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Ninety-third session
7 - 25 July 2008

VIEWS

Communication No. 1149/2002

Submitted by:	Mr. Vladimir Donskov (not represented by counsel)
Alleged victim:	Mr. Vladimir Donskov
State party:	The Russian Federation
Date of communication:	18 February 2002 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 31 December 2002 (not issued in document form)
Date of adoption of Views:	17 July 2008

* Made public by decision of the Human Rights Committee.

Subject matter: Fair trial; right to defence.

Substantive issue: fair trial; independent tribunal; defence guarantees.

Procedural issues: Level of substantiation of claims

Articles of the Covenant: 2; 7; 9; 14; 26

Article of the Optional Protocol: 2

On 17 July 2008the 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.1149/2002.

[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
Ninety-third session

concerning

Communication No. 1149/2002*

Submitted by:	Mr. Vladimir Donskov (not represented by counsel)
Alleged victim:	Mr. Vladimir Donskov
State party:	The Russian Federation
Date of communication:	18 February 2002 (initial submission)

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

Meeting on 17 July 2008,

Having concluded its consideration of communication No. 1149/2002, submitted to the Human Rights Committee by Mr. Vladimir Donskov 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. Vladimir Donskov, a Russian national born in 1969. He claims to be a victim of a violation by the Russian Federation of his rights under articles 2; 7; 9; 14; and 26, of the International Covenant on Civil and Political Rights. He is not represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

An individual opinion signed by Committee member Ms. Ruth Wedgwood is appended to the present decision.

The facts as submitted by the author

2.1 The author worked as an assistant Prosecutor in the Military Prosecutor's Office of the Krasnorechensk garrison of Khabarovsk city. His work consisted, inter alia, in conducting verifications in different military units of the area. In January 1996, he conducted an investigation in an army unit and found that individuals were substituting food from army stocks. During the inquiry, he received threats that his life "would be destroyed"; however, he did not pay attention to them at the time.

2.2 A criminal case against the author was opened on 21 March 1996. On 12 April 1996, he was charged with bribery. According to him, the criminal case was framed to punish him for the investigations conducted. The indictment act he was presented with allegedly did not mention the name of the prosecutor who had approved it. The author agreed to cooperate with the investigation, but on 5 July 1996, he was threatened by the investigators. As a result, he decided to confess guilt. He was then placed in the detention centre of Khabarovsk. He challenged the lawfulness of his detention, but the courts declared, on three different occasions, that it was lawful.

2.3 The author claims that during the investigation, pieces of evidence in his favour were removed or substituted from his criminal case by investigators and that others were ignored or not recorded. His requests to have factual issues clarified were rejected. He was also unable to examine his file in its entirety prior to the trial.

2.4 On 26 June 1997, the Khabarovsk Military Court found him guilty of having received a bribe as well as for an attempted receipt of a bribe and sentenced him to seven years imprisonment. The author challenges his conviction, claims that the court had no territorial jurisdiction to try him and had failed in its duty of impartiality and fairness. Neither the investigators nor the court interrogated several witnesses whose testimonies could have been relevant; witnesses against him gave often contradictory depositions[1]; the grounds for his conviction remained unclear; the court's conclusions were not based on the evidence examined; the court did not explain why it accepted some evidence and rejected other. Overall procedure was not conducted in accordance with the law. He also claims that several witnesses who had testified against him had an interest in the case.

2.5 At the beginning of the trial, the author requested to have the proceedings audio recorded, but his request was denied. The trial transcript was not prepared within the prescribed three day period, but only 4 months later, and its content was incorrect[2]. A number of documents contained in the case file prepared during the preliminary investigation were substituted or disappeared, which shows that his criminal case was fabricated. He requested to have his case examined by

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[1] The author affirms, in particular, that the witnesses who allegedly delivered the bribe could not remember the exact amount and the date of delivery.

