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Views

Communication No. 1535/2006

Submitted by: Nataliya Litvin (not represented by counsel)

Alleged victim: The author's son, Viktor Shchetka

State Party: Ukraine

Date of communication: 15 June 2006 (initial submission)

Document references: Special Rapporteur's rule 97 decision, transmitted to the State party on 5 December 2006 (not issued in document form)

Date of adoption of Views: 19 July 2011

* Made public by decision of the Human Rights Committee.

<i>Subject matter:</i>	imposition of a sentence of life imprisonment after an unfair trial
<i>Procedural issue:</i>	incompatibility <i>ratione materiae</i>
<i>Substantive issues:</i>	prohibition of torture and inhuman or degrading treatment; right to a fair trial; right to be presumed innocent; right to examine witnesses and to obtain the attendance of witnesses on his behalf; right to have his sentence and conviction reviewed by a higher tribunal;
<i>Articles of the Covenant:</i>	7; 14 (1); 14 (2); 14 (3) (e) and (g); 14 (5);
<i>Articles of the Optional Protocol:</i>	3

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. 1535/2006.

[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 (102nd session)

concerning

Communication No. 1535/2006**

Submitted by: Nataliya Litvin (not represented by counsel)

Alleged victim: The author's son, Viktor Shchetka

State Party: Ukraine

Date of communication: 15 June 2006 (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. 1535/2006, submitted to the Human Rights Committee on behalf of Mr. Viktor Shchetka, 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,

Aadopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication dated 15 June 2006 is Ms. Nataliya Litvin, an Ukrainian national born in 1949, on behalf of her son, Mr. Viktor Shchetka, also a national of Ukraine born in 1973 who, at the time of initial submission, was serving a prison sentence in Zhitomir, Ukraine. The author claims that her son is a victim of a violation of his rights under articles 7; 14, paragraphs 1, 2, 3(e), and 5, of the International Covenant on Civil and Political Rights. The author is unrepresented. The Optional Protocol entered into force for the State party on 25 October 1991.

** 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. Hellen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

The text of an individual opinion signed by Committee member, Mr. Fabian Omar Salvioli is appended to the present Views.

The facts as presented by the author

2.1 On 11 July 2000, a sister of her son's wife was murdered in the apartment of her son's parents-in-law, where he was temporarily living. The victim was undressed and her personal belongings were scattered all over the apartment. The investigation's initial version was that the victim had been raped and murdered. When her son returned home in the evening of 11 July 2000, he was requested to come to the district police department to testify.

2.2 At the police department, her son was told that he was the only person who could have raped and murdered his wife's sister. The author alleges that the head of investigation officially named her son as the perpetrator of rape and murder, even in official documents such as the decision on the conduct of a forensic medical examination dated 11 July 2000. For twenty four hours, the police officers tried to make him confess guilt. Her son was humiliated in many ways, deprived of water and sleep and not allowed to use the toilet. He was also refused access to a lawyer. The author claims that in the evening of 12 July 2000, the police officers started torturing her son. Thus, he was handcuffed, hung on a metal crowbar and hit on the head. He also had a gas mask put on and the police officers restricted the passage of air. As a result, he suffered a heart attack and wrote down a confession of guilt at the dictation of police officers (i.e. raped, murdered, scattered the belongings) who were constantly correcting him throughout the writing. Shortly after, around 11:30 p.m. on 12 July 2000, a report of the detention of her son as a suspect was drawn up, followed by a report of the interrogation, which he was forced to sign under threat of further torture. These investigative actions were conducted in the absence of a lawyer.

2.3 In the morning of 13 July 2000, the author's son was transferred from the district police department to the temporary detention ward (KPZ-23-GOM), where he was interrogated by the senior investigative officer of the Prosecutor's Office, Mr. K. in the absence of a lawyer. During the interrogation, he retracted his previous confession and claimed that it was extracted under torture. He also asked the investigator not to be exposed to those police officers who had recently tortured him. This interrogation was documented and filmed. However, no further investigation into his torture allegations followed.

2.4 During the night of 13-14 July, two police officers came to the temporary detention ward (KPZ-23-GOM) and tortured her son for having retracted his confession. In the morning of 14 July, the investigator K. visited him and asked him whether he had changed his mind as to the retraction of the confession. Her son refused to take responsibility for the crimes and refused to talk to the investigator for as long as he was not allowed to see a lawyer.

