



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 1861/2009

#### Views adopted by the Committee at its 107th session (11–28 March 2013)

<i>Submitted by:</i>	Sergei Bakurov (represented by his wife, Lyudmila Bakurova)
<i>Alleged victim:</i>	The author
<i>State Party:</i>	Russian Federation
<i>Date of communication:</i>	22 September 2008 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 29 January 2009 (not issued in document form)
<i>Date of adoption of Views:</i>	25 March 2013
<i>Subject matter:</i>	Unavailability of a jury trial and commutation of the death sentence to life imprisonment
<i>Procedural issues:</i>	Exhaustion of domestic remedies; level of substantiation of claims
<i>Substantive issues:</i>	Right to effective remedy; right to life; prohibition of torture, cruel or inhuman and degrading treatment or punishment; right to a fair hearing by an independent and impartial tribunal; adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; right to legal assistance; right not to be compelled to testify against himself or to confess guilt; retroactive application of a criminal law providing for a lighter penalty; prohibition of discrimination
<i>Articles of the Covenant:</i>	2; 6; 7; 14; 15; and 26
<i>Articles of the Optional Protocol:</i>	2; 5, para. 2 (b)

## 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 (107th session)**

concerning

#### **Communication No. 1861/2009\***

*Submitted by:* Sergei Bakurov (represented by his wife, Lyudmila Bakurova)

*Alleged victim:* The author

*State Party:* Russian Federation

*Date of communication:* 22 September 2008 (initial submission)

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

*Meeting on 25 March 2013,*

*Having concluded* its consideration of communication No. 1861/2009, submitted to the Human Rights Committee by Mr. Sergei Bakurov 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. Sergei Bakurov, a Russian national born in 1971, currently servicing a life sentence in the Russian Federation. He claims to be a victim of a violation by the Russian Federation<sup>1</sup> of his rights under articles 2; 6; 7; 14; 15; and 26, of the Covenant. He is represented by his wife, Ms. Lyudmila Bakurova.

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

2.1 On 22 August 1997, the Krasnoyarsk Regional Court, sitting in a composition of one professional judge and two lay judges, sentenced the author to death with the seizure of property. The author claims that he was not tried by a competent tribunal, as he was

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\* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla Mr. Cornelis Flinterman, Mr. Yuji Iwasawa Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

<sup>1</sup> The Optional Protocol entered into force for the State party on 1 January 1992.

deprived of the right, guaranteed under articles 20 and 47 of the Russian Constitution, and article 6 of the Covenant, to have his case examined by a jury.

2.2 Pending the establishment of a jury system in the Russian Federation, the Act on Making Changes and Amendments to the Law of the Russian Soviet Federative Socialist Republic (RSFSR) on the RSFSR judicial system, the RSFSR Code of Criminal Procedure, the RSFSR Criminal Code and the RSFSR Code on Administrative Offences was adopted on 16 July 1993. Paragraph 7, section II, of the Act added a new section 10 to the RSFSR Code of Criminal Procedure "On jury trial". Under paragraph 2 of the decision of the Supreme Council (Parliament) also adopted on 16 July 1993, jury trials were first to be introduced only in five regions of the Russian Federation (Stavropol, Ivanovo, Moscow, Ryazan and Saratov) as of 1 November 1993, and in four other regions (Altai, Krasnodar, Ulyanovsk and Rostov) as of 1 January 1994. This situation remained unchanged by 22 August 1997, when the author's death sentence was handed down. In this regard, the author claims that the unavailability of jury trials in the Krasnoyarsk region at the time of his trial constitutes a violation of article 19 of the Constitution and articles 2, 14 and 26, of the Covenant.

2.3 On 10 June 1998, the author's sentence was upheld by the Supreme Court. The author claims that, although he had not invoked a violation of constitutional provisions in his cassation appeal owing to his ignorance of the law, the Supreme Court was obliged to notice these violations and to quash his sentence.

2.4 On 3 June 1999, the author was pardoned by presidential decree and his death sentence was commuted to life imprisonment. He claims that this was done in violation of article 118 of the Constitution (which establishes that administration of justice in the Russian Federation is carried out only by courts), article 54 of the Constitution<sup>2</sup> and article 15 of the Covenant, since the 1961 Criminal Code of the RSFSR in force at the time of commission of the crime (July 1994) did not provide for life imprisonment as form of punishment, the maximum imprisonment for the crime he committed being 15 years or the death penalty.