[2] The author contends that the transcript did not reflect properly his requests, and sometimes the meaning of the record was contrary to what was in fact said in court. Some witnesses' depositions reproduced the information contained in the records of their interrogations during the preliminary investigation. The court proceedings were allegedly also not properly reflected.

three professional judges, but this request was also rejected and the court was composed of one judge and two assistants (assessors).

2.6 According to the author, the court based its decision on the fact that documents in relation to the inquiry of the food scam had been discovered in his office. In fact, these documents only showed that he was indeed conducting an inquiry and his superior knew about it but made a false deposition in court. The author further challenges the method of calculation of his family's income and expenses, as well as the experts' evaluation of certain items seized in his house allegedly purchased with money obtained through bribes.

2.7 The author contends that the trial court unlawfully based its conclusions partly on his confessions during the preliminary investigation. The court judgment indicated that he had confessed guilt freely, but this was refuted by the fact that, prior to 5 July 1996, he had claimed to be innocent. He also challenges the court's conclusion that on 5 July 1996, he was not in a state of "psychological affect". In fact, an expert had concluded that during his interrogation on that date, he was in a state of psychological emotion.

2.8 On 8 July 1997, the author filed an appeal against his sentence with the Military Court of the Far East [Military] District (FED hereafter). On 16 December 1997, the Court confirmed his sentence. The author claims that he had requested the Court to be present when his appeal was examined, but the decision was taken in his absence.

2.9 The author further appealed without success to the Supreme Court of the Russian Federation. He claims that the Supreme Court examined his complaint superficially, in violation of the requirements of national and international law.

2.10 On an unspecified date, the author submitted an application to the European Court of Human Rights, on the same facts. On 31 March 2000, the Court rejected his application as inadmissible *ratione temporis*.

The complaint

3. The author claims that he is a victim of violations by the Russian Federation of his rights under articles 2; 7; 9; 14; and 26, of the Covenant.

State party's observations

4.1 On 26 June 2003, the State party stated that the author had been found guilty of having received a bribe and of an attempted bribery. The bribe received amounted to 17, 5 million roubles, and was obtained through an intermediary (Mr. Ponamoriov), on 6 January 1996, from the chief of the Fuel and Lubricant Service of the Military Unit No. 51 480, Mayor Nikitin, in order to conceal the stealing and unlawful selling of some 19000 litres of gasoline from the army stock. Furthermore, at the end of January 1996, the author learnt about a scheme for a food scam from Military Unit 52 786. Again acting through Mr. Ponamioriov, he attempted to blackmail 1000 US dollars from the Unit's Supply Chief, Mr. Nitaliev, in order not to open an official investigation.

4.2 Both the preliminary investigation and the court trial were conducted in a comprehensive and objective manner. On 12 January 2001, the Presidium of the Court of the FED acceded to the Court Deputy Chairperson's request to review the case under a supervisory procedure. The previous judgements were modified, and the author was finally sentenced to five years imprisonment.

4.3 The State party adds that because of the author's numerous complaints, the legality and the grounds for his conviction were further examined on three occasions by the Supreme Court (in supervisory proceedings), and he was given motivated answers by several judges, including by the Supreme Court's Deputy Chairman.

4.4 According to the State party, the author's allegations in the context of the present communication do not contain any convincing arguments that would put the lawfulness of his conviction in doubt. His claims about the incompleteness of the preliminary investigation and of the court proceedings, his guilt not being established, the shortcomings in the conduct of the criminal procedure, the bias of the court when assessing evidence, etc., were contained in his appeal. They were duly considered by the courts, including by the Supreme Court, and were rejected. The author was given motivated decisions to the effect that these allegations were groundless.

4.5 Contrary to the author's allegations, all facts in relation to his criminal activities were confirmed by the testimonies given under oath by several witnesses (Messrs Ponomarev, Nikitin, Nitaliev, Gusarin, Kosilov, Padalki, Beznosov, Galuzion, and Besedin). The witnesses' depositions were consistent and concordant. The author's guilt was also established through documentary and other kinds of evidence.