2.5 The author claims that her son's lawyers were prevented from meeting him and that the investigation intentionally refused to disclose his whereabouts to the lawyer, despite several petitions lodged with the Prosecution's Office. Only on 18 July 2000, that is seven days after the arrest and when the marks of torture became less visible, her son was allowed to see a lawyer. The next day, on 19 July 2000, the lawyer submitted a motion to the prosecutor of Minsk District stating that his client bore traces of torture and requested an immediate medical examination. On 20 July 2000, the lawyer filed a complaint with the prosecutor of Minsk District for the illegal actions of the senior investigative officer K. who, abusing his powers, deprived his client of legal assistance for six days, and requested the prosecutor to initiate an investigation for illegal conduct. A similar complaint was lodged with the General Prosecutor of Ukraine. On 29 July 2000, the lawyer was informed that the internal investigation collected insufficient evidence against Mr. K. Although the Prosecutor's Office was obliged to conduct a medical examination and initiate an investigation into her son's torture allegations, it did so in an ineffective manner. Thus, the Prosecutor Office's staff initially refused to officially register the motion. On 28 September

2000, the senior investigator K. refused to initiate criminal proceedings against the police officers responsible for the torture of the author's son, indicating that the latter's allegations were not confirmed. Mr. K. stated, *inter alia*, that on 12 July 2000 the author's son had voluntarily written a confession of guilt to the prosecutor of Minsk District and had not complained of torture; that he was examined by a doctor on 12 July 2000 and that the latter did not find any marks of torture. The author submits that K. was well aware that the medical examination of her son was conducted in the morning of 12 July, while he was subjected to torture in the evening of 12 July and during the night of 13-14 July. Moreover, K. concealed the fact that he interrogated her son on 13 July 2000 with the use of video recording. Instead, K. claimed that the author's son complained for the first time about torture and retracted his confession only on 25 July 2000. All video materials were removed from the case file because they contained the retraction of her son's confession and showed that he bore visible marks of torture. According to the author, later on during a court hearing K. admitted that he interrogated her son on 13 July 2000 and that the latter retracted his confession extracted under torture. Mr. K. also admitted having removed the interrogation report and any further documents mentioning this interrogation from the case file.

2.6 On 16 August 2000, the author's son complained to the Prosecutor's Office of Kiev city, claiming that he was subjected to torture. It was the first complaint that he could write himself since, as a result of torture, he could not bend his fingers to hold a pen. This complaint was not added to his case file and later on the court dismissed the lawyer's motion to add it as evidence.

2.7 On 12 December 2000, the Judicial Chamber on Criminal Cases of the Kiev City Court (first instance court) found the author's son guilty on a number of charges that included theft, illegal bearing of "cold" weapons¹ and a murder aggravated by rape, and sentenced him to life imprisonment. During the court hearing, he complained about the physical and psychological pressure exerted by police. He stated that his confession of guilt had been extracted under torture, that the interrogation report of 12-13 July 2000 had been signed under the threat of further torture, and that he did not have access to a lawyer. The court simply ignored his allegations of torture, without examining them.

2.8 The author confirms that her son had indeed a knife and nunchaku (*engl.* "nunchuks")² that were moved from his old apartment to a recently purchased one. However, she claims that neither the investigation nor the court clarified the location of these objects during the move and whether they could have been used to commit a crime. The court did not ask any clarifying questions and did not examine this criminal charge during the proceedings, despite which it found her son guilty of illegal bearing of "cold" weapons. Based on the confession of 12 July 2000 extracted under torture and the inconclusive finding of the forensic medical examination³, the court also found her son guilty of murder aggravated by rape, without examining this charge. The author claims that the evidence collected objectively indicated that the victim had not been raped.

¹ Meaning not firearms.

² A forensic examination concluded that Mr. Shchetka's knife and nunchaku fell under the category of "cold" weapons.

³ The forensic medical examination (autopsy report) of 18 September 2000 confirmed that the victim was a virgin and that no injuries had been identified on the victim's external sex organs, hips or shins. No traces of semen were found in any of the swabs taken from the victim's mouth, vagina and anus. The expert examination concluded that the sexual intercourse could have been possible without damaging the hymen given the victim's anatomic particularities (the structure and shape of the hymen). Another forensic cytological examination concluded that no vaginal epithelial cells had been identified in the cytological smear obtained from Mr. Shchetka's penile surface.

Nonetheless, the court ignored this fact and sentenced her son to life imprisonment under article 93 of the Criminal Code (murder aggravated by, *inter alia*, rape). It was possible for the court to apply article 93 only because it "officially" established that the victim had been raped before being murdered. Except for rape, there were no other aggravating circumstances in the sense of article 93 of the Criminal Code.

2.9 The author's son lodged a cassation appeal with the Judicial Chamber on Criminal Cases of the Supreme Court, which rejected the appeal on 22 February 2001. The Supreme Court stated that during the pre-trial investigation her son confessed guilt and his guilt was corroborated by other evidence, *inter alia* by the testimony of the main witness of prosecution, to whom he had told details of the crime, as well as by forensic medical examinations which did not rule out the fact of rape. The Court further stated that her son's claims that the evidence was obtained in violation of criminal procedure norms and the investigative organs used illegal methods of interrogation had not been confirmed by the materials on file. The court concluded that her son's guilt was established by evidence and found no grounds for reversal of his conviction.

2.10 The author points to a number of irregularities committed by the courts during the consideration of the criminal case of her son, as outlined below.