2.5 Upon the request of the Moscow City Court, and on the basis of the complaints of three prisoners, the Russian Constitutional Court examined the constitutionality of paragraphs 1 and 2 of the resolution of 16 July 1993. On 2 February 1999, the Constitutional Court found that part of paragraph 1 of the resolution (which provided for the realization of a right, afforded to all persons accused of an offence for which the death penalty was prescribed, to have their cases examined by a jury initially only in nine regions and not on the entire territory of the Russian Federation) was contrary to articles 19, 20 and 46 of the Constitution. The Court held that paragraph 1 of the decision of 16 July 1993 could no longer be used as a ground for refusing the petition of an accused person liable to the death penalty to have his case examined by a jury. Such individuals should be afforded the possibility to have their case examined by a jury. Between the Constitutional Court's decision of 2 February 1999 and the entry into force of a federal law providing for such a right to trial by a jury, the death penalty could not be imposed by a court of any composition (jury, three professional judges or one professional judge and two lay judges). The author claims that the competent court was obliged to bring his sentence into compliance with the Constitutional Court's decision of 2 February 1999. This was not

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<sup>2</sup> Article 54 (retroactive laws) reads: (1) The law instituting or aggravating the liability of a person has no retroactive force; (2) No one may be held liable for an action which was not recognized as an offense at the time of its commitment. If liability for an offence has been lifted or mitigated after its perpetration, the new law applies.

done, however, and he did not petition the court to initiate a review procedure because of his ignorance of the law.

2.6 In early 2006, the author learned about the decision of the Zlatoust City Court of the Chelyabinsk region of 28 January 2001 whereby the death sentence of another prisoner “was brought into compliance with the Constitutional Court’s decision of 2 February 1999”. The author was told that the latter decision was a precedent that he could use in order to petition a competent court concerning his case. On an unspecified date, the author filed such a petition to the Sol-Iletsk District Court of the Orenburg region which rejected his petition on 28 June 2006 for lack of jurisdiction, explaining that the matter fell under the jurisdiction of the Presidium of the Supreme Court. The author claims that this decision violated his rights under articles 2, 14 and 26 of the Covenant, as this court was at the same level in the hierarchy of courts as the Zlatoust City Court of the Chelyabinsk Region and it should be deemed to have the same authority as the latter to bring his sentence into compliance with the Constitutional Court’s decision of 2 February 1999. On an unspecified date, the author filed a petition with the Presidium of the Supreme Court, who rejected it on 7 August 2007.

### **The complaint**

3.1 The author claims that the above facts constitute violations by the State party of his rights under articles 6, 7 and 15, of the Covenant.

3.2 He further claims that the decisions of the Supreme Court (7 August 2007) and the Krasnoyarsk Regional Court (22 August 1997) indicating that the consideration of death penalty cases by a jury had not been introduced in the Krasnoyarsk region, whereas such cases were being examined by a jury in nine other regions of the Russian Federation, violated his rights under articles 2, 14 and 26, of the Covenant.

### **State party’s observations on admissibility and merits**

4.1 By note verbale of 17 April 2009, the State party submitted that the decisions adopted in the author’s case were in compliance with its international obligations and domestic legislation, and that his allegations are unfounded. The author was sentenced to death on 22 August 1997 by the Krasnoyarsk Regional Court. His case was considered by a court composed of one professional judge and two lay judges. With regard to the author’s claim that his case should have been considered by a jury, the State party refers to section 2 “Final and Transitional Provisions”, part 6, of the Constitution. According to these provisions, until the entry into force of the federal law setting out the procedure for the examination of cases by a jury, the previous procedure of examination of that category of cases by courts is preserved. At the time of examination of the author’s criminal case, the trial by a jury had not been introduced in the Krasnoyarsk Region. Therefore, his case was considered by a competent, independent and impartial tribunal established by law.

4.2 The State party submits that the author’s reference to decision No. 3-P of the Constitutional Court of 2 February 1999 is also unfounded. According to this decision, no accused could be sentenced to death independently of whether his case had been examined by a jury or by a panel of three professional judges or by one professional judge and two lay judges from the moment of its entry into force (2 February 1999) and until such time as the application throughout the Russian Federation of the federal law providing to any accused of a crime for which the federal law establishes death penalty as an exceptional punishment the right to have his case examined by a court with the participation of a jury. However, the author was convicted before the entry into force of this decision.

