



**International covenant  
on civil and  
political rights**

Distr.  
RESTRICTED\*

CCPR/C/96/D/1309/2004  
25 August 2009

Original: ENGLISH

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HUMAN RIGHTS COMMITTEE  
Ninety- sixth session  
13 – 31 July 2009

**DECISION**

**Communication No. 1309/2004**

<u>Submitted by:</u>	Mrs. Yevgeniya Podolnova (not represented by counsel)
<u>Alleged victim:</u>	The author's son, Mr. Mikhail Podolnov
<u>State party:</u>	Russian Federation
<u>Date of communication:</u>	26 July 2004 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 21 September 2004 (not issued in document form)
<u>Date of adoption of decision:</u>	28 July 2009

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\* Made public by decision of the Human Rights Committee.  
GE.09-44445

*Subject matter:* Alleged partiality of the State party's courts.

*Procedural issues:* Evaluation of facts and evidence; denial of justice.

*Substantive issue:* Presumption of innocence.

*Article of the Optional Protocol:* 2.

*Article of the Covenant:* 14, paragraph 2.

[ANNEX]

**ANNEX****DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE  
OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON  
CIVIL AND POLITICAL RIGHTS**

Ninety-sixth session

concerning

**Communication No. 1309/2004\***

Submitted by: Mrs. Yevgeniya Podolnova (not represented by  
counsel)

Alleged victim: The author's son, Mr. Mikhail Podolnov

State party: Russian Federation

Date of communication: 26 July 2004 (initial submission)

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

Meeting on 28 July 2009,

Adopts the following:

**DECISION ON ADMISSIBILITY**

1. The author of the communication is Mrs. Yevgeniya Podolnova, a Russian national born in 1952. She submits the communication on behalf of her son, Mr. Mikhail Podolnov, also a Russian national born in 1978, who was imprisoned in the Russian Federation at the time of submission of the communication.<sup>1</sup> The author claims that her son is a victim of a violation by the Russian Federation of his rights under article 14, paragraph 2, of the International Covenant on Civil and Political Rights. She is unrepresented. The Optional Protocol entered into force for the Russian Federation on 1 January 1992.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Mohammed Ayat, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

<sup>1</sup> Facility USHCH-382/4, Pugachev, Saratov region.

## **Factual background**

2.1 The author's son was a junior sergeant in the Armed Forces of the Russian Federation. In July 2000, he was commissioned to participate in the second military operation in the Chechen Republic. On 16 August 2001, he led a reconnaissance unit charged with blockading the settlement of Zentoroi in the Kurchaloevsky district of the Chechen Republic. The unit's task was to control movements of inhabitants and transport, to prevent the entry into and exit from the settlement of groups of and individual armed insurgents by, *inter alia*, establishing temporary checkpoints, observation posts and mobile patrols, and by organising ambushes. The unit was ordered to detain suspicious individuals and particularly those found outside the settlement of Zentoroi.

2.2 At around 7 a.m. on 16 August 2001, the author's son decided to detain Mr. Rasul Dzhamalov on suspicion of belonging to an illegal armed group and of keeping under surveillance the reconnaissance unit under the command of the author's son. Mr. Dzhamalov attempted to escape while one of the subordinates of the author's son was untying his hands. As Mr. Dzhamalov did not comply with the summons to stop, the author's son shot Mr. Dzhamalov in the head and killed him.

2.3 On 23 May 2002, the author's son was convicted by the North Caucasus District Military Court under article 105, part 1, of the Criminal Code (premeditated murder), and sentenced to 9 years' imprisonment and stripped of his military rank. As transpires from the copy of the judgment provided by the author, the North Caucasus District Military Court found that Mr. Dzhamalov had been detained by the author's son, assisted by two of his subordinates. The subordinates wrapped Mr. Dzhamalov's jacket around his head and brought him to the unit's military location. Upon the order of the author's son, one of the subordinates then tied Mr. Dzhamalov's hands and took him away to a ravine for interrogation. The court established that Mr. Dzhamalov was only a few meters away from the author's son when he was shot in the head, and that after the initial shot which in fact killed Mr. Dzhamalov, the author's son shot him twice again at close range, once in the head and once in the chest, allegedly because Mr. Dzhamalov was still showing signs of life. Afterwards, the author's son dragged Mr. Dzhamalov's body under a tree, where he shot him once more in the chest at close range, and stabbed him in the back twice with a hunting knife. At around 2 p.m. the same day, the author's son, together with his subordinates, transported Mr. Dzhamalov's body in an armoured carrier and hid it in the bushes a few kilometres away from the crime scene, allegedly to avoid enraging the local population.

