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Communication No. 1856/2008

Views adopted by the Committee at its 109th session (14 October – 1 November 2013)

<i>Submitted by:</i>	Sergei Semenovich Sevostyanov (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	28 November 2006 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 29 December 2008 (not issued in a document form)
<i>Date of adoption of Views:</i>	1 November 2013
<i>Subject matter:</i>	Arbitrary detention; fair trial
<i>Substantive issues:</i>	Arbitrary detention and the right to challenge detention in court; equality before the courts; presumption of innocence; examination of witnesses; conviction and sentence being reviewed by a higher tribunal
<i>Procedural issues:</i>	Exhaustion of domestic remedies; level of substantiation of a claim.
<i>Articles of the Covenant:</i>	article 9, paragraphs 1 and 4; article 14, paragraphs 1, 2, 3 (e) and 5
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b).
	[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 (109th session)

concerning

Communication No. 1856/2008*

Submitted by: Sergei Semenovich Sevostyanov (not represented by counsel)

Alleged victim: The author

State party: Russian Federation

Date of communication: 28 November 2006 (initial submission)

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

Meeting on 1 November 2013,

Having concluded its consideration of communication No. 1856/2008, submitted to the Human Rights Committee by Sergei Semenovich Sevostyanov 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 Sergei Semenovich Sevostyanov, a Russian Federation citizen, born in 1960 and currently imprisoned in the Russian Federation. He claims to be a victim of violations by the State party of his rights under article 9, paragraphs 1 and 4; and article 14, paragraphs 1, 2, 3 (e) and 5 of the International Covenant on Civil and Political Rights.¹ The author is represented by his wife, Mrs. Sevostyanova.

Factual background

2.1 On 25 September 2004, the author, along with his wife, was working on his garden-plot when a neighbour, one Mikitenko, came and asked the author to accompany him to a neighbouring garden-plot. There had been multiple thefts and robberies in the surrounding

* The following Committee members participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Yuji Iwasawa, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Mr. Lazhari Bouzid, Mr. Walter Kaelin, Mr. Cornelis Flinterman, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Victor Manuel Rodríguez-Rescia, Ms. Anja Seibert-Fohr and Ms. Margo Waterval.

¹ The Optional Protocol entered into force for the Russian Federation on 1 January 1992.

summer houses and Mikitenko stated that the perpetrators were hiding at that neighbouring garden-plot. Mikitenko was holding a pack from which a wooden object similar to a handle of an axe could be seen. When the author and Mikitenko approached the neighbouring garden-plot in question, Mikitenko told the author to wait for him outside, behind the fence, and entered the house on his own. Several minutes later the author heard the sound of shooting from inside the house and decided to enter. At the doorstep of the house he bumped into Mikitenko who told him that the two of them should immediately leave. The author looked inside the house and saw two young men, one of whom had a bleeding jaw. The author returned to his garden-plot. Shortly thereafter, Mikitenko passed by the author's garden-plot again and told him that he had injured one of the young men and was on his way to call an ambulance.

2.2 The same day, the author was taken to a police station by officers of the Ust-Ilimsk Department of Internal Affairs to give evidence as a witness of the incident and was then released. Mikitenko was taken to the same police station and subsequently arrested on the suspicion of having committed the murder of one Zagrebin.

2.3 On 27 September 2004, the author was again taken to the police station by officers of the Ust-Ilimsk Department of Internal Affairs. While he was waiting in one of the rooms of the police station, officers present in the same room told him with a smile that his 'family tradition was to kill people'.² At a later stage, the head of the criminal investigation department entered the room and dropped in passing that a witness will recognise him. Then the author was transferred to another room where an investigator from the prosecutor's office announced that they will identify the murderer. The author was then presented, along with two other men (Mikitenko was not among them), for identification as Zagrebin's murderer to an eyewitness of the crime, one Bekreev (the second young man who was inside the house situated on the neighbouring garden-plot on 25 September 2004). Two witnesses were present at the identification procedure. The investigator asked whether the witness knew any of the men presented to him and the latter pointed in the author's direction. The investigator then asked whether the author was the one who had a rifle, but the witness replied that he did not know. The investigator asked the same question many times, and eventually the witness hesitantly acknowledged that it was the author who had a rifle. At the end of the identification procedure, the father of the witness, a former police officer, asked the investigator whether he and his son had done everything correctly. The investigator made a sign in the author's direction and took the witness and his father out of the room. The same day, the author orally motioned the investigator to request expert fingerprint and ballistics (gunpowder residue) examination that would prove that he had never been in possession of the murder weapon. This and all subsequent oral motions on the same matter were rejected by the investigator.