4.3 The State party also contests the author’s claim that the president exercised arbitrarily his right to pardon and that his death sentence could not be commuted to life

imprisonment, since pursuant to article 102 of the Criminal Code of the RSFSR, the alternative maximum sentence for the crime he committed was 15 years' imprisonment. The State party submits that the right to pardon is exclusively the prerogative of the president in his capacity as the head of State, and is enshrined in the Constitution (art. 89 (c)).<sup>3</sup> Pardon is not linked with the issue of criminal responsibility and determination of a sentence. The presidential decree pardoning the author was adopted pursuant to article 59, part 3, of the Criminal Code, according to which the death sentence as a result of pardon may be commuted to either life imprisonment or 25 years' imprisonment.

4.4 The president did not lower the author's sentence in view of the publication of a new law imposing a lighter penalty for the crime he had committed, but replaced his sentence to a lighter one. In this case, the commutation of the author's sentence was not decided as part of the criminal proceedings requiring compliance with the provision of article 54 of the Constitution on the non-retroactivity of a law providing for a heavier penalty, but in the exercise of his constitutional right to pardon. According to the legal position established by the Constitutional Court in its ruling No. 61-O of 11 January 2002, pardon as an act of mercy cannot lead to consequences that are heavier for the convict than those that were established for by the criminal law and decided by a court on a specific case. The commutation of the death sentence to a lighter sentence under the criminal law in force (in the author's case – to life imprisonment) as a result of a pardon cannot be considered as worsening the convict's situation. Therefore, neither the court decisions nor the presidential decree No. 698 of 3 June 1999 violate domestic legislation, international legal norms in the sphere of human rights and freedoms or the author's rights and interests.

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

5.1 On 15 June 2009, the author claims that the right of persons accused of crimes for which the federal law institutes capital punishment to have their cases considered by a jury, as set out in article 20, paragraph 2, of the Constitution, has been guaranteed on the territory of the Russian Federation following the adoption of the resolution of the Supreme Council of the Russian Federation of 16 July 1993. He further reiterates that, at the time of examination of his criminal case, trial by jury had not been introduced in the Krasnoyarsk region. Therefore, his case was not considered by a competent tribunal, in violation of article 14 of the Covenant. He also claims that he was not explained the meaning of article 51 of the Constitution (right to remain silent)<sup>4</sup> which lead to a violation of his right to defence and the right not to be compelled to testify against himself or to confess guilt under article 14, paragraph 3(g), of the Covenant.

5.2 The author challenges the State party's argument that the decision No. 3-P of 2 February 1999 is not applicable to his case. He claims that, although he was convicted before its entry into force, the decision had a retroactive effect. He rejects the State party's argument that the presidential decree does not go beyond the sanctions provided for in the Criminal Code of the RSFSR; the decree commuted his death sentence to life imprisonment, and under federal law this harsher penalty is applicable to particularly grave crimes, whereas the crime he committed in 1994 under article 102 of the Criminal Code of RSFSR belonged to the category of grave crimes.

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<sup>3</sup> Lit. "B" in original Russian.

<sup>4</sup> Article 51 of the Russian Constitution reads that: (1) No one shall be obliged to give evidence against himself or herself, his or her spouse and close relatives, the range of which shall be established by the federal law; (2) The federal law may stipulate other exemptions from the obligation to give evidence.

**Additional observations by the State party**

6.1 By a note verbale of 13 August 2010, the State party rejects as unfounded the author's claim under article 14 of the Covenant that his criminal case was not considered by a competent tribunal. Article 47, paragraph 1, of the Constitution guarantees that no one may be denied the right to having his or her case reviewed by the court and the judge under whose jurisdiction the given case falls under the law, meaning that the consideration of cases shall be carried out by a composition of a court established by law. The author's sentence was handed down on 22 August 1997 by a panel of one professional judge and two lay judges. Such a composition of the court was dictated by the fact that at that time trial by jury had not been introduced on the territory of the Krasnoyarsk region. Under article 420 of the Code of Criminal Procedure of the RSFSR, the regions in which jury trials were established were determined by the Supreme Council of the Russian Federation and such regions were designated by the Supreme Council in its decision of 16 July 1993. According to paragraphs 1 and 2 of the decision, the examination of those criminal cases concerning offences for which a death sentence could have been imposed by a court with the participation of a jury was introduced initially only on the territory of nine regions of the Russian Federation; Krasnoyarsk region was not one of them.