2.4 According to the judgment of the North Caucasus District Military Court, Mr. Dzhamalov, who was an inhabitant of the settlement, was 17 years old at the time of his death. The court found that on 18 August 2001, the author's son was summoned to the military prosecutor's office. The next day, he confessed to the killing of Mr. Dzhamalov and informed the authorities of the body's location. During the court hearing, he explained that he had fired at Mr. Dzhamalov "mechanically", to prevent him from escaping, and had no recollection of his subsequent actions. His earlier testimony was based on the description of the facts provided by his subordinate, whose deposition he trusted. The court concluded that the author's son did not have sufficient grounds to open fire on the adolescent Mr. Dzhamalov, as his attempted escape did not pose any real threat to the author's son and his subordinates, and that the escape could

have been prevented by means other than the infliction of physical injury. According to the testimony of the author's son and witness statements of his subordinates, Mr. Dzhamalov, while trying to avoid contact with military servicemen, did not resist and did not behave aggressively when detained. Furthermore, he did not have any objects that would pose any threat to the author's son and his subordinates.

2.5 The North Caucasus District Military Court examined available psychological and psychiatric evidence about the author's son's mental state, which indicated that although he was mentally sane, he suffered from battle fatigue and "combatant's accentuation", caused by a lengthy stay in the combat zone in the Chechen Republic, and that he reacted aggressively to any external threat. The court concurred with the expert conclusion that in the circumstances, these factors could have contributed to the negative perception by the author's son of Mr. Dzhamalov, whom he did not perceive to be a civilian person and to the peculiar behavioural pattern of his own actions and the "lowering of quality in the exercise of duties as the head of the reconnaissance unit". The court took all these factors into account before finding the author's son guilty of premeditated murder under article 105, part 1 (6 to 15 years' imprisonment), rather than of murder under aggravating circumstances under article 105, part 2, of the Criminal Code, as requested by the prosecution (8 to 20 years' imprisonment, death penalty or life imprisonment). The court also considered as extenuating circumstances the confession of the author's son and his positive conduct and approach during the second military operation in the Chechen Republic, prior to the incident in question.

2.6 The North Caucasus District Military Court acquitted the author's son of the charge under article 286, part 3, of the Criminal Code (exceeding one's authority). It found that, taking into account the military nature of the tasks that the reconnaissance unit had been given, and the short-term duration of Mr. Dzhamalov's detention prior to his attempted escape, the intention of the author's son to interrogate Mr. Dzhamalov without reporting to his superior officers beforehand could not be interpreted as clearly exceeding his authority, within the meaning of article 286 of the Criminal Code.

2.7 The cassation appeal of the author's son to the Military Chamber of the Supreme Court, filed on 13 June 2002, was dismissed on 3 October 2002. The court rejected the request of the author's son lawyer to modify the legal character of his actions from article 105, part 1, to article 109 of the Criminal Code (causing inadvertent death) and to give him a conditional sentence. The court established that the argument of inadvertence was refuted by the fact that after the first shot in the head, the author's son, instead of giving medical assistance to Mr. Dzhamalov, fired three more shots on his head and chest and stabbed him twice in the back. The court concluded that the author's son had a direct criminal intent to kill Mr. Dzhamalov.

2.8 On an unspecified date, the author's son requested the Presidium of the Supreme Court to initiate the supervisory review procedure in his criminal case. In the appeal, the author's son disagreed with the legal position taken up by his lawyer, which was to modify the legal character of his actions from article 105, part 1, to article 109 of the Criminal Code, and claimed that there were no constituent elements of *corpus delicti* set out in article 109 of the Criminal Code. He further argued that he had opened fire on Mr. Dzhamalov in full compliance with the requirements of the Charters of the Armed Forces of the Russian Federation (Charters of the Armed Forces) and superior orders, that Mr. Dzhamalov was dead after the first shot and that,

consequently his actions could not legally be characterised as murder, since the constituent elements of the *corpus delicti* set out in article 105, part 1, of the Criminal Code were absent in his action. In his opinion, the court's decision was politically motivated, since the settlement of Zentoroi was an ancestral place of the President of the Chechen Republic. Furthermore, the court's decision was influenced by the fact that in June 2001, the author's son was awarded a medal "for military valour" for the conduct of a military operation which had resulted in the capture of a Chechen warlord. After this award, the author's son had been threatened by the local population on many occasions.

2.9 On 22 April 2003, a judge of the Supreme Court dismissed the author's son's request to initiate the supervisory review procedure. He concluded that there was no evidence to support the claim of the author's son about the existence of superior orders to apply lethal force against unidentified individuals, forming concentration of an illegal armed group in the settlement of Zentoroi, Mr. Dzhamalov's cooperation with the said group, and the political nature of his conviction.