4.6 The author's allegation that the witnesses who testified against him had an interest in the case was not confirmed in light of the rest of the evidence. In addition to those testimonies, the court took into account the author's confessions given during the preliminary investigation, which corroborate both the witnesses' depositions and the rest of the evidence. The allegation according to which he was forced to confess guilt is groundless, as shown by the video record of the interrogations. Furthermore, according to the psychologist's conclusion, at the moment of interrogation and during his confrontation with Mr. Ponomarev (on 5, 6, and 8 July 1996), the author was not in a state of "psychological affect", and thus he was able to understand correctly the content of the investigation acts, was aware of the importance of his depositions, and could control his speech. No specific psychological particularities were revealed that could lead to the author's self-incrimination. The author's allegations that he was subjected to unlawful methods of investigation were not confirmed by the materials in the criminal case file.

4.7 According to the State party, the decision to open a criminal case against the author was lawful and grounded. After the receipt of a report from the Military Prosecutor of the Krasnorechensk garrison about the bribery, the Military Prosecutor of the FED ordered the opening of the case and designated the investigation team. After the conduct of the preliminary investigation acts, the author was temporarily suspended from his functions and was asked to sign a document that he would not leave the country. When it later became clear that he had committed a serious crime, he was arrested. According to the State party, all proceedings were conducted in conformity with the Law on the Prosecutor's Office and the Russian Constitution.

4.8 The criminal case file reveals that Mr. Nitaliev had refused to give a bribe to the author, and after a consultation with a lawyer, he reported the situation to his superiors. The Military Prosecutor of the garrison, Mr. Besedin, testified that on 19 March 1996, he was visited by a representative of the special services, who informed him that the author had received bribes and had attempted to receive bribes. The same day, the prosecutor interrogated several individuals in this connection, and on 21 March 1996, he reported to the FEDs' Military Prosecutor. The author's claim that his superior's deposition was false does not correspond to the material in the criminal case file, and the courts correctly retained it as evidence.

4.9 The witnesses Gusarin, Nikitin, and Grigoriev gave concordant and consistent depositions, later corroborated by other evidence. The fact that the individuals who handed over the bribe did not recall the exact date and amount does not cast any doubt on the veracity of their depositions.

4.10 The State party further affirms that the court made a correct assessment of the analysis of the Donskov family's income and expenses for the period 1995 - March 1996. The data revealed that the family's expenses exceeded the income by an amount more or less corresponding to the money received as a bribe. Even though the analysis was approximate, it was based on data collected during the investigation. In court, this analysis was assessed in conjunction with other elements, and was taken into account because it corroborated the rest of the evidence. For this reason, the court rejected the author's request to order a new expert's assessment of his income and expenses.

4.11 Contrary to his allegations, the author was allowed to examine the content of his criminal file. On 21 February 1997, he was informed of the end of the preliminary investigation, and he was provided with the materials of the entire file. By 4 March 1997, however, he had only examined 167 pages of the first volume and refused to continue with the examination, presenting requests that were not provided by law. Following this, on 13 March 1997, the investigator, with the authorisation of a prosecutor, extended the deadline for his examination of the file to 28 April 1997. The author thus studied the case file. This was confirmed by his signatures on the back of the totality of the documents and was not refuted by the author in court. Therefore, his allegations on the contents of the file and his inability to study it are groundless. The author's indictment act was properly prepared and filed in the criminal case file. It was signed both by the investigator and the approving prosecutor. A copy of it was provided to the author.

4.12 Contrary to what is alleged by the author, his and the witnesses' depositions were transcribed correctly. The author's observations on the trial transcript were examined on 20 November 1997. Some of them were accepted and included in the transcript's final version.

4.13 The State party contends that the author's guilt was fully established. The sanction imposed corresponded to both the circumstances of the case and the author's personality. The trial court had territorial jurisdiction to try the author. Therefore, the circumstances, the author's allegations in that regard are unfounded.

Author's comments on the State party's observations

5.1 On 26 August 2003, the author reiterated his initial allegations. On 5 December 2003, he presented his comments on the State party's observations. He contends that the State party did not present persuasive arguments in refutation of his allegations, and did not comment on his allegations regarding the incompleteness of the preliminary and the court's investigation, the breach of criminal procedure rules, and the bias of the court.