False testimony of the main witness of the prosecution

2.11 The court based its judgment on the testimony of the main witness, one Ko., who claimed that in July 2000 he shared a cell with her son in the district police department, where the latter told him and three other detainees details about the crimes he had committed. The witness further claimed that her son himself called for a policeman on duty and wrote down a confession of guilt. Mr. Ko. maintained that he immediately informed the police officers in writing about the details of the crimes as told by her son. Mr. Ko. was interrogated as a witness only on 3 August 2000, i.e. almost one month after his written statement to police. Despite the lawyer's questions in that regard, the court failed to clarify why such an important witness was not questioned shortly after his denouncing statement and why no confrontation between the witness and the accused was organized. The witness also testified in court that he had provided the information about the crimes in both his written statement of July 2000, as well as during his interrogation of 3 August 2000. However, the investigator K. denied the fact that the witness had provided such information. The author's son stated in court that Mr. Ko. was a false witness, as they had never shared a cell, and claimed that this information could have been easily verified in the police department's official records of arrests and through a confrontation with Mr. Ko., the policeman on duty and the three inmates whom he allegedly told about the crimes.

Refusal of court to summon and hear important witnesses, distortion and misrepresentation of witness testimonies

2.12 The author submits that the investigation was able to determine the exact time of the victim's murder, because at the moment of assault the victim was using the internet and the use of the computer was disrupted at 4:39 p.m. Her son requested the court on many occasions to summon and consider the testimonies of two witnesses, one Kl. and one O. who testified during the preliminary investigation that they had seen him at 4:30 p.m., i.e. 9 minutes before the commission of the crimes, several kilometers away from the crime site. Although this information confirmed his alibi, it was ignored by the court and her son's alibi was not verified.

2.13 Furthermore, the interrogation report of another witness, one Ch., who was interrogated on 12 July 2000 and testified that her son had no scratches on his face at 7:00 p.m., i.e. more than two hours after the crimes, was removed from the criminal file by the investigator, who maintained that such a witness had never been interrogated and that her

son had never mentioned him as a witness who saw him on the day of the crime. Although her son himself indicated the name of this witness at the time of his interrogation and this information was included in all interrogation reports, and Mr. Ch. himself confirmed his interrogation in the morning of 12 July 2000, the court ignored these facts and rejected the defence's motion to request the respective interrogation report from the investigator and to add it as evidence to the case file. The court also refused to request and to add to the criminal file other documents that were favorable to the defence.

2.14 The court also substantially distorted the testimony of Mr. B. who testified that her son did not drink any vodka on 11 July 2000 (the day of the crime), whereas in its decision the court on the contrary indicated that he consumed alcohol and was drunk. The author claims that there was no evidence on file that her son was drunk on 11 July 2000 (neither a witness testimony nor any expert medical examination).

Concealment by the court of exculpatory facts and evidence

2.15 The court made reference to a series of circumstances that, in its view, confirmed her son's guilt. Thus, it indicated that the victim physically resisted her son and scratched his face with her fingernails. A forensic medical examination identified four scratches on the left side of her son's chin and the medical expert concluded that they could have been inflicted by the victim during her resistance. The court also stated that there were no scratches on her son's face in the morning of 11 July 2000. The author however claims that according to the expert examination, minute particles of male skin, hair follicles and cells of mucous membranes of the attacker were found under the victim's fingernails of both hands. Therefore, the attacker should have had more than four scratches and his mucous membranes should have been damaged, while the medical examination found no other lesions than four scratches on her son's face and concluded that his mucous membranes were intact. Furthermore, the court cited the medical expert that "the location of the scratches does not exclude their formation following the victim's resistance", whereas it ignored another conclusion of the expert that the scratches could have been self-inflicted⁴, as her son himself declared during the pre-trial investigation. The author maintains that the scratches on her son's face appeared during the interrogation, i.e. three hours after the crime was committed. As the court stated in its judgment, the victim's relatives confirmed that there were no scratches on his face in the morning of 11 July 2000 (the day of the crime). However, the court failed to refer to the testimonies of the victim's relatives and two other witnesses, according to which her son had no scratches on his face at 7:00 p.m., i.e. more than two hours after the commission of the crimes.

The fabrication of evidence by investigative organs and the court

2.16 The author claims that the stains of the victim's blood on her son's shirt were fabricated by the investigation, as no such stains existed at the time of seizure of his shirt. The existence of blood stains was not recorded in any of the procedural documents drawn up on 11 July 2000. The court in its judgment states that "being interrogated as a suspect on 12 July 2000, Mr. Shchetka indicated that blood spurted out on his clothes", while in reality in the interrogation report the sentence stated "after that the blood spurted out", without any

⁴ The investigation posed the following questions before the forensic expert: (1) whether there were any injuries on Mr. Shchetka's body; (2) whether the scratches on his face could have been self-inflicted by imprudence because of sharp-edged nails, i.e. in the circumstances described by Mr. Shchetka; (3) whether the injuries on his face could have been the result of the victim's resistance. The expert, however, stated only that the four scratches on Mr. Shchetka's face had been produced by blunt objects.

indication of clothes⁵. Therefore the author maintains that her son never testified about any blood stains on his clothes, this is a distortion of facts by the court.