6.2 The State party reiterates its previous observations (see paras. 4.1 and 4.2 above) and submits that the author's communication is based on a wrong interpretation of the temporal application of the decision No. 3-P of the Constitutional Court of 2 February 1999, claiming that it has retroactive effect. The State party explains that, when examining the issue regarding the right of persons accused of a crime for which the federal law establishes the death penalty to have their cases examined by a court with the participation of a jury, the Constitutional Court was concerned at ensuring for citizens the equal right to have their cases examined by a court with the participation of a jury on the entire territory of the Russian Federation and did not address the matter of constitutionality of the death penalty as category of punishment. The Court found the application of the provisions introducing jury trials not on the entire territory of the country contrary to the Constitution and declared them void. Prior to the adoption of the Court's decision, the said provisions, in accordance with section 2 "Final and Transitional Provisions", part 6, of the Constitution, were integral part of the legal system of the Russian Federation and with regard to the transitional period were viewed as complying with the Constitution (ruling No. 284-O-O of the Constitutional Court of 15 April 2008). Paragraph 5 of the operative part of the decision No. 3-P makes it clear that the imposition of death penalty was no longer permissible in the Russian Federation following the adoption of the decision, i.e. after 2 February 1999 (ruling No. 68-O of the Constitutional Court of 6 March 2001). Since the Constitutional Court did not decide that its decision No. 3-P has retroactive effect, death sentences handed down prior to its entry into force are not subject to review on this basis.

6.3 Furthermore, in its decision No. 3-P, the Constitutional Court did not exclude from the categories of criminal sanctions either the death penalty or life imprisonment and did not declare unlawful the commutation of a death sentence to life imprisonment as a result of a pardon (ruling No. 568-O of 21 December 2006). Pardon operates independently and does not require the adoption of a court decision for its enforcement, it is applied outside the framework of administration of justice in criminal cases and, by virtue of its intended purpose, it cannot be considered as worsening the convict's situation and precluding him from exercising his right to have his plight eased, including when, following the pardon, the responsibility for the crime committed is lifted or mitigated by a new criminal law. This legal position has been confirmed by the Constitutional Court in a number of rulings (Nos. 406-O of 11 July 2006, 567-O of 21 December 2006 and 111-O-O of 21 February 2008).

6.4 The State party explains that the Criminal Code's provisions on commutation of one's death sentence to life imprisonment or deprivation of liberty for a specified period as

a result of pardon, do not preclude the application of a new criminal law that mitigates or eliminates the criminal responsibility for a committed crime, including at the stage of servicing the sentence and taking into account the act of pardon. Therefore, these provisions are not contrary to the principle enshrined in article 54, paragraph 2, of the Constitution.<sup>5</sup>

6.5 The State party observes that the author's main argument is based on his interpretation that, since the death penalty was outlawed by a decision of the Constitutional Court, the sanction of the crime provided for in article 102 of the Criminal Code of the RSFSR allegedly became lighter (up to 15 years' imprisonment) than the sanction which had been imposed on him as a result of the pardon and therefore, in violation of the principle of non-imposition of a heavier penalty than the one that was applicable at the time when the criminal offence was committed (art. 15, para. 1, of the Covenant). The State party reiterates that the constitutionality of the establishment by federal lawmakers of the death penalty as an exceptional measure of punishment was not addressed by the Constitutional Court, therefore there are no grounds for considering that the death penalty was abolished or excluded as form of criminal punishment from the criminal law and, consequently, that the author's case is subject to review. In light of this, the imposition of life imprisonment instead of death penalty cannot be considered as worsening the author's situation.

6.6 The State party further submits that the author's allegations under article 14, paragraph 3, of the Covenant are erroneous. As it transpires from the materials of his criminal case, the author and his co-defendants claimed that the evidence was fallacious because their rights as suspects and accused under article 51 of the Constitution had not been explained to them.<sup>6</sup> This allegation had been examined by the court of first instance and was declared unfounded. According to the judgment of the first instance court of 22 August 1997, all investigating officers who conducted the preliminary investigation had been summoned and testified in court, and confirmed that the meaning of article 51 of the Constitution had been explained to all of the accused, including the author. In addition, the text of the said provision was typewritten in advance on the standard form explaining to them their right to defence. Moreover, upon the lawyers' motion, the court ordered a forensic-technical examination of those procedural documents, which concluded that the text of article 51 of the Constitution had been typed in advance on the standard forms explaining to the accused their right to defence. This conclusion refutes the author's allegation that the text of article 51 was typed in the forms only after he had been acquainted with all the materials of the case file pursuant to article 201 of the Code of Criminal Procedure of the RSFSR. Furthermore, the author certified with his signature that his rights had been explained to him, including the rights set out in article 51 of the Constitution (vol. 6, p. 142, of the criminal file).