5.2 He insists that several witnesses who testified against him knew each other and had previously committed illegal activities together. He recalls that in the context of the verification that he had conducted, he had received threats.

5.3 The author challenges the probative value of several of the pieces of evidence against him, such as the analysis of his family's income, records on search and seizure acts, etc. He clarifies that he confessed guilt because the investigators threatened him that his wife could be subjected to violence, and that he, as a prosecutor, could be mistreated in detention. He was assured that if he confessed, he would be immediately released. He reiterates that he was in a state of psychological anxiety during the interrogation of 5 July 1996. During the investigation, all his complaints to the higher instances were referred to the authorities he was complaining against.

5.4 He further claims that it was unnecessary to place him in pre-trial detention, because he did not abscond. The State party's argument that he was detained when it transpired that he had committed a serious crime is groundless, because the charges against him remained unchanged since the opening of the criminal case.

5.5 The author further contends that he had asked the court to call as a witness the secret services agent who allegedly informed his superior about the bribery, but this request was rejected. He reiterates that his superior gave false depositions, as he was aware of the verifications he had conducted[3].

5.6 The author challenges the State party's reference to the witness Mr. Kosilov, and explains that the later was in fact responsible for the actions of both Messrs Nikitin and Gusarin, and as such had an interest in the case. On the State party's observation on the witnesses' failure to remember the exact amount of the money and the date of the payment, the author affirms that article 68 CPC requires that "…the occurrence of the crime (time, place, method, and the rest of the circumstances on the crime's event" must be proved in criminal proceedings. This, however, was not done in his case.

5.7 As to the contention that he had received detailed replies to all of his requests, the author notes that in fact he had received only two positive replies. He notes that in accordance with article 131 CPC (2001), an accused cannot be refused the right to call witnesses, or to have other investigation proceedings conducted, if this could have an importance for the criminal case.

5.8 The author contends that the State party's statement that the investigator Mr. Morozov was interrogated as a witness is groundless.

5.9 He further challenges the State party's reference to an investigation record in relation to Mr. Ponomarev's affirmation that some of the items seized in the author's house were bought with the money from the bribe. He claims that this witness was not present during the items' purchase. Furthermore, neither the record nor the items in question were examined in court,

[3] The author contends that the witness Mr. Padalki has testified in court that when he was giving written depositions, his superior, Mr. Besedin, had entered in the office and saw him there.

despite which they were listed as evidence in the Judgment. He adds that he had vainly requested the investigators to have the individuals who had sold him the items interrogated, and that he had acquired the items in question before the incriminated events, as he told the court.

5.10 On 21 February 1997, the author was presented only the first volume of his criminal case. Contrary to the procedural rules, the case file's contents were not indexed nor were the pages numbered. He complained about this and refused to continue with the examination. The investigator then numbered the pages in his presence. The author was subsequently presented other volumes, again without list of contents and with disordered pages. According to him, the absence of page numbers shows the investigators' intention to modify the criminal case file later on. In order to prevent this, he asked to have the pages numbered by pen and not by pencil. In reply, he was given a deadline to acquaint himself with his criminal case. He complained to the General Prosecutor's Office, which transmitted his complaint to the Prosecutor of the FED, i.e. the organ against whose actions he was complaining. The FED Prosecutor's Office rejected his claim.

5.11 The author reaffirms that the copy of the indictment act he was presented with did not disclose the signature of the approving prosecutor, and did not properly reflect his defence arguments or the arguments against him.

5.12 The author further reiterates that his sentence did not reflect correctly his and the witnesses' depositions, and the trial transcript was incorrect and unduly delayed. His comments on the trial transcript were examined by the court on 20 November 1997 in his absence, and only two points were modified. He requested to be informed of the motives for the court's decision, but never received them.

