



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2411/2014\*, \*\*

<i>Communication submitted by:</i>	V.K. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	21 March 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 4 June 2014 (not issued in document form)
<i>Date of adoption of decision:</i>	30 March 2016
<i>Subject matter:</i>	Torture; fair trial; retroactive application of criminal law
<i>Procedural issues:</i>	Exhaustion of domestic remedies; substantiation of claims
<i>Substantive issues:</i>	Torture; conditions of detention; fair trial; fair trial — witnesses; retroactive application of criminal law
<i>Articles of the Covenant:</i>	7, 10 (1) and (2) (a), 14 (1), (3) (b), (d), (e) and (g) and 15 (1)
<i>Articles of the Optional Protocol:</i>	2 and 5

\* Adopted by the Committee at its 116th session (7-31 March 2016).

\*\* The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Ahmed Amin Fathalla, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.



**Decision on admissibility**

1. The author of the communication is V.K., a Russian national born in 1950. He claims to be the victim of a violation by the Russian Federation of his rights under articles 7, 10 (1) and (2) (a), 14 (1), (3) (b), (d), (e) and (g) and 15 (1) of the International Covenant on Civil and Political Rights. The Optional Protocol to the Covenant entered into force for the Russian Federation on 1 January 1992. The author is not represented by counsel.

**The facts as submitted by the author**

2.1 The author served as an officer in Ministry of Internal Affairs units from 1971 to 2004, including in senior positions. On 3 April 2005, after winning the general elections, he assumed the post of Head of Administration of Kurganinsky District, Krasnodar. On 27 July 2005, the author resigned from his post, allegedly under pressure.

2.2 On 1 September 2005, the author was arrested by the Federal Security Service on suspicion of organizing terrorist attacks. During his detention in the Service's remand facility in Krasnodar, in order to obtain his confession, he was verbally offended and psychologically pressured by Service officers and his cell mates, who were working for the Service. On one occasion, the author was injected with psychotropic drugs, which caused a health disorder and suicidal thoughts for two months. He also claims to have been denied medical assistance and detained in a cell with previously convicted criminals. The author also claims that he was treated with unnecessary violence when transported from the remand facility to the court.

2.3 On 26 December 2006, in a jury trial, the Krasnodar Territorial Court found the author guilty, under articles 33 (3) and 205 (3) of the Criminal Code of 27 December 1996 as amended on 9 January 1999 (terrorism), of planning terrorist attacks in the city of Armavir on 9 and 16 January 2000.<sup>1</sup> Both provisions were applied separately for each attempted act of terrorism. The author was also found guilty of staging an attempt on his life by blowing up a grenade in his apartment on 19 April 2005 and, in this connection, he was further found guilty under the following articles of the Criminal Code: article 306 (3) on knowingly making a false denunciation; article 307 (2) on knowingly providing false testimony; article 167 (1) on intentionally damaging another's property; and article 222 (1) on the illegal acquisition, transportation and storage of ammunition. He was sentenced to 22 years in a penal colony of maximum security and deprived of the rank of colonel and of professional awards.

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<sup>1</sup> Article 205 (1) and (3) of the Criminal Code reads as follows:

1. Terrorism, that is, the perpetration of an explosion, arson or any other action endangering the lives of people, causing sizable property damage or entailing other socially dangerous consequences, if these actions have been committed for the purpose of violating public security, frightening the population or exerting influence on decision-making by governmental bodies, and also the threat of committing said actions for the same ends, shall be punishable by deprivation of liberty for a term of 5 to 10 years.

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3. Deeds stipulated in the first or second part of this article, if they have been committed by an organized group or have involved by negligence the death of a person, or any other grave consequences, and also are associated with infringement on objects of the use of atomic energy or with the use of nuclear materials, radioactive substances or sources of radioactive radiation, shall be punishable by deprivation of liberty for a term of 10 to 20 years. (See [www.russian-criminal-code.com/PartII/SectionIX/Chapter24.html](http://www.russian-criminal-code.com/PartII/SectionIX/Chapter24.html).)