2.4 The author was kept in detention until the end of the trial. He claims that from 25 December 2004 to 12 January 2005, he was kept in custody on the basis of a phone call instruction from the investigator.

² The author submits that, on 23 November 2003, while acting in self-defence, the author's son had killed the Deputy Head of the Ust-Ilimsk Department on the Fight against Organized Crime, one Peshkov. The author maintains that, being heavily intoxicated, Peshkov had opened fire on the unarmed author's son and his son's friend (who was twice wounded by Peshkov). The author's son was convicted under article 317 of the Criminal Code (killing of a police officer in discharge of professional duty) and sentenced to long-term imprisonment. The author claims that 'an order' to tamper with his criminal case was given to Chelmodeev in revenge by Peshkov's direct supervisor, the Head of the Ust-Ilimsk Department on the Fight against Organized Crime, one Knyazev.

2.5 The author further submits that in the course of the pre-trial investigation, he and his lawyer requested a confrontation between Bekreev and Mikitenko but this investigative action did not take place. On an unspecified date, a confrontation between Bekreev and the author took place; Bekreev took a piece of paper out of his pocket and read word for word what was written on it, stating that Zagrebin's fatal wound was inflicted by the author. He further stated that on the day in question the author was wearing a camouflage suit, whereas numerous other witnesses, including Mikitenko, testified that on that day the author was wearing a tracksuit.

2.6 On 31 May 2005, the author was convicted pursuant to article 105, paragraph 1, of the Criminal Code for the premeditated murder of Zagrebin by the Ust-Ilimsk City Court and sentenced to ten years' imprisonment in a high security prison. In the course of the court hearing, both identifying witnesses,³ who were present during the identification procedure of 27 September 2004, testified that the investigator had exercised pressure on Bekreev to identify the author. Mikitenko testified in court that he was wrestling with Zagrebin over a rifle when a shot occurred and Zagrebin received his fatal wound. The court, however, concluded that Mikitenko's self-implication in Zagrebin's murder was not trustworthy.⁴

2.7 On 6 June 2005, the author appealed the judgment of the Ust-Ilimsk City Court to the Judicial Chamber for Criminal Cases of the Irkutsk Regional Court. In his cassation appeal the author submitted that the first instance court did not take into account crucial evidence. On 3 November 2005, the Judicial Chamber for Criminal Cases of the Irkutsk Regional Court upheld the judgement of the Ust-Ilimsk City Court.⁵

2.8 On an unspecified date, the author filed a request for a supervisory review to the Presidium of the Irkutsk Regional Court. In this request, he, *inter alia*, challenged the fact that the cassation instance court disregarded a written statement from Bekreev of 10 August 2005 addressed to the Ust-Ilimsk Inter-District Prosecutor, in which he admitted that he had been pressured by investigators to lay the blame for Zagrebin's death on the author. In the same written statement Bekreev stated that Zagrebin was killed by Mikitenko, who was the first to enter the house. On 28 February 2006, a judge of the Irkutsk Regional Court rejected the author's request to initiate a supervisory review procedure.

³ See para 2.3 *supra*.

⁴ The investigation against Mikitenko had been discontinued after Bekreev identified the author as perpetrator of the murder.

⁵ In as far as relevant, the judgment of the Judicial Chamber for Criminal Cases of the Irkutsk Regional Court of 3 November 2005 [on file] reads as follows. "The author's counsel states in his cassation appeal that witness Bekreev was pressured during the identification, which was confirmed by Dzyuvina and Makhmudova. He also states that witness Mikitenko, who claimed that he was involved in the crime, knew the consequences of giving false testimony. [...] The [Regional] Court considers the author's contention that eye-witness Bekreev gave false testimony unsubstantiated. The [City] court's conclusion that there is no reason to distrust Bekreev's testimony is based on the material of the case. It follows therefrom that the [City] court sufficiently examined and rightly established the facts of the crime committed by Sevostyanov [the author] as well as the motives thereof. The claim that Sevostyanov was not involved in Zagrebin's murder lacks substantiation as the material on file proves, with no doubt, that Sevostyanov entered Ignatov's house and, acting intentionally and out of revenge, shot Zagrebin in the face, which caused acute blood loss and his subsequent death. The Judicial Chamber considers that the [City] court's conclusions as to Sevostyanov's guilt are accurate and agrees to the court's qualification of the crime under article 105, paragraph 1, of the Criminal Code." [Unofficial translation]

2.9 On an unspecified date, the author appealed the decision of Irkutsk Regional Court of 28 February 2006 to the Presidium of the same court. The appeal was rejected by the Acting Chairperson of the Irkutsk Regional Court on 20 June 2006.