2.17 The court referred to washed off splashes of blood on her son's shirt. Her son challenged this finding and requested the court to carry out additional examinations in order to clarify the mechanism of formation of stains on his shirt, but his request was rejected by the court on grounds that the biological examination offered an exhaustive response to his questions and the cloth became unfit for an additional chemical examination. The author claims that on the contrary the expert biologist explained that the formation of blood stains was outside his competence and that an additional physical and chemical examination could be carried out.

2.18 On 18 July 2001, after the first instance court judgment, the author submitted a written application to the prosecutor of Minsk District requesting her son's clothes that had been seized as evidence. On 27 July 2001, the prosecutor informed that the clothes retained as evidence might be returned only after the sentence entered into force and the court issued a ruling regarding the evidence. The same day, on 27 July, the author filed a motion to the Kiev City Court, requesting the court to release her son's clothes or, if that was not possible, to store them in view of the fact that the sentence was appealed and the clothes would be needed for a new forensic examination. On 30 July 2001, the author filed a new written request to the president of the Kiev City Court, asking the court to order the release of her son's clothes for additional forensic examinations. Following the request of the Kiev Appeal Court, the prosecutor transmitted all the evidence to the court on 7 August 2001. The Appeal Court ordered the destruction of the clothes, which was carried out on 21 September 2001. The court later indicated that the evidence was destroyed following the declaration of her son during a court hearing that he did not want his clothes back. The author maintains that her son never made such declarations, on the contrary he and his lawyers requested the court on many occasions to order additional forensic examination and to safely store the shirt with the alleged traces of the victim's blood. The author therefore claims that the court intentionally destroyed the evidence in order to prevent the defence from conducting additional forensic examinations.

Newly discovered facts and refusal of the Prosecutor's Office to reconsider the case

2.19 The author claims that during the pre-trial investigation and the court proceedings her son was deprived of his right to effectively defend himself and to refute the arguments put forward by the prosecution. In particular, his right to ask additional questions to the experts and to have additional forensic examination conducted, was denied. Therefore, after the judgment, his lawyer requested several forensic experts to assess the conclusions of the previously conducted forensic examinations. Thus, on 23 July 2001, he requested the opinion of two experts (specialists in forensic medicine and in molecular biology and genetics) on the conclusion of the forensic examination conducted on 19 July 2000. The experts stated that, based on the methods of investigation used and the data available to the expert, it was impossible to reach the conclusion that the second blood stain on her son's shirt contained undoubtedly the victim's blood. Following the lawyer's request, a specialist in forensic medicine studied the forensic medical documents and the conclusion of the autopsy report dated 18 September 2000. He concluded that no forensic data confirming a sexual intercourse with the victim before her death, and especially in a coerced and violent manner, existed.

⁵ According to the interrogation report of 12 July 2000, Mr. Shchetka indeed stated that "after [he stabbed the victim in the neck] the blood spurted out", without any mention of clothes.

2.20 In order to confirm her son's allegations of torture, two additional forensic examinations were carried out. After the examination of his handwriting text in the reports on provision of legal assistance dated 14 and 25 July 2000, the graphologist concluded that at the time of writing her son experienced significant difficulties in carrying out his handwriting ability due to an injury of his writing hand, as well as due to possible unusual emotional state (fear, stress, etc.). The second examination was conducted by a specialist in forensic linguistics on the text of his confession of guilt of 12 July 2000. The expert concluded that the confession of guilt was written under mental tension and reflected the reproduction in writing of the spontaneous speech of a person with skills in taking statements.

2.21 The defence also collected evidence in support of the claim that the main witness, Mr. Ko., made false testimonies during the court proceedings. The author claims that the written statement against her son which Mr. Ko. allegedly submitted to police officers on 12-13 July 2000 was missing from the case file. At the lawyer's request, the district police department confirmed that in 2000, the police department received no written motion from Mr. Ko.⁶. The author further claims that Ko. was a homeless man who had been detained by police on many occasions for petty crimes and might have been cooperating with the authorities in fabrication of evidence against her son in order to secure his release. Ko. testified against her son not immediately after he was allegedly told about the crimes, but only after having been arrested and fined twice for hooliganism (on 2 and 3 August 2000)⁷, and the date of his interrogation coincide with his last apprehension – 3 August 2000.

2.22 On 13 August 2002, her son's lawyers lodged a motion with the General Prosecutor's Office for reconsideration of his case based on the above mentioned newly discovered facts⁸. On 27 September 2002, the General Prosecutor rejected the lawyers' motion on grounds that the expert examinations were conducted outside the criminal proceedings and therefore had no procedural value. The author claims that the General Prosecutor had a legal obligation to conduct the required investigation of the new facts⁹, that his refusal constitutes a *de facto* interdiction of any prosecutor to investigate those facts and that his actions amount to a denial of justice.

⁶ In its reply of 5 September 2001, the police department stated that it was not possible to verify whether Mr. Shchetka was detained together with Mr. Ko. in the same cell, as at that time no records to this effect had been drawn up. However, the police department confirmed that Mr. Ko. did not submit any written motion in 2000.