2.10 On an unspecified date, an application was submitted to the European Court of Human Rights. On 19 December 2003, a panel of three judges of the Court declared the author's application No. 30876/03 inadmissible, because it did not comply with the requirements of articles 34 and 35 of the European Convention on Human Rights. The Court found that the final decision for the purposes of article 35, paragraph 1, of the European Convention on Human Rights was taken on 3 October 2002 and that, therefore, the application had been submitted after the expiry of a six-months period.

### **The complaint**

3.1 The author contends that her son was wrongly convicted of premeditated murder, because the State party's courts ignored the fact that he acted in full compliance with the requirements of the Charters of the Armed Forces, which have the status of a federal law and compliance with which is compulsory for all servicemen. She attaches an extract from the Charter of Garrison and Guard Service of the Armed Forces of the Russian Federation (Charter of Garrison and Guard Service) adopted by the Ministry of Defence in 1994. Paragraph 201 thereof sets out that a military serviceman is to "warn detained persons who are attempting to escape with the cry 'Stop or 'I'll shoot', and in the event of non-compliance with this demand use the weapons against them". The author refers to the conclusion of the North Caucasus District Military Court that her son did not have sufficient grounds to open fire on Mr. Dzhamalov, as his attempted escape did not pose a real threat to the author's son and his subordinates, and argues that this conclusion is contrary to the Charter of Garrison and Guard Service and all the circumstances of the case. This Charter, the author contends, makes it compulsory for military servicemen to carry out orders and to execute military tasks given by superior officers. The reconnaissance unit of her son had been in the vicinity of the settlement of Zentoroi for the execution of a specific military task, and the attempted escape of Mr. Dzhamalov, lawfully detained, jeopardised execution of this task.

3.2 The author claims that in order to be convicted of premeditated murder under article 105, part 1, of the Criminal Code, there should be evidence of a hostile relationship or a fight, or motive of revenge on the part of a defendant, and that no such element was established by the State party's courts in her son's case. Moreover, to find a defendant guilty of a specific crime,

the court should spell out in its judgment the *actus reus* attributed to the defendant, evidence thereof, as well as the form of *mens rea* and the motive for having committed the crime(s) in question. The author notes that the judgment of the North Caucasus District Military Court did not make reference to any motive for her son to kill Mr. Dzhamalov intentionally. Furthermore, as her son's first shot on the head killed Mr. Dzhamalov, his subsequent actions had no bearing on the legal aspect of the crime attributed to her son. She concludes that her son's right to be presumed innocent under article 14, paragraph 2, of the Covenant, was violated.

### **The State party's observations on admissibility and merits**

4.1 On 17 January 2005, the State party reiterates the facts summarised in paragraphs 2.1 - 2.4, 2.7 and 2.9 above and contends that the conviction of the author's son was lawful, well-founded and justified. It states that his guilt intentionally to kill the adolescent Mr. Dzhamalov was established on the basis of the totality of evidence examined by the court, the credibility of which is not in any way in doubt. The courts fully and thoroughly examined evidence corroborating the motives and the purpose of her son's actions, a form of his *mens rea* and his *modus operandi*, and described their analysis in their judgments.

4.2 The State party submits that the author's son had a direct criminal intent to deprive Mr. Dzhamalov of his life. The motive for his actions was to prevent Mr. Dzhamalov from leaving the detention site. Mr. Dzhamalov's detention, however, was unlawful, and justified his subsequent actions. Furthermore, it was ascertained that Mr. Dzhamalov was a civilian, who herded cattle on the day of his death. The author's son did not have any ground to detain Mr. Dzhamalov, to prevent him from leaving the detention site, or to apply the lethal force against him.

4.3 The State party refutes the author's claim that her son acted in full compliance with the requirements of the Charters of the Armed Forces. It refers to article 11 of the Charter of Internal Service of the Armed Forces of the Russian Federation (Charter of Internal Service), according to which military servicemen, as a last resort, may use weapons for strictly regulated purposes: (a) for the protection of military servicemen and civilians from the attack, threatening their life and health, if there are no other means for their protection; (b) the detention of a person who committed a crime or was caught committing a grave and dangerous crime, if he offers armed resistance; (c) the detention of an armed person if he refuses to comply with a lawful demand to surrender the weapon and there are no other means and methods to quell the resistance, to detain this person or to seize the weapon.

4.4 Under article 12 of the Charter of Internal Service, the use of a weapon must be preceded by a warning about the intent to use them and, if the weapons are used by military servicemen, they should take all possible measures to ensure the security of others and when necessary, provide medical assistance to victims. It is prohibited to use weapons against women and minors. The State party argues that by opening fire on Mr. Dzhamalov, the author's son also breached the requirements of the Charter of Internal Service.

