn up any reports of interrogations and had not subjected the accused to any physical or psychological pressure. The court concluded that these officers did not produce any procedural documents and did not carry out any procedural actions that could be used as evidence in court. The court also took into account that neither the author nor any of the co-accused complained about the use of unlawful investigation methods by the investigators that were in charge of the pre-trial investigation. The court concluded that the author decided to change his testimony after he had learnt about the death of Mr. R.K. with the aim to avoid criminal liability.

#### *Objections to the trial transcript*

2.23 On an unspecified date, the author submitted to the Kiev Regional Court, pursuant to article 88 of the Criminal Procedure Code, his objections to the trial transcript of the first instance court. The author complained that the trial transcript was incomplete and inaccurate and that substantial parts of the statements and remarks were missing altogether, other statements were distorted and most of the motions submitted by the author and his lawyer, including a challenge to the court, were not reflected at all. On 2 February 2001, these objections were examined by the same trial chamber that had handed down the judgment of 21 December 2000 and were dismissed as 'not corresponding to reality' and 'invented'. Neither the author nor his lawyer took part in the court hearing, because the court had failed to notify the author about the date of the hearing and a participation of the lawyer was not provided for by law. The author submits that the same prosecutor who took part in the consideration of his criminal case by the first instance court, also participated in examination of the author's objections to the trial transcript. The author adds that he was unable to appeal the court ruling of 2 February 2001 for the lack of the relevant procedure in the State party's law.

#### *Cassation proceedings*

2.24 On an unspecified date, the author submitted a cassation appeal to the Supreme Court against the judgment of the Kiev Regional Court of 21 December 2000. On 10 March 2001, he submitted an additional cassation appeal. He complained, *inter alia*, that the first interrogation and the first meeting with a lawyer took place more than 72 hours after his arrest. He also complained about the use of unlawful interrogation methods (torture), lengthy detention in the IVS in inhuman conditions, biased investigation into the death of Mr. R.K., dismissal of all the motions submitted by him and his lawyer, imposition of a heavier penalty than the maximum penalty allowed under the State party's law, lack of impartiality of the first instance court and dismissal of his objections to the trial transcript. On unspecified dates, the author's lawyer also submitted a cassation appeal and an additional cassation appeal to the Supreme Court. The author was represented at the cassation proceedings by his lawyer, since the court decided, pursuant to article 358 of the Criminal Procedure Code, that his participation was not 'worthy'. On 22 March 2001, the Supreme Court withdrew article 93, clause (g), of the Criminal Code from the author's judgment of 21 December 2000 and upheld it in the remaining part.

2.25 On an unspecified date, the author unsuccessfully appealed the decision of the Supreme Court through the supervisory review procedure.



*Sentence of life imprisonment*

2.26 The author submits that, at the time when the crime for which he was sentenced to life imprisonment had been committed, the heaviest penalty that could have been imposed in Ukraine was 15 years' imprisonment. He explains that, the new Constitution entered into force on 21 June 1996 and that article 27 of the Constitution proclaimed an inalienable right to life of every person. Article 93 of the Criminal Code, however, provided for two types of punishment for murder at that time: between 8 and 15 years' imprisonment and the death penalty. According to clause 1 of the transitional provisions of the Constitution, from the moment of its adoption the laws remained in force to the extent that they did not contradict the Constitution. According to clause 2 of the decision of the Plenum of the Supreme Court of 1 November 1996, the courts were instructed to evaluate the compatibility of provisions of every law with the Constitution while they were considering cases and, whenever necessary, to directly apply the provisions of the Constitution. The author argues, therefore, that all provisions of the Criminal Code that envisaged an imposition of the death penalty, such as article 93, should have been considered unconstitutional from the entry into force of the Constitution. In other words, the author continues, at the time when the crime for which he was convicted had been committed (13 December 1999), the death penalty could no longer be applied.

2.27 The author adds that, due to the moratorium on the *execution*<sup>4</sup> of death sentences proclaimed by the President of Ukraine on 11 March 1997, the death penalty *de facto* ceased to exist in Ukraine. Imposition of the death penalty in 1999 would have also breached a pledge to abolish the death penalty undertaken by Ukraine at the time of its accession to the Council of Europe on 9 November 1995.

2.28 On 29 December 1999, the Constitutional Court declared the death penalty unconstitutional. On 22 February 2000, the Parliament (Verhovnaya Rada) adopted a law "On amendments to the Criminal Code, the Criminal Procedure Code and the Correctional Labour Code", which entered into force on 4 April 2000. The law introduced a new type of punishment into the Criminal Code, i.e. life imprisonment. The author states that, according to the "transitional law" that was in force from 29 December 1999 to 4 April 2000, the heaviest penalty that could be imposed was 15 years' imprisonment.<sup>5</sup> The author argues that, if the applicable law has changed more than once between the time when the crime was committed and the conviction of the alleged perpetrator, this person should benefit from the version of the law that ensures the most favourable legal consequences for him. In other words, the State party's courts should have applied the most favourable version of the Criminal Code – the "transitional law" – in imposing the penalty on the author. The author submits that the law of 22 February 2000, that introduced life imprisonment, should not be applied retroactively to him, because it provided for a heavier penalty than the one under the "transitional law".<sup>6</sup>

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<sup>4</sup> Emphasis added.

<sup>5</sup> In support of his claim the author provides a copy of a letter dated 30 October 2000 from the First Vice-Chancellor of the State Legal Academy of Ukraine to the Deputy Chair of the Supreme Court.

<sup>6</sup> In support of his claim the author provides a copy of a letter dated 13 November 2000 from the Chancellor of the Bar Institute affiliated with the Kiev State University to the Deputy Chair of the Supreme Court.

## The complaint

### *Articles 7 and 10 of the Covenant*

3.1 The author submits that a cumulative effect of unlawful detention, beatings, threats of reprisals against his family, placement in a punishment cell, lengthy detention in inhuman conditions (from 24 December 1999 to 11 January 2000 and from 22 February 2000 to 21 March 2000), *incommunicado* detention, lack of legal assistance and the death of Mr. R.K. caused a very strong physical and psychological suffering to him, as well as a feeling of fear, vulnerability, depression and inferiority. Given the fact that the above-mentioned unlawful investigation methods were deliberately used against him with the aim of compelling him to testify against himself, the author submits that they should be qualified as torture. He further submits that in light of its obligations under article 2 of the Covenant, the State party has to investigate allegations of treatment contrary to articles 7 and 10 of the Covenant promptly and impartially. The author claims that a *pro forma* and superficial investigation into his allegations of being subjected to physical and psychological pressure that resulted in unfounded and erroneous decision of 10 March 2000 not to initiate criminal proceedings did not fulfil the requirements of articles 7 and 10 of the Covenant, read in conjunction with article 2.