⁷ The arrest of Mr. Ko. on 2 and 3 August 2000 is confirmed by the head of the district police department in his information of 26 October 2001. See also para. 2.11.

⁸ According to article 400-5 of the Criminal Procedure Code, the following shall be considered to be newly discovered facts: (1) falsified evidence, wrong translation, misleading testimonies of a witness, victim, accused or defendant, wrong opinion and explanations of a court expert; (2) abuses of the prosecutor, investigator, or judges committed during court proceedings; (3) any other facts of which the court had no knowledge when rendering its decision and which themselves or together with previously established facts show that the conviction or acquittal of the defendant was a mistake;

⁹ In accordance with article 400-8 of the Criminal Procedure Code, interested individuals, enterprises, institutions, organizations, and officials submit to the prosecutor applications for reopening of a criminal case. The prosecutor may request the court to submit the trial transcript for verification. In any case, the prosecutor, when new facts come to his/her knowledge, is required to personally, or through the investigators, conduct required investigation of such facts [...] Having investigated newly discovered facts, should any grounds for reopening the case be present, the prosecutor forwards the case to the higher prosecutor who has the competence to file an appropriate application with the cassation court based on newly discovered facts [...] Whenever the prosecutor finds no grounds for reopening a case upon newly discovered facts, he/she issue a decision to that effect and informs thereon the applicants. The decision may be appealed before the higher prosecutor.

2.23 On 23 September 2003, her son submitted to the Supreme Court an application for the review of his conviction¹⁰. The Supreme Court rejected the application on 4 November 2003, finding no grounds for reconsideration of the case.

2.24 The author claims that her son has exhausted all available domestic remedies.

The Complaint

3.1 The author claims that her son is a victim of a violation of his rights under article 7 of the Covenant, as he was subjected to torture and forced to assume responsibility for the crimes he did not commit.

3.2 She submits that her son's rights under article 14, paragraph 1, have been violated, since the court failed to recognize the fact of torture and, by doing so, used her son's confession of guilt extracted under torture as a basis for his conviction. The courts failed to properly evaluate the facts and evidence of the case, distorted witnesses' testimonies and concealed facts that had an exculpatory value or contradicted the arguments of the prosecution. Furthermore, the courts did not consider her son's claims regarding the false testimony of the main witness of the prosecution and tampering with evidence by the investigator, but merely ignored them. The courts violated the principle of impartiality by granting a privileged status to the prosecutor's side, while dismissing the requests of the defence to conduct additional forensic examinations and to add certain procedural documents as evidence to the case file. The author claims that the right guaranteed by article 14 would be rendered totally ineffective in the absence of any safeguards against the fabrication and manipulation of evidence, use of false testimonies and other abuses committed by the prosecution.

3.3 The author further claims that her son's right under article 14, paragraph 2, has been violated, since he was declared as the perpetrator of the crimes in official documentation without his guilt being proven according to law. The court found him guilty of illegal bearing of "cold" weapons and rape without examining these charges during the proceedings.

3.4 She submits that the courts have repeatedly declined her son's request to secure the attendance and the examination of several witnesses that could have confirmed his alibi, in violation of article 14, paragraph 3 (e), of the Covenant.

3.5 Finally, the author claims that her son is a victim of a violation of article 14, paragraph 5, since the General Prosecutor refused to examine his application for reconsideration of his case based on newly discovered facts, and the Supreme Court rejected his motion for the review of his conviction.

¹⁰ Mr. Shchetka claimed that: (1) he was sentenced for rape without this criminal charge being examined by the court; (2) he was deprived of his right to present arguments against the charge of rape; (3) the court found him guilty of rape in the absence of any forensic data that the rape had actually been committed, the court based its conclusion on the assumption that the sexual intercourse (not the rape) could have been possible and on his confession of guilt extracted under torture; (4) the fact that he was found guilty of rape in the absence of any evidence allowed the court to apply article 93 of the Criminal Code and to sentence him to life imprisonment for murder aggravated by rape; (5) the court invented the only aggravating circumstance (alcohol consumption) in order to declare him "extremely dangerous" by distorting the testimony of Mr. B. who stated that he did not drink any alcohol on the day of the crime; (6) the court was biased, partial and acted in an arbitrary manner.

State party's observations on admissibility and merits

4.1 In a note verbale of 6 June 2007, the State submits that Mr. Shchetka's guilt was duly established by evidence, in particular by his confession to the commission of the crimes that was consistent with the testimonies of the victim's relatives and of other witnesses, as well as with the information contained in the crime scene report. Mr. Shchetka described the character and location of the inflicted bodily injuries, which later on had been confirmed by forensic expert examinations. Under the victim's fingernails, minute particles of male skin and hair follicles had been identified, and their provenience from Mr. Shchetka was not excluded. The four scratches on his face and neck could have been produced by the victim's fingernails upon her resistance, and the blood traces on his shirt contained the DNA profile found in the victim's blood sample.