6.7 With regard to the temporal application of legal norms, the State party submits that the Committee should take into account the official interpretation of this matter by domestic courts, including the legal position of the Constitutional Court, more so since the author relies on its decisions in substantiation of his allegations.

#### **Further submissions by the author**

7.1 On 11 November 2010, the author adds that the court committed a number of procedural violations when examining his cassation appeal. For example, it failed to

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<sup>5</sup> According to article 54, paragraph 2, of the Constitution, no one may be held liable for an action which was not recognized as an offence at the time when it was committed. If liability for an offence has been lifted or mitigated after it had been committed, the new law shall apply.

<sup>6</sup> See footnote 4 above.

exclude evidence obtained in violation of the criminal procedure norms. He reiterates that he was never informed of his right under article 51 of the Constitution, and as a result he gave self-incriminating evidence. He submits that evidence obtained in violation of federal laws cannot serve as a basis for the accusation nor can it be used as evidence. He also refers to article 50, paragraph 2, of the Constitution and to the decision No. 8 of 31 October 1995 of the Supreme Court on the admissibility of evidence in the administration of justice.

7.2 The author reiterates that his death penalty was commuted to life imprisonment arbitrarily and the competent authorities refuse to initiate supervisory review proceedings in order to review his death sentence imposed before the adoption of the Constitutional Court's decision No. 3-P of 2 February 1999. He argues that the wording of paragraph 5 of the decision No. 3-P makes it clear that the imposition of the death penalty is prohibited and thus the commutation of his death penalty to life imprisonment as a result of pardon is equally unlawful. He reiterates his argument that article 102 of the Criminal Code of the RSFSR in force at the time of commission of crimes (summer 1994) provided for a sanction of deprivation of liberty of 15 years maximum.

7.3 On 12 May 2011, the author added that the State party signed Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty on 16 April 1997 and claims that, by sentencing him to death, the State party violated its international obligations under article 18 of the Vienna Convention on the Law of Treaties.<sup>7</sup> He further submits that the judicial power in the Russian Federation is exercised by courts composed of professional judges and claims that he was not tried by a competent, independent and impartial tribunal established by law, since his sentence had been handed down on 22 August 1997 by a panel of one professional judge and two lay judges.<sup>8</sup>

7.4 The author further claims that his cassation appeal was considered in the absence of his lawyer, in violation of his right to defence. He was not informed of his right to invite another lawyer to represent him, and submits that, according to the ruling of the Presidium of the Supreme Court of the Russian Federation No. BVSR 95-6 of 25 May 1994, the right of the accused to defence should be ensured at all stages of the proceedings.<sup>9</sup>

7.5 On 29 November 2011, the author reports that the Supreme Court rejected his application for supervisory review on 23 November 2010, ignoring, *inter alia*, his allegation under article 14, paragraph 3 (d), of the Covenant.

#### **Additional submissions by the parties**

8.1 On 23 January 2012, the State party reiterated its previous observations.

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<sup>7</sup> Article 18 of the Vienna Convention on the Law of Treaties reads: A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

<sup>8</sup> The author refers to the decision of the European Court of Human Rights in *Buscarini v. San Marino* (application No. 31657/96, decision on admissibility of 4 May 2000), where the Court made clear that the phrase "established by law" covers not only the legal basis for the very existence of the "tribunal" but also the composition of the bench in each case.

<sup>9</sup> In this regard, the author also refers to the judgments of the European Court of Human Rights in *Artico v. Italy* (application No. 6694/74, judgement of 13 May 1980) and *Pakelli v. Germany* (application No. 8398/78, judgement of 25 April 1983), where the Court found that, when an accused does not have sufficient means to pay for legal assistance, he is entitled under the Convention to free legal aid when the interests of justice so require.

8.2 On 6 April 2012, the author reiterated his allegations under article 14, paragraph 3 (d), of the Covenant, and claims that the failure of the courts to inform him of his right to invite another lawyer to defend him during the cassation proceedings represents a flagrant violation of the Code of Criminal Procedure, this position being confirmed in the ruling of the Presidium of the Supreme Court of the Russian Federation of 25 May 1994 in the case of *Z. v. Russian Federation*, where the court found that the refusal to provide Mr. Z. with effective legal assistance during the cassation proceedings had violated his right to defence.

8.3 On 4 June 2012, the author added that the sentence handed down by the Krasnoyarsk Regional Court on 22 August 1997 should be quashed and the case be remitted for fresh consideration, in particular in view of the fact that his right to have access to a lawyer from the first hours following his apprehension had been restricted, in violation of article 14, paragraph 3 (d), of the Covenant.