### *Article 9, paragraph 1, of the Covenant*

3.2 The author submits that at the time of his arrest by the police inquiry officers on 24 December 1999, none of the grounds for arrest enumerated in article 106, parts 1 and 2, of the Criminal Procedure Code were applicable. Therefore, his deprivation of liberty was not based on the grounds established by law and resulted in a violation of article 9, paragraph 1, of the Covenant. In addition, the police inquiry officers failed to comply with the following procedural requirements set forth by the Criminal Procedure Code:

- (a) prior to being interrogated for the first time in his capacity of a suspect, to explain his right to be represented by a lawyer and to draw up a respective report (article 21 of the Criminal Procedure Code);
- (b) to have access to a lawyer from the moment of detention (article 44, part 2, of the Criminal Procedure Code);
- (c) to be promptly interrogated in his capacity of a suspect (article 107, part 2, of the Criminal Procedure Code);
- (d) to be explained his rights as a suspect (article 43<sup>1</sup> of the Criminal Procedure Code);
- (e) to provide him with an opportunity to defend himself pursuant to the procedure established by law (article 21, part 2, of the Criminal Procedure Code);
- (f) to indicate in the arrest report, *inter alia*, the explanations provided by the arrested person and to explain to him, pursuant to article 21, part 2, of the Criminal Procedure Code his right to have a meeting with a lawyer (article 106, part 3, of the Criminal Procedure Code).

### *Article 14 of the Covenant*

3.3 The author submits that the fair trial guarantees of article 14 of the Covenant also apply to the pre-trial investigations carried out by the police and prosecutor's office.<sup>7</sup> He

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<sup>7</sup> The author refers to ECtHR 8 February 1996, 18731/91, *Murray v. the United Kingdom*.

claims, therefore, a violation of article 14, paragraph 3(g), of the Covenant, as he was subjected to unlawful interrogation methods from 29 December 1999 to 11 January 2000 to compel him to give a self-incriminating testimony and to confess guilt. He adds that subsequently and in violation of article 14, paragraphs 1 and 2, of the Covenant, he was found guilty by the court, primarily on the basis of this testimony that was obtained illegally.

3.4 The author submits that he did not have access to any lawyer for 72 hours and to a lawyer of his choice for more than two months; he was deprived of the right to remain silent; he was imposed an *ex officio* lawyer who was taking part in the proceedings only *pro forma* and he was not explained his rights to defence after his arrest on 24 December 1999. He claims, therefore, a violation of his rights under article 14, paragraphs 3(b) and (d), of the Covenant.

3.5 The author submits that, contrary to the rule of law principle that every accused should be given an opportunity to take part in all stages of the proceedings against him, neither he nor his lawyer were allowed to take part in the preliminary consideration of his criminal case by the Kiev Regional Court. Furthermore, contrary to the principle of the equality of arms, the prosecutor did participate in this preliminary hearing. He adds that the Kiev Regional Court did not eliminate any defects of the inquiry and pre-trial investigation, which in turn demonstrates that the court was biased and did not comply with the requirements of the law of criminal procedure. The author also submits that, due to the fact that the preliminary hearing of his criminal case was not public and he was not given a copy of the court ruling of 15 September 2000, he was deprived of the opportunity to adequately prepare for his defence at the next stage of the proceedings in the trial court. He claims, therefore, that the above facts demonstrate that there was a violation of his rights under article 14, paragraphs 1, 3(b) and (d), read in conjunction with article 2, paragraph 3(a), of the Covenant.

3.6 The author claims a separate violation of article 14, paragraph 1, of the Covenant, since the same judge and two assessors who conducted a preliminary consideration of his criminal case on 15 September 2000 participated in the proceedings of the first instance court.<sup>8</sup>

3.7 The author submits that the facts summarised in paragraphs 2.3, 2.5, 2.13, 2.14 and 2.19 above, demonstrate that his conviction is based to a considerable extent on the evidence obtained illegally by torture and other unlawful investigation methods and the State party's courts failed to recognise what is perceived by the author as a clear violation of his right to defence and other violations of the law of criminal procedure at the inquiry and pre-trial investigation stage. Hence, he claims that there was a violation of article 14, paragraphs 1 and 3(g), of the Covenant.

3.8 The author submits that, despite the fact that there were serious grounds to believe that the only other eye-witness of the murder of two persons on 13 December 1999, Mr. R.K., was subjected to unlawful investigation methods to compel him to write a 'confession' on 24 December 1999 and, due to his death in custody, he was unable to testify in court, it was that very same 'confession' of Mr. R.K. that was used by the court as key evidence in finding him guilty. The author claims, therefore, that there was a violation of his rights under article 14, paragraphs 1 and 3(e), of the Covenant.

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<sup>8</sup> Reference is made to the individual opinion submitted by Ms. Christine Chanet, Messrs. Kurt Herndl, Francisco Jose Aguilar Urbina and Bertil Wennergren in relation to communication No. 240/1987, *Collins v. Jamaica*, Views adopted on 1 November 1991.

3.9 The author submits that the facts summarised in paragraph 2.23 above demonstrate that there was a separate violation of article 14, paragraphs 1 and 3(d), of the Covenant, as far as the examination of his objections to the trial transcript on 2 February 2001 is concerned.

3.10 The author states that the facts summarised in paragraph 2.24 above demonstrate that there was a separate violation of article 14, paragraphs 3(b) and (d), read in conjunction with article 14, paragraph 1, and article 2, paragraph 3(c), of the Covenant, since he was not allowed to take part in the cassation proceedings and could not, therefore defend himself in person.

3.11 The author submits that, by not explaining the legal grounds for sentencing him to life imprisonment, the Kiev Regional Court has effectively deprived him of the possibility to prepare for and to defend himself fully in the court of cassation, which in turn resulted in a separate violation of article 14, paragraphs 1 and 3(b), of the Covenant.

*Article 15, paragraph 1, of the Covenant*

3.12 The author claims that, by sentencing him to life imprisonment, the State party's courts have imposed a heavier penalty than the one that was applicable at the time when the crime was committed and the one that was applicable under the "transitional law", i.e. 15 years' imprisonment. The author argues that if the relevant penalty has changed more than once between the time when the crime was committed and his conviction, he should benefit from the version of the law that ensures the most favourable legal consequences for him.

**State party's observations on the merits**

4.1 On 20 February 2006, the State party submits its observations on the merits of the communication. It adds that the fact that it does not deal with every single claim raised by the author does not imply that the claims are conceded.