2.10 On 12 March 2007, the author submitted a request for a review in the order of supervision to the Supreme Court on the basis of Bekreev's written statement of 10 August 2005, which, according to the author, constituted 'newly-discovered evidence'.⁶ On 23 April 2007, the Supreme Court rejected the author's request. On an unspecified date, the author challenged this decision in the Presidium of the Supreme Court. The author's complaint was rejected by the Presidium of the Supreme Court on 28 January 2008.

2.11 On unspecified dates, the author submitted further requests for review in order of supervision to the Irkutsk Regional Prosecutor's Office and to the General Prosecutor's Office. In its replies dated 16 February 2007, 9 March 2007 and 18 May 2007, the Irkutsk Regional Prosecutor's Office responded that there were no grounds to initiate a supervisory

⁶ Article 413. Of the Criminal Procedure Code regulates what is considered new evidence: Article 413 reads: Grounds for Resumption of the Proceedings on a Criminal Case Because of New or Newly Revealed Circumstances

1. The court sentence, ruling or resolution, which has come into legal force, may be cancelled and the proceedings on a criminal case may be resumed because of new or newly revealed circumstances.
2. Seen as the grounds for the resumption of the proceedings on a criminal case, in accordance with the procedure established by the present Chapter, shall be:
 - 1) newly revealed circumstances - the circumstances, pointed out in the third part of this Article, which existed at the moment of the entry into legal force of the sentence or other judicial decision, but were unknown to the court;
 - 2) new circumstances - the circumstances, indicated in the fourth part of this Article, unknown to the court at the moment when it passed the judicial decision, which eliminate the criminality and the punishability of the act.
3. Seen as the newly revealed circumstances shall be:
 - 1) a deliberate falsity of the evidence of the victim or of the witness, or of the expert's conclusion, as well as the forgery of the demonstrative proof, of the protocols of the investigative and the judicial actions and of other documents, or a deliberate erroneousness of the translation, which have entailed the passing of an unlawful, unsubstantiated or unjust sentence or of an unsubstantiated ruling or resolution;
 - 2) the criminal actions of the inquirer, the investigator or the public prosecutor, which have entailed the adjudgement of an unlawful, unsubstantiated or unjust sentence, or of an unlawful or unsubstantiated ruling or resolution;
 - 3) the criminal actions of the judge which he has committed during the examination of the criminal case, established by the court sentence that has entered into legal force.
4. Seen as new circumstances shall be:
 - 1) recognizing by the Constitutional Court of the Russian Federation of the law, applied by the court in the given criminal case, as not corresponding to the **Constitution** of the Russian Federation;
 - 2) a violation of the provisions of the **Convention** on the Protection of Human Rights and Basic Freedoms, established by the European Court on Human Rights, during the examination of the criminal case by a court of the Russian Federation, involved in:
 - a) an application of the federal law, not corresponding to the provisions of the Convention on the Protection of Human Rights and Basic Freedoms;
 - b) other violations of the Convention on the Protection of Human Rights and Basic Freedoms;
 - 3) other new circumstances.
5. The circumstances, indicated in the third part of this Article, may be established, in addition to the sentence, by a ruling or a resolution of the court, by a resolution of the investigator or of the inquirer on the termination of the criminal case on account of an expiry of the term of legal limitation, of an act of amnesty or an act of mercy, in connection with the death of the accused or on account of the person not reaching the age, from when the criminal liability sets in. [Unofficial translation]

review procedure in his case. The General Prosecutor's Office also rejected the author's requests on 16 August 2007 and 7 December 2007.

The complaint

3. The author claims that his arrest and trial give rise to violations of article 9, paragraphs 1 and 4; and article 14, paragraphs 1, 2, 3 (e) and 5, of the Covenant.