2.4 On 29 December 2006, the author filed a cassation appeal with the Supreme Court claiming erroneous application of criminal law by the court of first instance. He argued that the Krasnodar Territorial Court had applied an old version of the Criminal Code, not the new version that had entered into force on 27 July 2006, i.e. before the author's trial had taken place. Since the new version of article 205 of the Criminal Code had amended the subjective element of the disposition (the purpose of the terrorist act),<sup>2</sup> the author argued that his actions did not constitute terrorism under the new law. His actions should have been qualified under different articles of the Criminal Code, which would entail a lighter penalty. The author also claimed a wrong application of articles 306 (3) and 307 (2) of the Criminal Code and of the additional penalty depriving him of the rank and awards. Furthermore, he made complaints concerning procedural violations in the court of first instance. For example, he complained about: the biased attitude of the presiding judge, her influencing the decision of the jury by expressing an opinion about the facts of the case and the guilt of the defendants, manipulation of the way evidence was presented and the witnesses were questioned, the failure of the presiding judge to read in court the pretrial statements of the witnesses (Mr. D. and Mr. S.), which differed from those given by them during the hearing, the additional expert examination on the possible cause of a fire in his apartment after a grenade explosion on 19 April 2005 and the discrepancy between the facts of the case and the conclusions of the court.

2.5 In its decision of 22 November 2007, the Supreme Court, acting as a court of cassation, repealed the additional sanction depriving the author of his rank and awards. The rest of the sentence remained unchanged. The Court stated that the qualification of the author's actions under article 205 (3) was correct and that the procedural rules regarding the materials of the case and the transcript of the trial had not been violated by the court of first instance. The Court found that the defence had had a chance to question the witnesses during the court hearing but had not used this opportunity. As for the discrepancies between the facts of the case and the verdict, the court of cassation stated that the jury had the exclusive prerogative to establish the facts of the case and its judgment could not be revised.

2.6 On 28 August 2008, the author filed an appeal, under the supervisory review proceedings, to the Presidium of the Supreme Court, making the same claims he had made to the court of cassation. In its decision of 19 November 2008, the Supreme Court partially changed the sentence. It ruled that articles 33 (3) and 205 (3) of the Criminal Code should have been applied once since the actions falling under the same provision of the Criminal Code formed a single and not a cumulative offence. The Court also repealed the author's sentence under article 307 (2) of the Criminal Code. At the same time, it increased the original prison terms set by the court of first instance under articles 306 (3), 167 (2)

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<sup>2</sup> Article 205 of the Criminal Code as amended on 27 July 2006 reads as follows:

1. The carrying out of an explosion, arson or other actions intimidating the population, and creating the threat of human death, of infliction of significant property damage or the onset of other grave consequences, for the purpose of influencing the taking of a decision by authorities or international organizations, and also the threat of commission of the said actions for the same purposes, shall be punishable by a term of imprisonment of 8 to 15 years.

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3. Acts stipulated by parts one or two of this article if they:

(a) Entail encroachment on installations of the use of atomic energy or with the use of nuclear materials or of sources of radioactive radiation or venomous, poisonous, toxic or hazardous chemical or biological substances;

(b) Have entailed intentional causing of death to a person shall be punishable with imprisonment for 15 to 20 years or with a life sentence. (See <http://legislationline.org/documents/section/criminal-codes/country/7>).

and 222 (1) of the Code and sentenced the author to 21 years in a penal colony of maximum security. The author's claim about the breach of procedure during the hearing at the court of first instance was considered groundless. The Supreme Court found invalid the author's claim that the new version of article 205 decriminalized his actions. It ruled that criminal liability for the actions committed by the author had not been abolished by the amended provision, that the old version of the Code had been applied because it provided for a lighter penalty and that there were no grounds for a different qualification of the author's actions.

2.7 On 20 December 2011, the author filed a claim to the Constitutional Court arguing that article 205 of the Criminal Code as amended on 27 July 2006 should have been applied in his case since it decriminalized his actions. On 25 January 2012, the Constitutional Court found the author's claim inadmissible, stating that the question of whether amendments in the criminal law contained changes beneficial to the sentenced person and whether certain provisions should be applied in the claimant's case fell outside of the Court's jurisdiction.

2.8 On an unspecified date, the author filed an appeal under the supervisory review proceedings to the Prosecutor General's Office, which was rejected on 27 October 2009. On 7 June 2013, the author appealed again under the supervisory review proceedings to the Prosecutor General's Office. In his second appeal, he referred to Supreme Court resolution No. 1 of 9 February 2012 on some aspects of judicial practice relating to criminal cases on crimes of a terrorist nature. In paragraph 1 of the resolution, the Supreme Court underlined that the actions set out in article 205 of the Criminal Code amounted to the crime of terrorism only if they were carried out with the specific purpose of influencing the decision of the authorities or of an international organization. In paragraph 11 of the resolution, the Supreme Court further clarified that, if the actions listed in article 205 were carried out with a different purpose, that should be qualified under other relevant articles of the Criminal Code. The Prosecutor General's Office rejected the author's appeal on 14 June 2013.