4.5 Lastly, the State party challenges the admissibility of the communication on the basis of article 5, paragraph 2(b), of the Optional Protocol. It submits that neither the author herself nor her son availed themselves of a remedy provided by article 406, part 4, of the Criminal

Procedure Code, by requesting the Chairperson of the Supreme Court or his deputies to initiate the supervisory review procedure in the criminal case of Mr. Podolnov.

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

5.1 In her comments dated 16 February 2005, the author contends that the arguments advanced by the State party are not borne out by the circumstances of the case. She reiterates that the judgment in her son's case does not refer either to the motives and purpose of her son's actions, the form of *mens rea* or *modus operandi* on his part. She adds that the State party does not explain what other means could have been used by her son to prevent Mr. Dzhamalov's escape, especially in view of the secretive nature of the military task given to her son's reconnaissance unit. It was exactly for this reason that he was issued a weapon with a silencer.

5.2 The author refutes the State party's claim that the motives for her son's actions were to prevent Mr. Dzhamalov from leaving the detention site and that his detention was unlawful. She reiterates that Mr. Dzhamalov was detained in pursuance of the unit's military task and superior orders. His successful escape would have revealed the location of the reconnaissance unit and would have jeopardised the execution of the military task, potentially resulting in the death of military servicemen. Although there is no reference in her son's judgment to the Charters of the Armed Forces with which he complied, the author submits that a loud warning shot required by one of the Charters would also have revealed the location of the reconnaissance unit. Moreover, she adds that, at the time of his detention, Mr. Dzhamalov did not have any identification to prove that he was then 17 years and 6 months old, and there was no evidence to suggest that her son was aware that Mr. Dzhamalov was a minor.

5.3 The author challenges the State party's claim that domestic remedies have not been exhausted and submits that she, her son and his lawyer had on numerous occasions requested the Chairperson of the Supreme Court to initiate the supervisory review procedure. She submits a copy of such requests dated 28 December 2002, 10 January 2003, 30 December 2003, 15 January 2004 and 9 April 2004, all addressed to the Chairperson of the Supreme Court. All these requests were dismissed.

### **Supplementary submissions by State party**

6. On 27 July 2005, the State party withdrew its objection to the admissibility of the communication for non-exhaustion of domestic remedies. On the merits, it refutes the author's argument that her son's actions were determined exclusively by the military task to blockade the settlement of Zentoroi and that there were no other motives for her son to use violence against Mr. Dzhamalov. Rather, the killing of Mr. Dzhamalov and subsequent concealment of his body by Mr. Podolnov did not derive either from the military task or the ensuing circumstances. The direct intent to deprive Mr. Dzhamalov of his life is confirmed by the fact that the author's son fired further shots and stabbed Mr. Dzhamalov in the back, when he no longer posed a threat to the military servicemen. The North Caucasus District Military Court thoroughly examined the motives for her son's actions and concurred with the expert conclusions that her son suffered from battle fatigue and "combatant's accentuation".



### Issues and proceedings before the Committee

7.1 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.

7.2 As required by article 5, paragraph 2(a), of the Optional Protocol, the Committee has ascertained that a similar complaint submitted by the author was declared inadmissible by a panel of three judges of the European Court for Human Rights on 19 December 2003 (application No. 30876/03), since it had been submitted after the expiry of a six-months period. Article 5, paragraph 2(a), however, does not preclude the Committee from examining the present communication as the issue is no longer being examined by the European Court and the State party has formulated no reservation under article 5, paragraph 2(a), of the Optional Protocol.

7.3 With respect to the requirement of exhaustion of domestic remedies under article 5, paragraph 2(b), of the Optional Protocol, the Committee notes that the State party has withdrawn its claim that there are domestic remedies that could still have been exhausted by the author.

7.4 As to the author's claim that her son's right to the presumption of innocence was violated, because the State party's courts ignored the fact that he acted in full compliance with the requirements of the Charters of the Armed Forces and that his actions were determined by the specific military task given to his unit by superiors, the Committee notes that these allegations relate primarily to the evaluation of facts and evidence in the case. The Committee reiterates its jurisprudence<sup>2</sup> that it is generally for the courts of States parties to evaluate facts and evidence in a particular case, unless it can be demonstrated that the evaluation was clearly arbitrary or amounted to a denial of justice. In this respect, the Committee notes that the State party's courts and authorities in fact addressed all these arguments of the author and concluded that the *modus operandi* of her son did not derive either from the military task of his reconnaissance unit or the ensuing circumstances of its activities in the vicinity of the Zentoroi settlement.

7.5 Consequently, on the basis of the material before it, the Committee concludes that the author has failed to substantiate sufficiently for purposes of admissibility that the decisions of the State party's courts were arbitrary or amounted to a denial of justice. For these reasons, the Committee concludes that this claim is inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That the present decision shall be communicated to the State party and to 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.]

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<sup>2</sup> Communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision of 3 April 1995, paragraph 6.2.