State party's observations on admissibility and merits

4.1 On 9 June 2009, the State party submits that on 25 September 2004, the author and Mikitenko agreed to find and punish persons who, according to them were committing thefts from summer houses in the area. They entered one summer house, where they found two unknown adolescents and the author shot with a hunting rifle one of them in the face, which resulted in the adolescent's death. On the same date the police arrested Mikitenko. On 27 September 2004, in accordance with article 91 of the Criminal Procedure Code the police arrested the author, because the second adolescent (Bekreev) had testified that the author had committed the murder. On 29 September 2004, the Deputy of the Ust-Ilimsk Prosecutor filed a motion to the Ust-Ilimsk City Court to order the author's detention on remand. The court postponed the decision, but extended the author's detention by 72 hours, till 2 October 2004. On 2 October 2004, the Ust-Ilimsk City Court ordered the author's detention on remand on suspicion of having committed a murder. On 5 October 2004, the author was charged under article 105, part 1 of the Criminal Code (premeditated murder). On 26 November 2004, the author's detention was extended upon a motion of the Deputy of the Ust-Ilimsk Prosecutor till 25 December 2004 by the Ust-Ilimsk City Court. On 22 December 2004, the author and his defence attorney were informed that the preliminary investigation was finalised and on 24 December 2004 they were presented with the evidence. On 25 December 2004, the Deputy prosecutor approved the indictment against the author.

4.2 The State party submits that, on 12 January 2005, the author and his attorney were given the indictment and neither made any objections or filed any complaints then or during court proceedings.

4.3 The State party submits that, on 25 December 2004, the author's criminal case was sent to the Ust-Ilimsk City Court, which received it on 21 January 2005, and, on 31 January 2005, extended the author's detention and scheduled a preliminary hearing for 7 February 2005. On 7 February 2005, the author's detention was again extended by the court. The author's lawyer appealed on cassation only the 2 October 2004 order for the author's detention. The Judicial College on Criminal Cases of the Irkutsk District Court rejected that appeal on 9 November 2004. Nor the author, neither his lawyer appealed the 26 November 2004 decision to extend his detention. The State party maintains that the author's allegations that his rights under article 9 of the Covenant had been violated are unfounded, because he was detained in accordance with the domestic criminal procedure and could have appealed his detention before the court.

4.4 The State party further submits that, on 31 May 2005, the Ust-Ilimsk City Court convicted the author of premeditated murder under article 105, part 1 of the Criminal Code. In determining the length of his sentence the court took into consideration the duration of his detention between 27 September 2004 and 31 May 2005. On 3 November 2005, the Judicial College on Criminal Cases of the Irkutsk District Court rejected the author's appeal against the verdict. The State party submits that the author had appealed his conviction on multiple occasions as well as filed complaints regarding irregular acts of the investigators, prosecution and the court. The State party maintains that the author's complaints had been investigated and rejected.

4.5 The State party submits that the declaration of Bekreev, made on 4 August 2005, that he wrongly identified the author as the murderer, was made after the first instance verdict and therefore could not be taken into consideration by the cassation court.⁷ Another declaration of Bekreev that he wrongly accused the author was also investigated by the Investigation Department of Ust - Ilimsk Prosecutor's Office, which on 9 January 2008 issued a ruling refusing to open a criminal investigation, since it did not find indication that any crime had been committed. A subsequent complaint by the author, which included an identical declaration by Bekreev, was investigated in accordance with articles 144 and 145 of the Criminal Procedure Code.⁸ On 8 December 2008, the Ust-Ilimsk Prosecutor's Office

⁷ The State party does not explain why the cassation court could not take into consideration Bekreev's declaration, but from the Criminal Procedure Code it appears that the cassation court is limited to checking the legality, the substantiation and the justness of the sentence, as pronounced by the first instance court, but does not hear new evidence.

Article 360 reads:

Limits of an Examination of a Criminal Case by a Court of the Appeals or Cassation Instance

1. The court examining a criminal case in accordance with either the appeals or the cassation procedure, shall check the legality, the substantiation and the justness of the sentence and of another judicial decision.

2. The court examining a criminal case in accordance with either the appellate or the cassation procedure, shall only check up the legality, the substantiation and the justness of the sentence in the part in which it is appealed against. If in the course of trying a criminal case there are established circumstances which concern the interests of other persons convicted or acquitted in the same criminal case and in respect of which an appeal or presentation have not been filed, the criminal case has to be likewise checked in respect of these persons. With this, the deterioration of their position shall not be allowable. [...]

See also Articles 373 and Article 380

Article 373. Object of the Judicial Proceedings in a Court of the Cassation Instance

A court of the cassation instance shall verify the legality, the substantiation and the justness of the sentence and of the other court decision by the cassational appeals and presentations.