5.13 Finally, the author reiterates that he was tried by an incompetent tribunal. Although the incriminated acts were allegedly committed in the Krasnorechensk garrison, under the jurisdiction of the Krasnorechensk Military Court, he was tried by the Khabarovsk Garrison's Military Court.

State party's further observations on the merits

6.1 On 25 June 2004, the State party presented additional observations and noted that the author's comments constitute again an evaluation of the evidence used by the courts in assessing his guilt. It notes in particular the author's claims that witnesses against him had an interest in the case, that not all the necessary evidence had been assessed, that his confessions were obtained unlawfully, and that his guilt was not established. It affirms that these allegations were examined and rejected by the first and second instance courts, as well as by the Supreme Court.

6.2 All the author's requests, including those to have additional witnesses called, were examined by the judges and were given a motivated reply. The alleged bias of the court is not corroborated by evidence. The author's allegations that he confessed guilt because of the threats received were examined by the court with the assistance of a psychologist and were declared groundless. The sentence was based on evidence examined in court in the presence of all parties.

6.3 The author's statement on the inadmissibility of the analysis of his family's income and expenses is incorrect; the documentary analysis corresponds to the criminal procedure requirements.

6.4 Contrary to the author's allegations, all elements of the crime were established: time, place, and method of occurrence, as well as the amount of the bribe and the circumstances of its payment, as reflected in the judgment.

6.5 The author's right to examine the content of his criminal case file at the end of the investigation was not breached. Article 201 of the CPC then into force, did not require a list of the file contents and did not specify the means by which the numbering of documents should be made. The use of pencil was not unlawful, and did not show the investigators' intention to modify the case file content at a later stage. The fact that the author has refused to acquaint himself with the content of the file cannot be considered as constituting a breach of the procedure law. Such acquaintance is a right and not an obligation for an accused. The author has refused to examine his criminal case file under an invented pretext.

6.6 Contrary to the author's allegations, his indictment act was established in accordance with the criminal procedure requirements then into force, and this was confirmed both by the prosecutor who endorsed it, and by the courts. The absence of the visa of the prosecutor who had approved the indictment act on the copy presented to an accused does not constitute a criminal procedure violation.

6.7 The decision to transmit the author's case to the Khabarovsk garrison Military Court was taken in accordance with the Criminal Procedure Code then into force, as the crime was committed on the territory of Khabarovsk city.

Author's further comments

7.1 The author presented further comments on 30 September 2004. On the State party's observations that all his allegations were examined by the courts, he reiterates that the trial court did not examine the totality of the evidence listed in the indictment act, that several of his requests were rejected without justification, and that the appeal court examined his case in his absence.

7.2 The author refers to several interpretative decisions of the Supreme Court, inter alia, on the motivation of court's refusals to seek clarifications on issues relevant to the case, on the assessment of evidence, equality of arms, the strict respect of the regulations for an exhaustive, full, and objective assessment of the criminal case materials, on the preparation of trial transcripts, on the role of the defence in a criminal case, on inadmissibility of evidence collected in violation of the law, and on the rights of the accused. He contends that the Supreme Court's directives in such rulings are compulsory for all courts, but that some ignore them in practice.

7.3 The author contends that in the context of his criminal case, the authorities seized materials confirming the illegal activities of some witnesses who testified against him, but these materials later disappeared. The fact of the seizure is confirmed by a record contained in his the case file. Nevertheless, a letter from a prosecutor indicates that the documents in question were not received by the Prosecutor's Office.

7.4 The court did not verify his statement regarding the registration of the investigations he had conducted against Messrs Nikitin and Padalki. This demonstrates that the court failed in its duty of objectivity and impartiality.

State party's additional observations in connection with the author's comments

8.1 On 20 May 2005, the State party submitted additional information. It observes that further verifications permitted to establish that the author's allegations on the lawfulness of his conviction, raised in his numerous complaints, were examined by the prosecutor's office and the courts and were found to be groundless. The author's allegations regarding the occurrence, during the preliminary investigation and in court, of numerous violations of criminal procedure and international law, are groundless. His reference to Supreme Court's rulings do not relate to specific actions of investigators or courts in his case.