*Article 2 of the Covenant*

4.2 As for the alleged violation of article 2 of the Covenant at the stage of preliminary consideration of the criminal case, the State party concedes that there is no remedy for the accused at this stage of the proceedings to appeal the court's refusal to consider his / her petitions. It adds that consideration of the case is limited to the procedural issues enumerated in article 242 of the Criminal Procedure Code and does not touch upon the merits. The State party refers to the commentary on article 240 of the Criminal Procedure Code, according to which 'a refusal to uphold a petition is not subject to appeal, though this in no way prevents the petitioner from submitting the same petition at the merits stage'<sup>9</sup> where the remedy in fact exists. It submits that there is no violation of article 2 of the Covenant, since the ruling of the Kiev Regional Court of 15 September 2000 did not 'affect the author's position of an accused before the court' (the court dealt exclusively with procedural issues) and *a fortiori* there existed a remedy at the merits stage.

*Article 7 of the Covenant*

4.3 With regard to the alleged violation of article 7 of the Covenant, the State party refers to the facts of the communication summarised in paragraphs 2.3 and 2.14 above and submits that the author did not provide any evidence in support of his allegations of being subjected to beatings and other physical and/or psychological pressure. It argues that the

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<sup>9</sup> Scientific and Practical Commentary to the Criminal Procedure Code of Ukraine (eds. Boyko V.F. and Goncharenko V.G.), 1997, Kiev, Jurincom Inter, commentary on article 240 at p. 294.

author's reference to the medical documents issued for other individuals cannot be considered by analogy as an evidence of the same treatment of the author himself and, therefore, these documents should not be interpreted by the Committee as corroborating his allegations under article 7. The State party refers to the decision on admissibility of the European Court of Human Rights (ECtHR) in *Chizhov v. Ukraine*, concluding that 'in the absence of any substantiation whatsoever, the complaint [of beatings] is manifestly unfounded'.<sup>10</sup>

4.4 As for the author's claims about inhuman conditions of detention, the State party submits that he failed to exhaust domestic remedies in relation to these allegations. Complaints about 'inadequate' conditions of detention are to be submitted under articles 248<sup>1</sup>-248<sup>9</sup> of the Civil Procedure Code.

4.5 With regard to the author's claims that his *incommunicado* detention from 24 December 1999 to 11 January 2000 and from 22 February 2000 to 21 March 2000 amounted to torture within the meaning of article 7 of the Covenant, the State party notes the distinction between 'torture' and 'inhuman or degrading treatment' made by the ECtHR.<sup>11</sup> It submits that it can hardly be imagined that the *incommunicado* detention has caused sufficiently serious and cruel suffering to the author for it to be considered as torture. The State party argues that the author's detention was not *incommunicado*. Firstly, he was not detained 'without means of communication', since he had at least formally communicated with his lawyer. The State party adds that it has fulfilled its obligation to provide free legal assistance in criminal cases and notes that a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes.<sup>12</sup> Secondly, the author was not detained in solitary confinement, since in his communication to the Committee he complained about the investigator's failure to question his cellmates who could have attested that he had been subjected to beatings.

#### *Article 9 of the Covenant*

4.6 As for the author's claim that his arrest was arbitrary and in violation of article 9, paragraph 1, of the Covenant, the State party refers to article 106, part 1, clause 2, of the Criminal Procedure Code, according to which a suspect can be arrested 'if the eye-witnesses or victims point at that very individual as having committed a crime he/she is suspected of'. It recalls that in the present case, the author came to the district police department of Vasilkov city on his own initiative to confess and, therefore, statements of eye-witnesses or victims should be substituted by his own testimony. In any case, the investigator had to check at least *prima facie* the trustworthiness of the author's testimony prior to requesting the prosecutor's authorisation. The State party respectively submits that the author's arrest on 24 December 1999 complied with the requirements of article 106 of the Criminal Procedure Code.

4.7 As to the author's allegations summarised in paragraph 3.2 (a), (d) and (f) above, the State party refers to the report of 27 December 1999 preceding the author's first interrogation as a suspect, which bears the author's signature and has the following text written by him:

'I was explained my rights as a suspect. I wish to have a lawyer, Mr. L.K., as my representative. My rights set forth in article 63 of the Constitution are clear to me. I wish to testify in relation to this crime'.

<sup>10</sup> ECtHR 6 May 2003, 6962/02, *Chizhov v. Ukraine*.

<sup>11</sup> ECtHR 18 January 1978, *Ireland v. the United Kingdom*, Series A No. 25, pp. 66-67, paragraph 167.

<sup>12</sup> ECtHR 13 May 1980, *Artico v. Italy*, Series A No. 37, p. 18, paragraph 36.

The State party adds that the above-mentioned report was signed *a fortiori* by the lawyer, which proves that the author was represented and his right to defence was respected. Although this report does not mention the time when it was drawn up, the State party maintains that the author was explained his rights as a suspect and had a meeting with the lawyer before his first interrogation. It adds that the author did not provide any evidence to corroborate his allegations to the contrary (see, paragraph 3.2(b) above).

4.8 The State party submits that it has complied with the requirement to promptly interrogate the author in his capacity of a suspect (see, paragraph 3.2(c) above). It submits that the State party's law allows detaining the suspects for 72 hours during which a decision has to be taken on whether to place them into custody or to release them. In the present case, the author was interrogated 3 days after being detained and as soon as his placement into custody was authorised by the prosecutor.

4.9 With regard to the author's allegations summarised in paragraph 3.2(e) above, the State party refers to the commentary on article 21 of the Criminal Procedure Code,<sup>13</sup> according to which the right to defence is guaranteed if the law provides the author as a participant in the process with a set of procedural rights enabling him to defend his interests; provides him with a right to have a lawyer; and obliges the investigator, prosecutor and the court to respect these rights. The State party submits that in the present case, the author was acknowledged to be a participant in the process, he was provided with a lawyer and his procedural rights were respected by the respective state bodies and courts.

#### *Article 10 of the Covenant*

4.10 Since the author's allegations under article 10 of the Covenant are linked to his allegations under article 7, the State party refers the Committee to its observations summarised in paragraphs 4.3 - 4.5 above.