4.2 The State party considers groundless the author's claim that the expert examinations conducted after the judgment confirmed her son's innocence and constitute newly discovered facts, and submits that these facts had been examined during the pre-trial investigation and court proceedings. In particular, the courts thoroughly considered Mr. Shchetka's confession to the commission of the crimes, the reasons for its retraction, the claim of prohibited interrogation methods, as well as the testimonies of the victim's relatives and other witnesses, the conclusion of expert forensic examinations and of other evidence available to the court. The Supreme Court found no violation of the criminal procedure norms that would have justified the reversal of the conviction or the modification of the imposed sentence, and rejected his cassation appeal on 22 February 2001.

4.3 Mr. Shchetka's allegations of physical and psychological pressure by police officers were considered by the court, and the internal investigation confirmed that the police officers had not been involved in inflicting bodily injuries to him. The internal investigation also established that the documents regarding the activity of the police department of Minsk District (the reports on the arrest and custody of persons suspected of crimes, records of detained persons etc.) had been destroyed on 16 February 2005: in accordance with the decree of the Ministry of Interior of 4 June 2002, such documents are retained for a period of five years and thereafter are destroyed.

4.4 The State party also provides a copy of Mr. Shchetka's written explanation dated 5 June 2006 in which he states that he has no claims against the administration of the Kiev remand centre (No. 13) and the Zhitomir penitentiary institution (No. 8). It also appended to its observations a nine-page summary of the criminal procedure provisions regulating the issues raised by the author in the present communication.

Author's comments on the State party's observations

5.1 In her comments of 11 January 2008, the author states that the State party has not refuted any of her claims under the Covenant, but merely reproduced the content of the court judgment and quoted the relevant national legislation. She maintains that the State party provided false information on the violation of her son's rights under article 14, paragraph 5, by claiming that the newly discovered facts had been examined during the pre-trial investigation and court proceedings. In reality, the General Prosecutor did not refute any of the new facts presented by the lawyer, but simply refused to investigate the newly exculpatory facts on grounds that such facts should have been collected in the context of the criminal proceedings. She insists that the prosecutor is required, under the national legislation, to conduct an investigation of the new facts and that the lawyer may collect such new evidence anywhere.

5.2 The author reiterates the claims under the articles 7 and 14 of the Covenant. The allegations of torture are confirmed by indirect evidence (the sequence of events, the absence of the video materials of his interrogation, the absence of legal assistance from the

time of arrest, the refusal of authorities to document torture by a medical examination etc.) and direct evidence (the lawyer's complaints on torture, the conclusions of the linguistics and handwriting examinations etc.). The author recalls that the courts violated her son's right to defence, committed forgery of documents and destroyed exculpatory evidence, in breach of article 14 of the Covenant, while the General Prosecutor misinterpreted the law in order not to investigate the new exculpatory facts in his case, in violation of article 14, paragraph 5. Furthermore, the court sentenced her son to life imprisonment without examining the key criminal charge against him during the court hearings, in breach of article 14, paragraph 2, of the Covenant. The author therefore maintains that her claims are sufficiently substantiated and corroborated by the documentary evidence provided to the Committee.

Additional observations by the State party

6.1 On 16 April 2008, the State party provided to the Committee information from the General Prosecutor's Office and the Ministry of Interior. It states that the author's claim that her son is innocent is refuted by his written confession of guilt addressed to the prosecutor. Moreover, answering the prosecutor's questions, he communicated the details of the crimes he had committed and he made similar statements during his interrogation as a suspect. His allegations of torture were considered by the Supreme Court in cassation proceedings and were not confirmed. His guilt was fully established by the collected evidence which was thoroughly considered by courts.

6.2 The State party also states that on 31 August 2001 the author, Ms. Nataliya Litvin, filed a written motion to the Interior Department of Kiev city, requesting information on the arrest of Mr. Ko. The requested information was provided on 21 October 2001. On 12 December 2005, she requested written explanations as to whether it was possible to detain together in the preliminary detention cell a person with multiple convictions and a person arrested for the first time. Ms. Litvin was invited to the Interior Department, and during the conversation she retracted her request for a written reply.

Additional comments by the author

7.1 In a letter of 25 July 2008, the author reiterates her previous comments that the State party has failed to refute her claims under the Covenant and states that it provided information which is not relevant to the consideration of the communication.

7.2 On 9 July 2009, the author provided the Committee with a copy of her son's application for review of his sentence that he had been regularly addressing to the Supreme Court of Ukraine since 2003, as well as with a copy of the court's reply of 18 March 2009 according to which his complaint was examined and no grounds for the review of the sentence were found.

Further observations by the State party

8. On 3 March 2010, the State party reiterated its previous observations. With regard to the charge of rape, it states that Mr. Shchetka confessed guilt of rape in the presence of a lawyer during the preliminary investigation, and only during the court hearings changed his testimony, accusing the police officers of falsification and use of physical force towards him. These claims have been the object of an investigation conducted by the Prosecutor's Office of Minsk District who found no violations of his rights and therefore refused to initiate criminal proceedings against the police officers on 28 September 2000. Mr. Shchetka had the possibility to appeal against the prosecutor's refusal to the higher prosecutor in accordance with article 99, paragraph 1, of the Ukrainian Code of Criminal Procedure, as well as in court, as prescribed by article 336, paragraph 1, of the said Code.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

9.3 With regard to the requirement of exhaustion of domestic remedies, the Committee notes that according to the information submitted by the author, all available domestic remedies have been exhausted. In the absence of any objection by the State party, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met.