8.4 On 17 September 2012, the State party reiterates its previous observations and submits that the author's right to appeal against his sentence was explained to him. He availed himself of this right and filed a cassation appeal that was examined and rejected by the Supreme Court. The author has not requested that the court grant him legal assistance for the purposes of cassation proceedings. Since he was informed about the possibility to have the assistance of a lawyer and he did not exercise this right, his allegations are unfounded.

8.5 The State party points out that the author's claim that the rejection of his supervisory review application by the Supreme Court on 23 November 2010 constitutes a violation of domestic legislation is based on an erroneous interpretation of the temporal application of the criminal procedure norms and on the misinterpretation of the legal position of the Constitutional Court on the matter. The Supreme Court stated in its decision that the preparation for the examination of the author's case in cassation proceedings and the examination itself had been carried out in accordance with the provisions of the RSFSR Code of Criminal Procedure of 1961 (then in force). The Code did not provide for the mandatory participation of a lawyer in the cassation proceedings, such a requirement having only been codified in the Criminal Procedure Code of 2001.

8.6 The State party also submits that the author in his supervisory review application requested the court to review his criminal case in the light of the adoption of ruling No. 255-O-P of the Constitutional Court of 8 February 2007, where the court confirmed the obligation of the cassation court to ensure the participation of a defence counsel in the proceedings in the circumstances specified by law, including at the request of the accused. However, the ruling of the Constitutional Court of 8 February 2007 does not have retroactive effect in respect of the decision of the cassation court of 10 June 1998 adopted in the author's case. Since the courts' decisions in the author's case were issued prior to the adoption of the rulings of the Constitutional Court of 8 February 2007 and he was not part of the constitutional proceedings that lead to the adoption of these rulings, the legal positions expressed by the Court therein cannot be applied to his case (rulings of the Constitutional Court of 17 November 2011 Nos. 1547-0-0, 1549-0-0, 1610-0-0 and of 21 December 2011 Nos. 1632-0-0, 1777-0-0 and others). Therefore, the author's supervisory review application was rejected lawfully.

8.7 On 5 January 2013, the author adds that he was apprehended on 24 July 1994 on the suspicion of having committed a crime under article 102 of the RSFSR Criminal Code, and that he was detained for more than 80 hours, a period during which several investigative measures were carried out, including his interrogation as suspect. He claims that his request to be provided with a lawyer was rejected on the basis of article 47 (1) of the RSFSR Code of Criminal Procedure, according to which a lawyer should be called to take part in a case

at the moment when charges are brought against a person,<sup>10</sup> as a suspect he was not entitled to legal assistance. His complaints on this matter were dismissed by the Prosecutor's Office. He adds that, as a suspect, he familiarized himself with his arrest record only after being de facto detained for some time, a period during which certain investigative measures were carried out. The author claims that, by depriving him of the assistance of a lawyer from the moment of his arrest, the State party violated his rights under article 48 of the Constitution<sup>11</sup> and under article 14, paragraph 3 (d), of the Covenant.

8.8 On 6 February 2013, the author added that the Krasnoyarsk Regional Court, on 22 August 1997, deprived him of the right to familiarize himself in court with the proceedings in the case and with the appeals and motions submitted, as well as of the right to present his written objections thereto, as guaranteed by article 328 of the RSFSR Code of Criminal Procedure. These facts restricted his right to defence and also cast doubts on the impartiality of the judge and lay judges.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

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

9.2 The Committee 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.

9.3 The Committee takes note of the author's claims under article 14, paragraph 3 (b) and (d) of the Covenant, submitted only in January and February 2013 and not in his initial communication of 22 September 2008: (1) that he was deprived of the right to familiarize himself in court with the proceedings in the case and with the appeals and motions submitted (see para. 8.8 above) and (2) that he was not provided with legal assistance from the moment of his arrest (see para. 8.7 above). The Committee observes, however, that the material before it does not show that the author has raised these claims in the domestic court proceedings prior to invoking them in the present communication. Therefore, it declares this part of the communication inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol, for lack of substantiation and for failure to exhaust domestic remedies.

9.4 As to the author's remaining claims, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol, have been met.

9.5 In the absence of any information or evidence in support of the author's claim that his rights under article 7 of the Covenant have been violated, the Committee finds this claim insufficiently substantiated, for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

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<sup>10</sup> According to article 47(1) of the RSFSR Code of Criminal Procedure, a lawyer should be called to take part in a case at the moment when charges are brought or, if a person suspected of a criminal offence is arrested or detained, before charges are brought against him, at the moment when the arrest record or a detention decision is read out to him.