2.9 On 29 January 2008, the author filed a complaint to the European Court of Human Rights. His complaint was found inadmissible by a committee of three judges on 30 April 2010. The committee found that the material on file did not disclose any violation of the author's rights and freedoms.

### **The complaint**

3.1 The author claims that his prolonged subjection to inhuman treatment while in the remand facility of the Federal Security Service had an adverse physical and psychological effect on him, especially taking into account the state of his health (diabetes, hypertension, gastritis, pyelonephritis, prostatitis, varicose veins, chronic bronchitis, barotrauma and reduced hearing). In this context, he claims that his rights under articles 7 and 10 (1) and (2) (a) of the Covenant have been violated.

3.2 The author claims a violation of his rights under article 14 (1) of the Covenant because the presiding judge of the court of first instance was biased, had influenced the decision of the jury and had prohibited the audio recording of the hearing and the taking of written notes by the lawyer and relatives of the author while Federal Security Service representatives were allowed to video record the hearing. The author claims that the transcript of the trial, drafted over seven months, was amended by the court but that the defence did not possess audio recordings to prove the bias of the judge or other procedural violations. He also claims that the court breached the principle of equality of all persons before the law by failing to apply to him mitigating circumstances that were applied to his co-defendants and considering that the planned effects of the explosion never took place. He claims that his sentence was excessively severe and did not take into account, among other factors, his age, poor health, family circumstances and professional awards.

3.3 He further submits that his right to equality of arms under article 14 (3) (e) of the Covenant was violated when the presiding judge in the court of first instance refused to read the pretrial statements of the witnesses (Mr. D. and Mr. S.), whose numerous pretrial statements were allegedly incoherent and controversial and contradicted the statements made in court. He also claims a violation of article 14 (3) (b) and (g) of the Covenant without providing further details.

3.4 The author claims that the court violated article 14 (3) (d) of the Covenant because he was found guilty under article 307 (2) of the Criminal Code of giving false testimony when interrogated on the alleged attempt to his life while, at the same time, being found guilty of staging the attempt on his life by exploding a grenade in his apartment. He claims that, under article 51 of the Constitution, a person who gives false testimony when interrogated as a witness in a crime cannot be held responsible for having given such testimony if he or she has participated in the crime in question.

3.5 The author finally alleges a violation of his rights under article 15 (1) of the Covenant on two accounts: (a) the court of supervisory instance worsened his situation by increasing the term in prison under some of the articles of his sentence, compared to the terms imposed by the court of first instance; and (b) the courts did not take into account the decriminalization of his actions by article 205 of the Criminal Code as amended on 27 July 2006 and made an error by applying to him a heavier penalty under the old version of the Code instead of requalifying his actions under different articles of the Criminal Code.

#### **State party's observations**

4.1 In a note verbale dated 31 July 2014, the State party submitted that, since the author had filed a complaint with the European Court of Human Rights in 2008, his complaint to the Committee was inadmissible under article 2 (5) of the Optional Protocol.

4.2 In a note verbale dated 6 October 2014, the State party submitted its comments on admissibility and the merits. It stated that the author's allegations of a violation of articles 14 and 15 of the Covenant were considered by the Supreme Court acting as a supervisory instance (see its decision of 19 November 2008). The Supreme Court found no confirmation of the biased attitude of the judge presiding over the court of first instance and found that her behaviour corresponded with the requirements of procedural legislation. The Supreme Court noted that the witnesses were questioned during the hearing and that the defence had the opportunity to ask them questions about the inconsistencies in the statements they made during the pretrial investigation. The defence, however, did not avail itself of that opportunity.

4.3 The Supreme Court also noted that the evidence and conclusions of experts were studied during the court hearing in accordance with established procedure. The request of the defence to conduct an additional expert examination was rejected by the presiding judge with due account taken of the opinion of the trial participants and with the reasons for the refusal reflected in the trial record. The Supreme Court repealed the author's sentence under article 307 (2) of the Criminal Code. As for the author's claims about the erroneous qualification of his actions under article 205 of the old Criminal Code, the Supreme Court found that the new wording of article 205 did not decriminalize his actions and that there was therefore no reason to qualify them differently. The overall sentence of 21 years in a penal colony of maximum security was calculated by the Supreme Court in accordance with article 69 of the Criminal Code, which sets the rules for determining sentences for cumulative offences and was fair and proportionate to his actions.