#### *Alleged violations of article 14 of the Covenant*

4.11 As for the author's claim under article 14, paragraph 1, of the Covenant (see, paragraphs 3.5 and 3.6 above), the State party explains that the preliminary consideration of the criminal case is a separate stage of the proceedings where a court or an individual judge – depending on the gravity of the crime – considers whether the pre-trial investigation is sufficiently complete for a trial court to examine the merits of the case.<sup>14</sup> As far as participation of the accused or his/her lawyer in the preliminary consideration of the criminal case is concerned, the commentary on article 240 of the Criminal Procedure Code states that, at this stage the court or an individual judge meet in private and the circle of participants is limited to the judge(s), a prosecutor and a court secretary. The accused or his lawyer can be subpoenaed at the court's or judge's discretion for this hearing following their respective petitions.<sup>15</sup> No such petitions were submitted (those submitted were either dismissed or irrelevant) in the present case and, therefore, the Kiev Regional Court had no reason to subpoena the author or his lawyer. The State party maintains that the preliminary consideration of the criminal case had no impact on establishing the author's guilt and, therefore, there was no violation of his right under article 14, paragraph 1, of the Covenant.

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<sup>13</sup> See, supra n.9, Scientific and Practical Commentary to the Criminal Procedure Code of Ukraine, commentary on article 21 at p. 50.

<sup>14</sup> Ibid, commentary on article 237 at p. 289.

<sup>15</sup> Ibid, commentary on article 240 at p. 293.

4.12 With respect to the alleged violation of the author's right under article 14, paragraph 3(b), of the Covenant, the State party's refers to the Committee's jurisprudence<sup>16</sup> and submits that the author has failed to indicate what actions were taken by him and his lawyer in order to get access to the case file materials or to request an adjournment. It concludes, therefore, that there was no violation of the author's right to have adequate time and facilities for the preparation of his defence.

4.13 As for the author's claim that he was not represented by a lawyer the first three days after being arrested and that the *ex officio* lawyer failed to represent him *bona fide*, the State party confirms that indeed the *ex officio* lawyer was assigned to the author on 27 December 1999 but argues that his first interrogation also took place on the same day and that the author was represented by a lawyer during that interrogation. It adds that no procedural measures were taken with regard to the author during the three-day period when he was not represented by a lawyer. The State party refers to the Committee's jurisprudence<sup>17</sup> and submits that the author was represented by a lawyer at every stage of the proceedings against him and, accordingly, the absence of a lawyer from 24 to 27 December 1999 did not result in a violation of his right under article 14, paragraph 3(d), of the Covenant.

4.14 As regards the effectiveness of the legal aid rendered by the *ex officio* lawyer, the State party refers to the position of the ECtHR in that "mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may [...] shirk his duties" but "[i]f they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations".<sup>18</sup> The State party submits that in his communication to the Committee, the author does not claim that he had notified the state authorities about the ineffectiveness of the *ex officio* lawyer. It concludes that the State party's authorities cannot be held responsible for the conduct of an *ex officio* lawyer, since the author failed to notify them about his ineffectiveness.

4.15 As for the author's claim under article 14, paragraph 3(g), of the Covenant, the State party refers to the Committee's General Comment No. 13<sup>19</sup> and recalls its observations in relations to the author's claims under article 7 and article 10 of the Covenant summarised in paragraphs 4.3 - 4.5 and 4.10 above. It concludes that there was no violation of the author's right not to be compelled to testify against himself or to confess guilt.

#### *Article 15 of the Covenant*

4.16 As for the author's claims under article 15, paragraph 1, of the Covenant, the State party submits that the problem raised by the author is of purely juridical character and concerns the effect of law in time. The author's contention that there was a moratorium on the death penalty *per se* since 11 March 1997 when the President of Ukraine issued his decree, is erroneous as far as the President cannot amend the law (in particular, the Criminal Code) by his decrees and, therefore, the death penalty continued to exist until 29 December 1999 when the Constitutional Court declared unconstitutional the provisions of the Criminal Code on the death penalty. Thus, at the time when the crime was committed, article 93 of the Criminal Code provided for two types of punishment for murder: between 8 and 15 years' imprisonment and the death penalty.

<sup>16</sup> Reference is made to communication No. 610/1995, *Henry v. Jamaica*, Views adopted on 20 October 1998, paragraph 7.5.

<sup>17</sup> Communication No. 704/1996, *Shaw v. Jamaica*, Views adopted on 2 April 1998, paragraph 7.5.

<sup>18</sup> See, *supra* n.12, p. 16, paragraph 33. The State party also refers to ECtHR 19 December 1989, 9783/82, *Kamasinski v. Austria*.

<sup>19</sup> General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14), HRI/GEN/1/Rev.9 (Vol. I) at p. 187, paragraph 14.

4.17 On 21 December 2000, the Kiev Regional Court convicted the author on counts of premeditated murder of two individuals under aggravated circumstances for which the courts generally impose the death penalty. Thus, bearing in mind the requirement that the court shall apply the penalty that was in effect at the time when the crime was committed, the Kiev Regional Court would have imposed the death penalty with regard to the author. However, since this type of penalty was declared unconstitutional and replaced by life imprisonment, which seems to be a more lenient one, the court sentenced the author to life imprisonment.<sup>20</sup> The State party submits that the courts have imposed a lawful penalty and, therefore, there was no violation of the author's rights under article 15, paragraph 1, of the Covenant.

#### **Author's comments on the State party's observations**

5.1 On 30 April 2006, the author submits his comments on the State party's observations and suggests that his claims that were not addressed in these observations should be taken by the Committee as proven.<sup>21</sup>

#### *Article 2 of the Covenant*

5.2 The author notes that the State party itself has conceded that there was no remedy for the author at the stage of the preliminary consideration of his criminal case to appeal the court's refusal to consider his petitions. He reiterates that his claim of a violation of article 2 should be examined in conjunction with his claims under article 14, paragraphs 1, 3(b) and (d), of the Covenant.

#### *Articles 7 and 10 of the Covenant*

5.3 The author reiterates his initial claim about the cumulative effect of a number of factors that caused a very strong physical and psychological suffering to him and insists that unlawful investigation methods deliberately used against him with the aim of compelling him to give self-incriminating testimony should be qualified as torture.<sup>22</sup>

5.4 As to the State party's claim that the author failed to substantiate his claims under article 7 and 10 of the Covenant, he refers to the judgment of the ECtHR, recognising that allegations of torture in police custody are extremely difficult for the victim to substantiate if he has been isolated from the outside world, without access to doctors, lawyers, family or friends who could provide support and assemble the necessary evidence.<sup>23</sup> Given the fact that the State party has failed to carry out a thorough and effective investigation into his allegations of being subjected to unlawful investigation methods, as well as into the injuries of his brother, a witness in his criminal case, and Mr. R.K, a co-accused, the author asks the Committee to make a finding of a violation of articles 7 and 10 of the Covenant.