8.2 The State party further observes that the author's arguments that he was innocent and slandered by several witnesses, and forced to confess guilt, were examined on numerous occasions by the courts and were not confirmed. The author's attempt to put in doubt the admissibility and the trustworthiness of certain of the evidence used in court for the establishment of his guilt is based on a random interpretation of the national criminal procedure law.

8.3 The calculation of the income and the expenses of the author's family was based on documentary evidence and was not in contradiction with the requirements of the Criminal Procedure Code. This calculation was examined in court and was found to be objective and trustworthy.

8.4 The author's allegations on the territorial incompetence of the court in his case amount also to a random interpretation of the national law. Given that he was a prosecutor in the Krasnorechensk garrison, his case could not be examined by the Military Court of that garrison, pursuant to the provisions of CPC. For this reason, and in accordance with the CPC requirements, the Chairperson of the FED Court transmitted the case to the Khabarovsk Garrison Court.

8.5 The State party finally contends that the author's allegations that he was not present during the examination of his appeal is also to be considered groundless, as the law then in force (article 335 CPC) did not provide for a compulsory presence of an accused when his/her appeal is considered.

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 rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

9.2 The Committee notes, as required by article 5, paragraph 2 (a) of the Optional Protocol, that the same matter was submitted to the European Court of Human Rights (application No.

54976/00), and declared inadmissible *ratione temporis* on 31 March 2000. Accordingly, the Committee considers that it is not bound by the limitation of the above mentioned provision. It also notes, as required by article 5, paragraph 2 (b) of the Optional Protocol, that it is uncontested that domestic remedies have been exhausted.

9.3 The Committee has noted that the author invokes a violation of article 7 of the Covenant, without presenting a full explanation on that matter. In the absence of any further information in this respect, the Committee considers that this part of the communication is inadmissible as insufficiently substantiated under article 2, of the Optional Protocol.

9.4 The author claims that his arrest was unlawful, which raises issues under article 9 of the Covenant. The State party has not specifically commented on this allegation, but has explained that the author was only arrested when it became clear that he was suspected of a serious crime. The Committee further notes that, as submitted by the author himself, the lawfulness of his arrest was verified by the courts and found to be lawful. In the circumstances, and in the absence of any other information in this connection, the Committee considers that this part of the communication is insufficiently substantiated for purposes of admissibility and is accordingly inadmissible, under article 2, of the Optional Protocol.

9.5 The Committee has noted the author's claims on the alleged bias and partiality of the court in his case. The State party has replied that the court trial was conducted in a comprehensive and objective manner, that the case was reviewed on numerous occasions, including by the Supreme Court. It also affirmed that the author's allegations on the bias of the court were considered by the courts and the author was given a motivated answer to the effect that they were groundless[4]. In the absence of any further information in this regard, the Committee considers that this part of the communication is inadmissible, as insufficiently substantiated under article 2 of the Optional Protocol.

9.6 The Committee has noted the author's allegations on the groundlessness and unlawfulness of his indictment act and sentence, on the manner they, and the trial transcript, were drafted, on the manner the case was handled by the investigators and by the courts; as well as on the trial court's territorial incompetence; on the investigators' and court's refusals to respond to some of his requests, including the manner in which his case file was organised and presented to him, and the obstacles to the exercise of his right to examine the file; the way the court accepted or rejected evidence and assessed the circumstances of the case in general; on the refusal to call some witnesses; on the unreliability of certain witnesses who testified against him; on the manner his income/expenses were assessed; etc. It notes that the State party has refuted these allegations as groundless. The Committee notes that these allegations relate primarily 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 justice[5]. In this case, the Committee considers that in the absence before it of any court records, trial transcript, or other pertinent information, which would make it possible to verify whether the trial in fact

[4] See paragraphs 4.2 – 4.4 above.
[5] See, inter alia, Communication No. 541/1993, Errol Simms v. Jamaica, inadmissibility decision adopted on 3 April 1995, paragraph 6.2.

suffered from the defects alleged by the author, this part of the communication is inadmissible under article 2 of the Optional Protocol, as insufficiently substantiated.