9.4 As to the author's claim that the refusal of the General Prosecutor to reconsider the criminal case of her son based on newly discovered facts after the Supreme Court decided the cassation appeal amounts to a violation of article 14, paragraph 5, of the Covenant, the Committee considers that the scope of article 14, paragraph 5 does not extend to a review of a conviction and sentence based on newly discovered facts once this sentence has become final. Therefore, the Committee considers that the author's claim under article 14, paragraph 5, is incompatible *ratione materiae* with the provisions of the Covenant and declares it inadmissible in accordance with article 3 of the Optional Protocol.

9.5 The Committee also notes that, in addition to the violations claimed by the author, the facts of the present complaint raise issues under article 14, paragraph 3 (g), of the Covenant. Accordingly, the Committee declares the communication admissible with regard to article 7, article 14, paragraph 1, article 14, paragraph 2 and article 14, paragraph 3 (e) and (g) of the Covenant, and proceeds to its consideration on the merits.

Consideration of merits

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

10.2 The Committee notes the author's claim that her son was tortured by police officers and thus forced to confess guilt to the rape and murder of his wife's sister. He retracted his confession during an interrogation conducted by the investigative officer of the Prosecutor's Office with the use of video recording, claiming that he was tortured and coerced to take responsibility for the crimes. However, his allegations were ignored and the respective video materials were subsequently removed from his criminal file. The author provides details on the methods of ill-treatment used and contends that these allegations were raised by her son before the Prosecutor's Office, as well as in court. The Committee observes that Mr. Shchetka's lawyer submitted complaints to the Prosecutor's Office requesting, *inter alia*, for a medical examination and an investigation into his allegations of torture. In this regard, the Committee recalls that once a complaint about treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially¹¹. The Committee takes note of the State party's affirmation that Mr. Shchetka's allegations of

¹¹ See, e.g., Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of torture and cruel treatment or punishment), 1992 (HRI/GEN/1/Rev.8), paragraph 14.

torture were the object of an investigation conducted by the Prosecutor's Office of Minsk District and were also considered by the Supreme Court in cassation proceedings, but were dismissed as groundless. It further notes that the State party provided a written explanation from Mr. Shchetka (see para. 4.4 *supra*) stating that he did not have any claims against the administration of the Kiev remand centre (No. 13) and the Zhitomir penitentiary institution (No. 8). The Committee observes that it is not clear from that explanation whether Mr. Shchetka referred to his detention following the arrest (when he was allegedly tortured) or to his detention following his conviction by the court. Given the fact that the explanation is dated 5 June 2006 and mentions none of the institutions where Mr. Shchetka alleged to have been tortured (the district police department and the temporary detention ward (KPZ-23-GOM), see paras. 2.2 and 2.4 *supra*), the Committee does not consider it relevant in connection with the author's claims under article 7.

10.3 The Committee also notes that Mr. Shchetka was allowed to see his lawyer only after seven days from the date of actual apprehension, when the marks of torture became less visible. It further notes the State party's argument that Mr. Shchetka confessed guilt of rape in the presence of a lawyer. However, the Committee observes that, while the State party has not provided any documentary evidence in support of its argument, Mr. Shchetka's claims are supported by the materials on file, *inter alia* by two complaints submitted to the prosecutor against the abuses committed by the investigative officer. In the absence of a thorough explanation from the State party regarding the investigation into the torture allegations, the reasons for refusing a medical examination of the author's son and the information provided by the author, such as the linguistic and graphologist examinations, the Committee considers that the State party's competent authorities did not give due and adequate consideration to Mr. Shchetka's complaints of torture made both during the pre-trial investigation and in court. In these circumstances, the Committee concludes that the facts before it disclose a violation of Mr. Shchetka's rights under articles 7 and 14, paragraph 3 (g), of the Covenant¹².

10.4 The Committee further notes the author's claim that the court ignored her son's request to call and examine several important witnesses that testified during the preliminary investigation and confirmed, *inter alia*, his alibi and the absence of injuries on his face after the commission of the crimes. The court also declined her son's motions for the conduct of additional forensic examinations. The Committee recalls that, as an application of the principle of equality of arms, the guarantee of article 14, paragraph 3(e) is important for ensuring an effective defence by the accused and their counsel and guaranteeing the accused the same legal power of compelling the attendance of witnesses relevant for the defence and of examining or cross-examining any witnesses as are available to the prosecution¹³. In the present case, the Committee observes that the State party failed to respond to these allegations and to provide any information as to the reasons for refusing to examine the respective witnesses. In the absence of information from the State party in that respect, the Committee concludes that the facts, as reported, amount to a violation of Mr. Shchetka's rights under article 14, paragraph 3(e), of the Covenant.