5.5 The author urges the Committee to apply the standard "beyond reasonable doubt" when evaluating the material before it.<sup>24</sup> The author recalls that he, his brother, Mr. R.K. and the other two co-accused, Mr. A.K. and Mr. G.D., were detained in the same IVS during the same period of time and subjected to unlawful interrogation methods by the same police inquiry officers. In addition to the author's attempts to complain about the use

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<sup>20</sup> The State party also refers to ECtHR 22 June 2000, 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, *Coëme and others v. Belgium*, paragraph 145.

<sup>21</sup> Reference is made to communication No. 529/1993, *Edwards v. Jamaica*, Views adopted on 28 July 1997, paragraph 8.3.

<sup>22</sup> See, *supra* n.11, p. 66, paragraph 167.

<sup>23</sup> ECtHR 18 December 1996, 21987/93, *Aksoy v. Turkey*, paragraph 97.

<sup>24</sup> See, *supra* n.11, paragraph 161.



of unlawful investigation methods described in his initial submission to the Committee, he provides a copy of the interrogation reports of 19 April 2000 and 14 June 2000 in which he explained that the self-incriminating testimony was obtained by the police inquiry officers under physical and psychological pressure.

5.6 As to the author's claims about inhuman conditions of detention in the IVS of Vasilkov city from 24 December 1999 to 11 January 2000 and from 22 February 2000 to 21 March 2000, he submits that these claims should be considered in the context of deliberate use of unlawful investigation methods against him. The author recalls that these claims have not been thoroughly, promptly and impartially investigated by the State party's authorities despite his numerous complaints to the prosecutor's office, the Kiev Regional Court and the Supreme Court. As for the State party's argument that domestic remedies have not been exhausted in relation to these allegations, the author submits that it is incumbent on the State party claiming non-exhaustion to show that the remedy was an effective one available in theory and in practice.

5.7 The author acknowledges that he did not initiate civil proceedings to challenge his conditions of detention but he notes that the State party failed to explain how such proceedings could have provided redress in his situation and to give any examples of judicial proceedings on this matter by a convicted person to prove that such remedy offered reasonable prospects of success.

5.8 As for the author's claims in relation to the *incommunicado* detention, he reiterates his argument about the cumulative effect of numerous factors, including *incommunicado* detention, which caused a very strong physical and psychological suffering to him. The author insists that he was kept in solitary confinement for the first three days of his detention and was transferred to the ordinary cell only after he gave a self-incriminating testimony. He adds that he was *de facto* without any means of communication with the outside world, since the *ex officio* lawyer who was imposed on him by the investigating authorities was representing him only *pro forma* and was collaborating with the investigating authorities in covering up their unlawful actions.

#### *Article 9 of the Covenant*

5.9 The author rejects the State party's argument that he was arrested on 24 December 1999 in full compliance with the requirements of article 106 of the Criminal Procedure Code and submits that he indeed came to the district police department of Vasilkov city on his own initiative but notes that he did not confess to having committed a murder. He adds that, contrary to the requirements of article 96 of the Criminal Procedure Code, his initial oral testimony given at the time of his arrest was not documented in a report. Moreover, his explanations about the circumstances in which the crime had been committed were not reflected in the arrest report of 24 December 1999 and the protocol does mention that his rights were explained to him.

5.10 The author explains in great detail that, at the time of his arrest, the State party's authorities failed to comply with the requirements of article 106, part 4, of the Criminal Procedure Code. He submits that the State party has acknowledged that he was assigned a lawyer and interrogated for the first time in his capacity of a suspect only three days after his arrest, i.e. on 27 December 1999. The author recalls that, under article 107, part 2, of the Criminal Procedure Code, a suspect is to be promptly interrogated and, under article 44, part 2, of the Criminal Procedure Code, he / she has to be assigned a lawyer within 24 hours after the arrest. He adds that pursuant to article 46, part 3, clause 3, of the Criminal Procedure Code, the participation of a lawyer was mandatory in his case. The author concludes that the State party's authorities violated provisions of the domestic law in relation to his arrest and subsequent detention and, therefore, there was also a violation of his rights under article 9, paragraph 1, of the Covenant.

*Article 14 of the Covenant*

5.11 With regard to the State party's arguments summarised in paragraph 4.11 above, the author recalls that at the time of the preliminary consideration of his criminal case, the Criminal Procedure Code did not allow for the participation of either the accused or his / her lawyer in the preliminary hearing and, therefore, they could not have petitioned the court to subpoena them. The author also recalls that the Criminal Procedure Code in force at the time of the preliminary hearing did not provide for a possibility of being provided with a copy of the respective ruling and of appealing it. Moreover, he was provided with a copy of the indictment only after the preliminary consideration of his criminal case by the Kiev Regional Court. The author maintains that there was a violation of his right under article 14, paragraph 1, of the Covenant.

5.12 As for the State party's argument that the preliminary consideration of the criminal case had no impact on establishing his guilt, the author submits that in fact the Kiev Regional Court did consider on 15 September 2000 a number of issues which are of crucial importance for the merits of his criminal case, *inter alia*, whether his right to defence at the inquiry and pre-trial investigation stage was duly ensured, whether there were grounds for dismissing or suspending the proceedings, whether there was sufficient evidence for the examination of a case by the court, whether all individuals in relation to whom incriminating evidence were gathered had been charged.<sup>25</sup> The author submits, therefore, that the preliminary hearing of his criminal case by the Kiev Regional Court went far beyond the procedural issues and amounted in fact to a consideration of the case in full. He reiterates his initial claim that the participation of the same judge and two assessors who conducted a preliminary consideration of his criminal case on 15 September 2000 in the proceedings of the first instance court resulted in a separate violation of his right under article 14, paragraph 1, of the Covenant.

5.13 The author rejects the State party's argument that he has failed to indicate what actions were taken by him and his lawyer in order to get access to the case file materials or to request an adjournment and submits that the preliminary hearing of his case by the Kiev Regional Court was not public and, therefore, he could not submit any petitions or appeal the ruling of 15 September 2000. He asks the Committee to declare that there was a violation of article 14, paragraph 3(b), of the Covenant.

5.14 The author recalls his claims summarised in paragraph 3.4 above, rejects the State party's arguments summarised in paragraphs 4.12 – 4.14 above and submits that the lack of a lawyer for 72 hours and a failure to explain to him the right to defence have as such resulted in a separate violation of his right under article 14, paragraphs 3(b) and (d), of the Covenant. Moreover, it was within these 72 hours that the author was compelled to testify against himself and to confess guilt – a confession that became a basis for his indictment and subsequent conviction.