9.7 The author has also invoked a violation of his rights under article 26 of the Covenant, without presenting further argumentation. In the absence of any other pertinent information in this respect, the Committee considers that this part of the communication is inadmissible under article 2, of the Optional Protocol, as insufficiently substantiated.

9.8 The Committee decides that the remaining part of the author's allegations relating to his inability to be present when his appeal was considered, raising issues under articles 2 and 14, paragraph 3 (d), of the Covenant have been sufficiently substantiated for purposes of admissibility.

Consideration on the merits

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

10.2 The author claims that his right to defence was violated because despite his request to be present, his appeal was examined in his absence by the appeal court. The State party replied that the Criminal Procedure Code then into force did not provide for the compulsory presence of an accused before the appeal instance. The Committee notes that the material before it does not permit it to conclude that in this case, the appeal court failed to duly examine all facts and evidence of the case, as well as the first instance judgment. In the absence of any further relevant information in this respect, the Committee considers that the facts as presented do not amount to a violation of the author's rights under article 14, paragraphs 3 (d) of the Covenant.

10.3 In light of the above conclusion, the Committee does not find it necessary to examine separately the author's allegations under article 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 facts before it do not disclose a violation of the rights under the Covenant invoked by the author.

[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.]

APPENDIX

Individual opinion of Committee member Ms. Ruth Wedgwood

The author – who is a Russian military lawyer convicted for taking bribes in the course of his official duties – has challenged the fairness of his criminal trial on a variety of points. The Committee has concluded that the pleadings as filed do not substantiate most of his claims of error.

But the Committee has properly noted that one issue is admissible, namely, the author's complaint that he was improperly excluded from the hearing of his appeal from the criminal conviction. See Views of the Committee, paragraph 2.8.

In answer to this claim, as the Committee notes, the State party simply argues that "the Criminal Procedure Code then in force did not provide for the compulsory presence of an accused before the appeal instance." See Views of the Committee, paragraph 10.2.

But this restatement of positive law does not address the question of "equality of arms." As the Committee has held on many occasions, the defense in a criminal proceeding must be afforded an adequate chance to make its case. A one-sided appellate argument, in which the procurator appears but the defendant and his counsel are excluded, would not seem to be consistent with the standard of equality of arms, and the requirements of Article 14(5) of the Covenant.

It is also of interest that the Criminal Procedure Code applicable at the time may itself guarantee both the defendant and even third parties a right to be present for an appeal. See Criminal Procedure Code of the Russian Federation, 15 February 1997, Article 335(1): "During review of a case on appeal, the procurator gives opinions about the legality and evidentiary basis of the adjudication. During the review of a case on appeal, the defendant may participate."

See also *id*., Article 335(2): "A question about the participation of a defendant in a proceeding of review of a case on appeal is allowed by this court, and while appearing in this court proceeding, the defendant in every case is allowed to give explanations."

As to third party participation, Article 335(3) and (4) also note that "During the review of the case on appeal, other parties as indicated in article 325 of the statute may participate," and that "Non-appearance of the above-mentioned persons who were duly notified about the date of the review does not bar review of the case."

In the opinion issued in the author's case on 16 December 1997, the Russian Military Court of the Far East District stated in the opening paragraphs that the court "heard the report of the colonel of justice and conclusions of the head of the department of military prosecutions of the Far East District." The State party has not claimed that this "report" was merely a submission on the papers. The appearance of a defendant and his counsel at an appellate hearing in which the State party also appears is important, because it permits both parties to answer questions that arise during the colloquy on an equal basis.

A military justice system may face exigencies that are different from those of a civilian court system. But there is no argument by the State party that they could not practicably produce the defendant during the hearing of his appeal, only that they didn't have to. That may have been Russia's national law, but it does not answer the question of what the Covenant demands.

[*signed*] Ms. Ruth Wedgwood

[Done 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.]