<sup>11</sup> Article 48, paragraph 2, of the Constitution, provides that an arrested or detained person or a person accused of a criminal offence should have a right to legal representation from the moment of his or her arrest, placement into custody or when charges are brought.

9.6 The Committee further notes the remainder of the author's allegations under article 14, paragraph 3 (d), of the Covenant, that, in violation of his right to defence, his lawyer was absent during the cassation proceedings and that he was not informed of his right to invite another lawyer to represent him. The Committee notes in this respect the State party's arguments that the author was informed about the possibility to have the assistance of a lawyer but chose not to exercise this right and that the criminal procedure law in force at the material time did not provide for the mandatory participation of a lawyer in cassation proceedings. The Committee observes that, as it transpires from the decision of the Supreme Court of 10 June 1998, the author's cassation appeal was prepared and submitted by the lawyer who had represented him during the first instance court proceedings and that the court addressed the arguments put forward in the appeal. In the circumstances, and in the absence of any explanation from the author of how his right to defence had been affected, the Committee concludes that the author has failed to substantiate, for purposes of admissibility, his claims under article 14, paragraph 3 (d), of the Covenant, and declares them inadmissible under article 2 of the Optional Protocol.

9.7 As regards the author's claims under article 14, paragraph 3 (g), of the Covenant, that he made self-incriminating statements because he had not been explained the meaning of article 51 of the Constitution (right to remain silent) and that the text of the article was printed in the procedural documents only after he had been acquainted with the content of the criminal case file, the Committee notes the State party's argument, not refuted by the author, that the author certified with his signature that he had been explained his rights, including the rights set out in article 51 of the Constitution, and that the forensic-technical examination of the procedural documents in question concluded that his allegations were groundless. Accordingly, and in the absence of any other pertinent information on file, the Committee concludes that the author has failed to substantiate, for purposes of admissibility, his claims under article 14, paragraph 3 (g), of the Covenant, and declares them inadmissible under article 2 of the Optional Protocol.

9.8 The Committee considers that the author's remaining allegations raising issues under articles 6; 14, paragraph 1; 15, paragraph 1; and 26, of the Covenant, have been sufficiently substantiated for purposes of admissibility, and proceeds to their examination on the merits.

#### *Consideration of the merits*

10.1 The Human Rights Committee has considered this communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee notes the author's allegations under article 14, paragraph 1, of the Covenant, that his case was not considered by a competent, independent and impartial tribunal established by law since it should have been considered by a jury, and that domestic courts failed to bring his sentence into compliance with the Constitutional Court's decision No. 3-P of 2 February 1999. The Committee further notes that the author also claims a violation of his rights under article 26 of the Covenant, a claim which appears to be based on the same fact, i.e., that he was denied a trial by a jury while jury trials were granted to some other accused persons in courts in other regions of the Russian Federation (see paras. 2.2 and 3.2 above).

10.3 The Committee takes note of the State party's arguments that the author's sentence was handed down on 22 August 1997 by a court composed of one professional judge and two lay judges and that this was due to the fact that, at that time, trials by jury had not yet been introduced in the Krasnoyarsk region. It also notes the State party's explanation that the author's case was considered by a competent, independent and impartial tribunal established by law since according to section 2 "Final and Transitional Provisions", part 6,

of the Constitution the previous procedure of examination of that category of cases by the courts is preserved until the entry into force of the federal law setting out the procedure for the examination of cases by a jury. In the light of this explanation, the Committee considers that the author was tried by the court which was competent at the time of examination of his criminal case.

10.4 As to the author's claim regarding the failure of courts to review his sentence on the basis of the Constitutional Court's resolution No. 3-P, the Committee notes the State party's contention that the author's claim is based on a wrong interpretation of the temporal application of the decision. In this respect, the Committee observes that the Constitutional Court ruled that from the moment of entry into force of its decision (2 February 1999) and until the adoption of a federal law ensuring exercise of the right of all persons accused of crimes punishable by death to be tried by a jury, the imposition of death penalty was no longer permissible. The Committee takes note of the argument of the State party that the decision does not have retroactive effect and death sentences handed down prior to its entry into force (i.e., prior to 2 February 1999) were not subject to review on the basis of the decision. The Committee observes that the author was sentenced to death on 22 August 1997, before the entry into force of the said decision, therefore the decision cannot serve as a legal basis for the review of his sentence. In the light of the considerations in paragraphs 10.3 and 10.4, the Committee finds that the materials on file do not permit it to conclude that the author's rights under article 14, paragraph 1, of the Covenant, have been violated in the present case.