5.15 The author states that, according to article 14, paragraph 3(d), of the Covenant, free legal assistance must be assigned when an individual does not have sufficient means to pay for it. In his case, he never requested the investigating authorities to assign him an *ex officio* lawyer and his family has sufficient means to hire a lawyer. In fact, his family did hire a lawyer, as soon as he managed to contact them through unofficial channels, since he was deprived of official means of communication with the outside world. The author submits that the State party can not reproach him for not notifying the respective authorities about the ineffectiveness of the *ex officio* lawyer. Firstly, this lawyer was imposed on him by the investigating authorities through the use of torture and other unlawful investigation

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<sup>25</sup> Reference is made to articles 6, 242, 244, 245, 246, 248 and 253 of the Criminal Procedure Code.

methods. Secondly, the author refers to the interrogation report of 14 June 2000 in support of his claim that he did complain to the State party's authorities, including the prosecutor's office, about the ineffectiveness of the *ex officio* lawyer.

*Article 15 of the Covenant*

5.16 The author reiterates his initial claims under article 15, paragraph 1, of the Convention.<sup>26</sup> He maintains that he should have benefited from the version of the law that ensures the most favourable legal consequences for him,<sup>27</sup> i.e. the "transitional law".

5.17 As to the penalty applicable at the time when the crime was committed, the author submits, on 13 February 2011, that further to the signature by Ukraine of Protocol No. 6 to the European Convention on Human Rights on 5 May 1997, it was obliged to refrain from the imposition and /or execution of the death sentences, i.e. acts which would defeat the object and purpose of the treaty.<sup>28</sup> He submits that the same legal stance was taken by the Constitutional Court of the Russian Federation in its ruling of 19 November 2009.<sup>29</sup> The author, therefore, reiterates his initial claim that, on 13 December 1999, i.e. the time of the crime for which the author has been convicted, the heaviest penalty that could have been imposed in Ukraine was 15 years' imprisonment.

5.18 As to the State party's argument that, in light of the requirement that the court shall apply the penalty that was in effect at the time when the crime was committed, the Kiev Regional Court would have imposed the death penalty with regard to the author, he submits that there is nothing in the court decisions issued in his case by the State party's courts to support this argument. He adds that, under article 24 of the Criminal Code the death penalty was considered an exceptional punishment, whereas under article 23, paragraph 1-1, of the Criminal Code, life imprisonment is treated as an ordinary punishment. The author refers to the principle of legal certainty of the criminal law, guaranteed under article 15, paragraph 1, of the Covenant.<sup>30</sup>

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<sup>26</sup> The author refers to a ruling of the Supreme Court of Ukraine dated 13 February 2009, in which the Supreme Court established that the heaviest penalty that could be imposed for a crime committed on 6 January 2000, i.e. when the "transitional law" was in force, was 15 years' imprisonment. He also refers to a ruling of the Supreme Court of Ukraine dated 11 December 2009, in which the Supreme Court established that the heaviest penalty that could be imposed for a crime committed at 10 p.m. on 4 April 2000, i.e. when the "transitional law" was in force, was 15 years' imprisonment.

<sup>27</sup> The author also refers to ECtHR 17 September 2009, 10249/03, *Scoppola v. Italy* (no. 2), paragraphs 100-109 and 119-121.

<sup>28</sup> The author refers to article 18 of the 1969 Vienna Convention on the Law of Treaties and ECtHR 19 October 2004, 17707/02, *Melnychenko v. Ukraine*, paragraph 64 (in relation to the 1951 Geneva Convention).

<sup>29</sup> See, ruling of the Constitutional Court of the Russian Federation No. 1344-0 of 19 November 2009, paragraph 4.3 (available in the Russian language at: <http://www.ksrf.ru/Decision/Pages/default.aspx>).

<sup>30</sup> See, *supra* n.27, paragraphs 101-102. In support of his claims the author submits a copy of the ruling of the Military Chamber of the Supreme Court of the Russian Federation dated 25 December 2006, which found that in establishing a penalty under article 102 of the Criminal Code of the Russian Federation for the premeditated murder of two individuals, one could not be sentenced to either the death penalty or life imprisonment, since the latter did not exist in the law in question and there was a moratorium on the application of the death penalty in the Russian Federation. The Court, therefore, established that the maximum term of imprisonment under article 102 of the Criminal Code of the Russian Federation was 15 years' imprisonment.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

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

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

6.3 Pursuant to article 5, paragraph 2(b), of the Optional Protocol, the Committee is precluded from considering any communication unless it has been ascertained that all available domestic remedies have been exhausted; this rule does not, however, apply if it is established that the application of domestic remedies has been or would be unreasonably prolonged or would be unlikely to bring effective relief.

6.4 The State party has argued that the author failed to exhaust domestic remedies in relation to his allegations about inhuman conditions of detention at the IVS of Vasilkov city, and stated that complaints about 'inadequate' conditions of detention were to be submitted under articles 248<sup>1</sup>-248<sup>9</sup> of the Civil Procedure Code. In this regard, the Committee has consistently held that the State party must describe in detail which legal remedies would have been available to an author in the specific case and provide evidence that there would be a reasonable prospect that such remedies would be effective.<sup>31</sup> A general description of rights and remedies available is insufficient. The Committee notes that the State party failed to explain how civil proceedings could have provided redress in the present case. The Committee further notes that the author complained about inhuman conditions of detention in his cassation appeal to the Supreme Court. The Committee therefore considers that the requirements of article 5, paragraph 2(a), of the Optional Protocol, have been met and concludes that the claims in relation to conditions of detention at the IVS of Vasilkov city submitted by the author under articles 7 and 10 of the Covenant are admissible.

6.5 The Committee notes the author's claims under article 14, paragraphs 1, 3(b) and (d), read in conjunction with article 2, paragraph 3(a), of the Covenant, in relation to the preliminary consideration of his criminal case, and the State party's observations thereon. The Committee observes that the author has not provided any substantiation in support of his claim that the Kiev Regional Court had considered his criminal case on the merits at the preliminary hearing. In these circumstances, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that his and his lawyer's non-participation in the preliminary hearing of his criminal case resulted in a violation of his rights under article 14, paragraphs 1, 3(b) and (d), read in conjunction with article 2, paragraph 3(a), of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.6 In light of the above, the Committee further considers that the author has failed to substantiate, for purposes of admissibility, his claim that the participation of the same judge and two assessors who conducted a preliminary consideration of his criminal case on 15 September 2000 in the proceedings of the first instance court resulted in a violation of his right under article 14, paragraph 1, of the Covenant. Therefore, this part of the communication is inadmissible under article 2 of the Optional Protocol.

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<sup>31</sup> See, for example, communication No. 6/1977, *Sequeira v. Uruguay*, Views adopted on 29 July 1980, paragraphs 6(c) and 9(b).