10.5 The author claims that her son's rights under article 14, paragraph 1, have been violated, as the court has failed to take into account exculpatory facts and evidence, to address the issue of fabrication and tampering with evidence by the investigation, as well as to verify the credibility of the main witness's testimony and, by doing so, it has given an unfair advantage to the prosecution's side. Her son was also referred to as the perpetrator in

¹² See Human Rights Committee General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (article 14), U.N. Doc. CCPR/C/GC/32 (2007), para. 60; communication No. 1401/2005, *Kirpo v. Tajikistan*, Views adopted on 27 October 2009, para. 6.3;

¹³ See Human Rights Committee General Comment No. 32, para. 39.

documents concerning the investigation. The Committee observes that the author's allegations refer primarily to the evaluation of facts and evidence and recalls its jurisprudence according to which it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was manifestly arbitrary or amounted to a denial of justice. In the present case, the Committee notes that the State party has not addressed the substance of the author's respective claims, but merely affirmed, in general terms, that her son's guilt was duly established on the basis of corroborating testimonies and other evidence. Based on the materials on file, and given the Committee's findings of a violation of article 7, and article 14, paragraphs 3(e) and (g), of the Covenant, the Committee is of the view that the consideration of Mr. Shchetka's case by courts did not observe the minimum guarantees of a fair hearing, in violation of article 14, paragraph 1, of the Covenant¹⁴.

10.6 Having reached the above conclusions, the Committee will not examine separately the author's claim under article 14, paragraph 2, 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 State party has violated article 7 and 14, paragraph 3 (g); article 14, paragraphs 1 and 3 (e), of the International Covenant on Civil and Political Rights.

12. Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee considers that the State party is under an obligation to provide Mr. Shchetka with an effective remedy, including: carrying out an impartial, effective and thorough investigation into the allegations of torture and ill-treatment and initiating criminal proceedings against those responsible; considering his retrial in conformity with all guarantees enshrined in the Covenant or his release; and providing the victim with full reparation, including appropriate compensation. The State party is also under an obligation to take steps to prevent similar violations occurring in the future.

13. Bearing in mind that, by becoming a State 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 and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested 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.]

¹⁴ See, e.g., communication No. 1519/2006, *Khostikoev v. Tajikistan*, Views adopted on 22 October 2009, para. 7.3.

Appendix

Individual opinion of Committee member, Mr. Fabián Salvioli

1. I concur with the decision on Communication No. 1535/2006, Viktor Shchetka v. Ukraine, as I fully share the Committee's reasoning and conclusions. However, I would like to add some comments on an issue which, I believe, deserves fuller treatment in the future jurisprudence of the Human Rights Committee. That issue has to do with the idea of "cross-fertilization" in the resolution of personal cases like the present one and the impact that this can have in terms of the reparations recommended by the Committee.
2. The present case of Shchetka v. Ukraine reveals extremely serious failings and omissions by the State in investigating the victim's allegations of torture and punishing those responsible. These faults were deemed by the Committee to constitute a violation, *inter alia*, of article 7 of the International Covenant on Civil and Political Rights.
3. When expressing its Views on individual communications, the Committee usually indicates, as it has done here, that the State should ensure that similar violations do not occur in the future. Paragraph 12 of its Views on this case is not, however, sufficient to achieve this; in order to ensure that violations do not recur, it is necessary to state what specific steps need to be taken.
4. For this purpose, the Committee can, and should, draw on the findings of other international or regional human rights bodies, as appropriate. In this regard, the observations made to Ukraine in 2007¹ by the United Nations Committee against Torture referred unequivocally to specific measures for the prevention of torture. These measures included, firstly, the establishment by the State of an effective and independent oversight mechanism to guarantee prompt, impartial and effective investigations into all complaints of torture and ill-treatment during criminal investigations and, secondly, the adoption of all appropriate measures to eliminate any adverse effects that the current investigation system for promoting confessions might have on the treatment of suspects. The Committee against Torture also called upon Ukraine to take the necessary measures to establish that statements which had been made under torture would not be invoked as evidence in any proceedings.²
5. The prohibition of torture is absolute. This is a norm of international public law (*jus cogens*) and as such has garnered unanimous support in international human rights jurisprudence. The Human Rights Committee's mandate and duty are to apply the International Covenant on Civil and Political Rights. To fulfil its mandate effectively, the Committee should apply the principle of useful effect. In this case, the Committee, taking a pro persona approach to protecting the victim's rights and reinforcing its decision by correctly applying the logic of "communicating vessels" (cross-fertilization), should have enjoined Ukraine to make specific reparations to guarantee the non-recurrence of such violations, by, for example, establishing an independent and effective mechanism for investigating complaints of torture or ill-treatment and making the filming of interrogations mandatory.

(Signed) Fabián Omar Salvioli

¹ CAT/C/UKR/CO/5, 3 August 2007.

² Ibid., paras. 10 and 11.

[Done in English, French and Spanish, the Spanish 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.]