10.5 With regard to the author's allegations under article 6 of the Covenant, the Committee observes that on 3 June 1999 the author was pardoned by presidential decree and his death sentence imposed on 22 August 1997 was commuted to life imprisonment. In the circumstances, the Committee will not examine separately the author's claims under article 6 of the Covenant.<sup>12</sup>

10.6 In respect of the author's claim under article 26 of the Covenant, the Committee takes note of the State party's explanation that the examination of criminal cases concerning offences for which a death sentence could have been imposed by a court with the participation of a jury was introduced initially only in nine regions of the Russian Federation (decision of the Supreme Council of the Russian Federation of 16 July 1993) and Krasnoyarsk region was not one of them (see para. 6.1 above). It also notes the State party's argument that section 2 "Final and Transitional Provisions", part 6, of the Constitution established that, until the adoption of the federal law setting out the procedure for the examination of cases by a jury, the existing procedure of examination of that category of cases by courts should be preserved. The Committee recalls its jurisprudence<sup>13</sup> to the effect that, while the Covenant contains no provision establishing a right to a jury trial in criminal cases, if such a right is provided under domestic law, and is granted to some persons charged with crimes, it must be granted to others similarly situated on an equal basis. If distinctions are made, they must be based on objective and reasonable grounds. The Committee notes that the availability of a jury trial is governed by federal law, but that there was no federal law on the subject. The Committee considers that the fact that a federal State permits differences among the federal units in respect of jury trial does not in itself constitute a violation of article 26 of the Covenant.<sup>14</sup> Since the author has not

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<sup>12</sup> See communications No. 1284/2004, *Kodirov v. Uzbekistan*, Views adopted on 20 October 2009, para. 9.4; No. 1378/2005, *Kasimov v. Uzbekistan*, Views adopted on 30 July 2009, para. 9.7.

<sup>13</sup> See communication No. 790/1997, *Cheban et al. v. Russian Federation*, Views adopted on 24 July 2001, para. 7.2.

<sup>14</sup> See communication No. 1425/2005, *Marz v. Russian Federation*, Views adopted on 21 October 2009, para. 6.3.

provided any information to the effect that jury trials have been held in capital cases in Krasnoyarsk region so as to substantiate a difference in treatment between him and other accused, the Committee cannot conclude to a violation of his rights under article 26 of the Covenant.

10.7 The Committee notes the author's claims that the commutation of his death sentence to life imprisonment constitutes a violation of his rights under article 15, paragraph 1, of the Covenant. It notes in this respect the author's arguments that (a) the decision No. 3-P of the Constitutional Court of 2 February 1999 outlawed the death penalty and therefore the sanction for the crime he committed became lighter (maximum 15 years' imprisonment); (b) life imprisonment is a form of punishment imposed only for the commission of particularly grave crimes while the crime he committed belonged to the category of grave crimes; and (c) as a consequence of the presidential pardon, a heavier penalty was imposed on him than the one that was applicable at the time of commission of the crime.

10.8 The Committee takes note of the State party's explanation that the author's argument that the sanction for the crime he committed became lighter is based on a wrong interpretation of the decision No. 3-P of the Constitutional Court, which did not address the matter of constitutionality of the death penalty as category of punishment or outlawed the death penalty, as alleged by the author. Furthermore, the presidential decree pardoning the author was adopted pursuant to article 59, part 3, of the Criminal Code, according to which the death sentence as a result of pardon may be commuted to either life imprisonment or 25 years' imprisonment; pardon as an act of mercy cannot lead to consequences that are heavier for the convict than those that were established for under criminal law.

10.9 The Committee observes that article 15, paragraph 1, regards the nature and the purpose of the penalty, its characterization under national law and the procedures regarding the determination and the enforcement of the penalty as part of the criminal proceedings. The Committee notes that pardon is in essence humanitarian or discretionary in nature, or motivated by considerations of equity, not implying that there has been a miscarriage of justice.<sup>15</sup> It also notes that, in any event, life imprisonment cannot be seen as constituting a heavier penalty than the death penalty. The Committee therefore concludes that there has been no violation of article 15, paragraph 1, of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any provision of the Covenant.

[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>15</sup> Ibid., para. 6.6.