6.7 The Committee also notes the author's argument that he is a victim of a violation of article 14, paragraphs 1 and 3(d), of the Covenant, because neither he nor his lawyer took part in the examination of his objections to the trial transcript of the first instance court on 2 February 2001, whereas, contrary to the principle of the equality of arms, the prosecutor did participate in the hearing in question. The Committee notes, however, that the author does not explain how this affected the determination of the criminal charges against him. It concludes, therefore, that the author has failed to sufficiently substantiate, for purposes of admissibility, this part of the communication. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.8 With regard to the author's claims that he was not allowed to take part in the cassation proceedings and could not, therefore defend himself in person, the Committee notes that, as transpires from the copy of the ruling of the Supreme Court of 22 March 2001 provided by the author, he was represented at that hearing by his privately hired lawyer and his mother. The Committee further notes the author's own affirmation that he and his lawyer submitted their respective cassation appeals and additional cassation appeal to the Supreme Court. In these circumstances, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that his non-participation in the cassation hearing resulted in a violation of his rights under article 14, paragraphs 3(b) and (d), read in conjunction with article 14, paragraph 1, and article 2, paragraph 3(c), of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.9 The Committee considers that the author's remaining claims under article 2; article 7; article 9, paragraph 1; article 10; article 14, paragraphs 1, 2, 3(b), (d), (e) and (g); and article 15, paragraph 1, of the Covenant, are sufficiently substantiated, for purposes of admissibility, and proceeds to their examination on the merits.

#### *Consideration of the merits*

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

7.2 The author claims that he was beaten, threatened with reprisals against his family, placed in a punishment cell by the police inquiry officers at the IVS of Vasilkov city to make him confess guilt, contrary to article 7 and article 14, paragraph 3(g), of the Covenant. The Committee notes that, on 17 February 2000, the author submitted a written complaint to the Kiev Regional Prosecutor's Office, describing the unlawful investigation methods to which he was subjected and that the Prosecutor's Office decided neither to initiate criminal proceedings nor to undertake any further investigation. The Committee further notes that the author retracted his confession in court, asserting that it had been made under torture, and that his challenge to the voluntariness of the confession was dismissed by the court, after having heard testimonies of five police inquiry officers. No other witnesses were called. The Committee also notes that the State party has argued that the author did not provide any evidence in support of his allegations of being subjected to beatings and other physical and/or psychological pressure.

7.3 In this regard, the Committee reaffirms its jurisprudence<sup>32</sup> that the burden of proof cannot rest on the author of the communication alone, especially considering that the author

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<sup>32</sup> See, e.g. communication No. 30/1978, *Bleier v. Uruguay*, Views adopted on 24 March 1980, paragraph 13.3; communication No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, paragraph 7.2; and communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, paragraph 8.3.

and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the author made all reasonable attempts to collect evidence in support of his claims and where further clarification depends on information exclusively in the hands of the State party, the Committee may consider the author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party.

7.4 Furthermore, as regards the claim of a violation of the author's rights under article 14, paragraph 3 (g), in that he was forced to sign a confession, the Committee must consider the principles that underlie this guarantee. It recalls its jurisprudence that the wording, in article 14, paragraph 3(g), that no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion by the investigating authorities of the accused with a view to obtaining a confession of guilt.<sup>33</sup> The Committee recalls that in case of alleged forced confessions, the burden is on the State to prove that statements made by the accused have been given of their own free will.<sup>34</sup> The Committee observes that the State party did not provide any arguments corroborated by relevant documentation to refute the author's claim that he was compelled to confess guilt. In these circumstances, the Committee concludes that the facts before it disclose a violation of article 7, and article 14, paragraph 3 (g), of the Covenant.

7.5 The Committee also recalls that a State party is responsible for the security of any person in detention and, when an individual claims to have received injuries while in detention, it is incumbent on the State party to produce evidence refuting these allegations.<sup>35</sup> Moreover, complaints of ill-treatment must be investigated promptly and impartially by competent authorities.<sup>36</sup> The Committee notes that the author provided a detailed description of the treatment to which he was subjected and that the State party failed to investigate. In the circumstances of the present case, the Committee is of the view that the requisite standard was not met and concludes that the facts as presented disclose a violation of article 7, read in conjunction with article 2, paragraph 3, of the Covenant.

7.6 On the question of whether the author's arrest on 24 December 1999 and subsequent detention were carried out in conformity with the requirements of article 9, paragraph 1, of the Covenant, the Committee notes that deprivation of liberty is permissible only when it takes place on such grounds and in accordance with such procedure as are established by domestic law and when this is not arbitrary. In other words, the first issue before the Committee is whether the author's deprivation of liberty was in accordance with the State party's relevant laws. The author claimed that none of the grounds for arrest enumerated in

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<sup>33</sup> Communication No. 330/1988, *Berry v. Jamaica*, Views adopted on 4 July 1994, paragraph 11.7, communication No. 1033/2001, *Singarasa v. Sri Lanka*, Views adopted on 21 July 2004, paragraph 7.4, and communication No. 912/2000, *Deolall v. Guyana*, Views adopted on 1 November 2004, paragraph 5.1.

<sup>34</sup> Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007, paragraph 49.

<sup>35</sup> Communication No. 907/2000, *Siragev v. Uzbekistan*, Views adopted on 1 November 2005, paragraph 6.2; and communication No. 889/1999, *Zheikov v. Russian Federation*, Views adopted on 17 March 2006, paragraph 7.2.

<sup>36</sup> Human Rights Committee, General Comment No. 20 (1992) on the prohibition of torture and cruel treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, paragraph 14.

article 106, parts 1 and 2, of the Criminal Procedure Code were applicable at the time of his arrest and that the police inquiry officers failed to comply with a number of procedural requirements set forth by the Criminal Procedure Code, including a right to have access to a lawyer from the moment of arrest, to be promptly interrogated as a suspect by an investigator and to be explained his rights. While the State party argued that that the author's arrest on 24 December 1999 complied with the requirements of article 106 of the Criminal Code, it acknowledged that the author was assigned a lawyer and interrogated as a suspect for the first time three days after being arrested. The Committee notes the author's argument that, under article 107, part 2, of the Criminal Procedure Code, a suspect is to be promptly interrogated and, under article 44, part 2, of the Criminal Procedure Code, he / she has to be assigned a lawyer within 24 hours after the arrest. The Committee also notes the author's claim, which has not been specifically contested by the State party, that he was *de facto* interrogated by the police inquiry officers for three days after his arrest in the absence of a lawyer and investigator, and without having been explained his rights. In the circumstances, the Committee finds a violation of article 9, paragraph 1, of the Covenant.