Article 380. Non-Correspondence Between the Conclusions of the Court, Expounded in the Sentence, and the Factual Circumstances of the Criminal Case

The sentence is recognized as not corresponding to the factual circumstances of the criminal case, established by the court of the first or of the appeals instance, if:

- 1) the court conclusions are not confirmed by the proof, examined in the court session;
- 2) the court has not taken into account the circumstances which could have exerted an essential impact on the court conclusions;
- 3) in the face of the existence of contradictory proof of essential importance for the court conclusions, it is not indicated in the sentence on what grounds the court has accepted some of them while rejecting the other;
- 4) the court conclusions, expounded in the sentence, contain essential contradictions, which have exerted or could have exerted an impact on the resolution of the question of the guilt or the innocence of the convict or of the acquitted person, on the correctness of the application of the criminal law or on determining the measure of punishment. [Unofficial translation]

⁸ The relevant parts of articles 144 and 145 read:

Article 144. Procedure for Considering the Communication on a Crime

1. An inquirer, inquiry body, investigator, and the head of an investigative body must accept and check information about any crime committed or being prepared and shall, within the competence established by this Code, take a decision on it within three days from the day when such information is received. When checking certain information about a crime, an inquirer, inquiry body, investigator, the head of an investigative body may demand the conduct of documentary checks, audits, examinations of documents, objects, corpses and attract specialists to participation in such checks, audits and examinations, as well as to give instructions in writing on taking operative search measures to an inquiry body to be followed without fail. [...]

refused to initiate criminal prosecution against the investigator, because it did not find that any crime had been committed. The Irkutsk District Prosecutor's office confirmed that decision. The author did not appeal the decision of the Irkutsk District Prosecutor before the court.

4.6 The State party further maintains that the court ensured equality of arms during the trial, that all witnesses requested by the prosecution and the defence were summoned and questioned and that the defence arguments that Mikitenko had committed the murder had been investigated by the court but could not be confirmed because they contradicted other evidence. The State party describes in detail the pre-trial investigation against the author. In particular the State party notes that the author's defence attorney requested the exclusion from evidence of the protocol for the identification of the author by the main witness, but the court rejected that motion by rulings, dated 2 and 28 March 2005.

4.7 The State party submits that the author submitted requests for review in the order of supervision of the verdict and the decision of the cassation court against him twice to the Irkutsk District Court and twice to the Supreme Court. The verdict and decisions were reviewed and the appeals had been rejected respectively on 28 February 2006, 20 June 2006, 23 April 2007 and 28 January 2008. The State party maintains that no violation of the rights of the author under the Covenant has taken place.

Author's comments on the State party's observations

5.1 On 30 July 2009, the author submits that: the author's lawyer during the trial requested that the protocol for the identification of the author by the main witness be excluded from the evidence, but that the court rejected his motion; that the witnesses of the identification had testified in court that the investigator was putting pressure on the main witness to identify the author as the murderer, but that the court chose to interpret their

4. The applicant shall be issued a document about accepting the communication on a crime with the information on the person who has accepted it and with an indication of the date and the hour of its acceptance.

5. Refusal to accept the communication on a crime may be appealed against with the public prosecutor or with the court in the procedure established by Articles 124 and 125 of the present Code.

6. An application of a victim or his legal representative on criminal cases of private accusation submitted to a court shall be considered by a judge in accordance with Article 318 of this Code. In the cases stipulated by Part four of Article 147 of this Code, and the communication about the crime shall be verified in accordance with the rules established by this Article.

Article 145. Decisions Taken on the Results of Considering the Communication on a Crime

1. On the results of considering the communication on a crime, the body of inquiry, the inquirer, the investigator, the head of an investigatory agency shall take one of the following decisions:

1) on the institution of a criminal case in accordance with the procedure established by Article 146 of the present Code;

2) on the refusal of the institution of a criminal case;

3) on handing over the communication in accordance with the jurisdiction in conformity with Article 151 of the present Code, and as concerns criminal cases of the private prosecution - to the court, in conformity with the second part of Article 20 of the present Code. [Unofficial translation]

The applicant shall be informed about the adopted decision. He shall also be explained his right to appeal against the given decision and the procedure for filing an appeal. [...]