7.7 The Committee has noted the author's allegations, that the conditions of detention at the IVS of Vasilkov city, where he was held from 24 December 1999 to 11 January 2000 and from 22 February 2000 to 21 March 2000, were inappropriate, and that the cells were overcrowded, wet, dirty and not equipped with beds, mattresses and other basic items; that, in general, the temperature, lighting and air supply in the cells were insufficient. The State party has not specifically addressed the author's allegations that were described by the author in great detail. The Committee recalls that persons deprived of their liberty must be treated in accordance with minimum standards.<sup>37</sup> It appears from the author's submissions, which were not refuted by the State party, that these standards were not met. Consequently, the Committee finds that the facts before it disclose a violation by the State party of the author's rights under article 10, paragraph 1, of the Covenant.

7.8 The Committee notes the author's claims that he did not have access to any lawyer for 72 hours and to a lawyer of his choice for more than two months, that he was imposed an *ex officio* lawyer who was taking part in the proceedings only *pro forma* and that there were no legal grounds for assigning him an *ex officio* lawyer. The State party partly rejected these claims by stating that no procedural measures were taken with regard to the author during the three-day period when he was not represented by a lawyer and that the author failed to notify the State party authorities about the ineffectiveness of the *ex officio* lawyer. The author responded to the State party's arguments by submitting that it was during the three-day period during which he was not represented by the lawyer when he was compelled to give self-incriminating testimony. In addition, he provided a copy of an interrogation report of 14 June 2000 in support of his claim that he did complain to the State party authorities about the ineffectiveness of the *ex officio* lawyer. In the circumstances, the Committee concludes that the facts before it disclose a violation of article 14, paragraphs 3(b) and (d), of the Covenant.

7.9 The Committee notes the author's claim that his trial was unfair, as the court was biased and did not comply with the requirements of the law of criminal procedure. In addition, the author points to circumstances which he claims demonstrate that he did not benefit from the presumption of innocence. The Committee has noted the author's contention that he and his lawyer requested the court, *inter alia*, to examine the claim that he and the other co-accused were subjected to unlawful investigation methods by the police inquiry officers at the pre-trial investigation stage to compel them to confess guilt; to

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<sup>37</sup> General Comment No. 21: Humane treatment of persons deprived of their liberty (Article 10), HRI/GEN/1/Rev.9 (Vol. I) at pp. 202-203, paragraphs 3 and 5.

exclude the inculpatory evidence that was obtained unlawfully, including the ‘confession’ written by Mr. R.K. on 24 December 1999 who could no longer be summoned as a witness. These requests were dismissed by the Kiev Regional Court. The Supreme Court that examined the author’s criminal case on cassation did not eliminate any defects of the proceedings in the trial court.

7.10 In this regard, the Committee recalls its jurisprudence that it is generally not for the Committee, but for the courts of States parties, to review or to evaluate facts and evidence, or to examine the interpretation of domestic legislation by national courts and tribunals, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice.<sup>38</sup> In the present case, the facts presented by the author, which were not specifically addressed by the State party, show that the evaluation of inculpatory evidence against the author by the State party’s courts reflected their failure to comply with the guarantees of a fair trial, as established by the Committee earlier regarding article 14, paragraphs 3(b), (d) and (g), of the Covenant. In the circumstances, the Committee, therefore, concludes that the facts before it disclose a violation also of article 14, paragraphs 1 and 3(e), of the Covenant.

7.11 In light of this conclusion, the Committee does not consider it necessary to deal separately with the author’s claim under article 14, paragraph 2, of the Covenant.

7.12 The Committee notes the author’s claim under article 15, paragraph 1, that, by sentencing him to life imprisonment, the State party’s courts have imposed a heavier penalty than the one that was applicable at the time when the crime was committed and the one that was applicable under the “transitional law”, i.e. 15 years’ imprisonment. The Committee also notes the author’s further argument that, if the relevant penalty has changed more than once between the time when the crime was committed and his conviction, he should benefit from the version of the law that ensures the most favourable legal consequences for him. The Committee, however, observes as submitted by the State party that the death penalty continued to exist until 29 December 1999 when the Constitutional Court declared unconstitutional the provisions of the Criminal Code on the death penalty. The Committee also notes that, according to the decision of the Constitutional Court of 29 December 1999 itself, provisions of the Criminal Code on the death penalty became void from the date of the adoption of the decision in question. Thus, at the time when the crime was committed on 13 December 1999, article 93 of the Criminal Code provided for two types of punishment for murder: between 8 and 15 years’ imprisonment and the death penalty.

7.13 The Committee further notes with regard to the period when the law in effect was determined on the basis of the Constitutional Court’s decision of 29 December 1999 that this law was applicable to a very specific category of cases, namely, those where the crime in question was committed between 29 December 1999 and 4 April 2000 and those where respective judgments were handed down during the above-mentioned period. In this regard, the Committee refers to its jurisprudence in *Tofanyuk v. Ukraine*,<sup>39</sup> where it concluded that the Constitutional Court’s decision did not establish a new penalty which would replace the death penalty. It considers, therefore, that in the author’s case the law in effect between 29 December 1999 and 4 April 2000 does not constitute a ‘provision [...] made by law for the imposition of a lighter penalty’ within the meaning of the last sentence of article 15, paragraph 1, of the Covenant. The Committee further notes that the penalty of life

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<sup>38</sup> See, *inter alia*, communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, paragraph 6.2.

<sup>39</sup> Communication No.1346/2005, *Tofanyuk v. Ukraine*, Views adopted on 20 October 2010, paragraph 11.3.



imprisonment established by the law of 22 February 2000 fully respects the purpose of the Constitutional Court's decision, which was to abolish the death penalty, a penalty which is more severe than life imprisonment. Consequently, there were no other provisions made by law for the imposition of a lighter penalty from which the author could benefit, other than the above-mentioned amendment on life imprisonment.<sup>40</sup> In such circumstances, the Committee cannot conclude that the State party's courts, by sentencing the author to life imprisonment, have violated his rights under article 15, paragraph 1, of the Covenant.

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 disclose a violation by the State party of article 7; article 7, read in conjunction with article 2, paragraph 3; article 9, paragraph 1; article 10, paragraph 1; and article 14, paragraphs 1, 3(b), (d), (e) and (g), 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 remedy should include a review of his conviction that would comply with fair trial guarantees of article 14 of the Covenant, impartial, effective and thorough investigation of the author's claims under article 7, prosecution of those responsible, and full reparation, including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

10. 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 there has been a violation of the Covenant or not 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 when it has been determined that a violation has occurred, 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. In addition, it requests the State party to publish the Committee's Views.

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

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<sup>40</sup> Ibid.