Article 24. of the Criminal Procedure Code reads:

Grounds for Refusal to Institute a Criminal Case or to Terminate a Criminal Case

1. A criminal case cannot be instituted, and or instituted criminal case shall be subject to termination on the following grounds:

1) absence of the event of a crime;

2) absence of the *corpus delicti* in the act; [...] [Unofficial translation]

evidence in favour of the prosecution; that the author did not have a lawyer during the identification procedure; that Mikitenko was not presented to the main witness together with the author for identification; that the State party argued that the author had failed to file certain appeals, but that was because the author was not familiar with the criminal procedure and his lawyer was incompetent;⁹ that the court failed to take into consideration the testimony of one witness who declared that she saw the author standing outside the fence at the moment of the murder; that the State party claimed that the main witness was underage and was accompanied by his father for that reason, but did not mention that the father was a former police officer and wanted to help his colleagues. The author further stresses that the main witness Bekreek had written several declarations, admitting that he falsely implicated the author as perpetrator of the crime, but that the Ust-Ilimsk Prosecutor's office did not conduct a proper investigation.

5.2 On 30 December 2009, the author submits that he addressed another complaint to the Prosecutor's office, enclosing Bekreev's declarations of false testimony and that his complaint was rejected again.¹⁰

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 it 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 matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility his claims under articles 9, paragraph 1, and 14, paragraph 5, of the Covenant and therefore proceeds to their examination on the merits.

6.4 The Committee notes the author's allegations that the criminal charges against him were fabricated by the investigation in revenge for the killing of a police officer by the author's son. The Committee, however, observes that the author's claims under article 14 of the Covenant relate exclusively to the evaluation of facts and evidence by the State party's courts. It recalls that it is generally for the courts of States parties to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice¹¹. The material before the Committee does not contain enough elements to demonstrate that the court proceedings suffered from such defects. Accordingly, the Committee considers that the author has failed to substantiate his claims under articles 9, paragraph 4, and 14, paragraphs 1, 2, 3 (e), of the Covenant and thus declares them inadmissible under article 2 of the Optional Protocol.

⁹ The lawyer was privately retained by the author.

¹⁰ The author submits a copy of the response of the Irkutsk District Prosecutor's office, dated 15 October 2009, which states that they had already investigated an identical complaint and on 8 December 2008 issued a decision not to open a criminal investigation since no crime was committed.

¹¹ See, inter alia, Communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, paragraph 6.2.

Consideration of the merits

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

7.2 The Committee observes that article 9, paragraph 1 of the Covenant recognises for everyone the right to liberty and the security of his person and that no-one may be subjected to arbitrary arrest or detention. The article, however, provides for certain permissible limitations on this right, by way of detention, where the grounds and the procedures for doing so are established by law. The Committee notes the author's allegation that from 25 December 2004 to 12 January 2005, he was kept in custody arbitrarily on the basis of a phone call instruction from the investigator. The Committee also takes note of the State party's submission that neither the author, nor his lawyer had appealed the 26 November 2004 decision for his detention. The Committee, however, observes that the above decision according to the State party's submission extended the author's detention until 25 December 2004 and that the next decision of the court to extend the author's detention was not taken by the court until 31 January 2005. The Committee finds that, in the absence of a court decision for his detention, the author was detained arbitrarily for that period in violation of his rights under article 9, paragraph 1 of the Covenant.

7.3 The Committee notes the author's allegation that the appellate instance court did not conduct a full review of the criminal case against him, in violation of article 14, paragraph 5, of the Covenant, since it did not take into account a written statement from Bekreev of 10 August 2005, in which he admitted that he laid the blame for Zagrebin's death on the author, because he had been pressured by the investigator and that the actual killer was Mikitenko. The Committee also notes the State party's submission that the appellate court, in accordance with the criminal procedural law, could not take into consideration the above declaration, because it was made after the first instance court had issued the verdict. The Committee observes that under article 14, paragraph 5 of the Covenant, a higher tribunal must review the conviction and sentence, but need not proceed to a factual retrial. However, this provision imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case. A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant.¹² The Committee notes that in the present case the appellate court (see para 2.7 *supra*), despite the limitations imposed on it by procedural law with regard to the examination of facts, not only considered the grounds for cassation, submitted by the author in his appeal, in general but also examined the evidence reviewed by the first instance court, upheld, in particular, that court's conclusion that there was no reason to distrust Bekreev's initial testimony, and concluded that the conclusions of the contested judgment regarding the facts of the case and the guilt of the author were well reasoned. In the light of the circumstances of the case, the Committee is of the view that the facts before it do not reveal any violation of article 14, paragraph 5, 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 violations of the author's rights under article 9, paragraph 1 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, which should include

¹² See the Committee's General comment No 32 at para 48.

adequate and appropriate compensation. The State party is under an obligation to avoid 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 a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

[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.]