4.4 As for the author's allegations concerning a violation of article 7 of the Covenant, the Supreme Court notes that the transcript of the trial does not reflect any mention by the author of cruel treatment. The author submitted his comments for inclusion in the transcript

of the trial but did not mention that those particular allegations had been left out by the Krasnodar Territorial Court. Thus, the State party concludes that the author's complaint does not reveal a violation by the national courts of his rights under the Covenant.

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

5.1 In a letter dated 11 November 2014, the author reiterated his original allegations and specified that the remedy he was seeking before the Committee was for the State party to repeal his sentence under articles 33 (3) and 205 (3) and reduce his sentence from 21 to 10 years.

5.2 On 24 November 2014, he added that the correspondence from the Committee had been delivered to him by the prison authorities in a damaged envelope and that he had made a note about it in the incoming correspondence registry. When he returned to his cell, he found a SIM card that was not his among his belongings. After that, he was accused of having violated the prison regime, was placed in solitary confinement cell for three days and transferred from a lighter to a stricter regime of detention afterwards. He alleges that those sanctions were carried out by the prison authorities in retaliation for his report on the open letter.

5.3 On 20 August 2015, the author informed the Committee that he had undergone surgery on one eye and that an operation on the other eye was needed, but that such operations could not be performed in prison hospitals. Because of his deteriorating health, he asked the Committee to speed up consideration of his complaint.

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

##### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee takes note of the State party's submission that the author filed a complaint with the European Court of Human Rights in 2008. It notes that, when acceding to the Optional Protocol, the State party made a declaration<sup>3</sup> in which it clarified that "the Committee shall not consider any communications unless it has been ascertained that the same matter is not being examined under another procedure of international investigation or settlement". The Committee observes that the European Court found the author's complaint inadmissible in April 2010. Since the matter is not currently being examined under another procedure of international investigation or settlement, the Committee is not precluded from considering the author's complaint under article 5 (2) (a) of the Optional Protocol.

6.3 The Committee takes note of the State party's observation that the author has never raised a claim of ill-treatment under article 7 of the Covenant before the national courts. It notes the author's claims that he complained repeatedly to the territorial prosecutor's office

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<sup>3</sup> The declaration reads: "The Union of Soviet Socialist Republics, pursuant to article 1 of the Optional Protocol, recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Union of Soviet Socialist Republics, in respect of situations or events occurring after the date on which the Protocol entered into force for the USSR. The Soviet Union also proceeds from the understanding that the Committee shall not consider any communications unless it has been ascertained that the same matter is not being examined under another procedure of international investigation or settlement and that the individual in question has exhausted all available domestic remedies."

about his treatment in the pre-remand facility and that he made a declaration in that regard before the court of first instance. The Committee, however, does not find documents on file to confirm the author's statement about making a declaration before the court of first instance regarding his treatment in violation of articles 7 and 10 (1) and (2) (a) of the Covenant, nor has he supplied any medical documents relevant to his pretrial detention or to complaints or appeals to support his claim. In the absence of any other pertinent information on file, the Committee considers that the author has failed to sufficiently substantiate his claim under articles 7 and 10 (1) and (2) (a) of the Covenant and finds it inadmissible under article 2 of the Optional Protocol.

6.4 Regarding the author's claims under article 14 (1) of the Covenant that the presiding judge prohibited the carrying out of an audio recording of the hearing and took away the written notes of the author's lawyer and relatives, and regarding also his claims concerning the violation of the principle of equality before the law that allegedly occurred when his sentence was calculated, the Committee notes that the author does not provide any information to support his allegations and therefore finds that this part of the complaint is insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

6.5 Regarding the author's claim under article 14 (1) of the Covenant that his sentence was excessively severe and did not take into account his personal and family circumstances, the Committee notes that the claim involves an interpretation of national legislation and that national legislation is in principle interpreted by the courts of States parties, unless the sentence was clearly arbitrary or amounted to a denial of justice.<sup>4</sup> The Committee considers that there is nothing in the submissions of the author that would indicate that the evaluation was manifestly arbitrary. The Committee therefore finds that this part of the author's claim is insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

6.6 As for the author's claims under article 14 (1) and (3) (e) in relation to the examination of the facts of his case, the alleged biased behaviour of the presiding judge, the refusal to carry out an additional expert examination and questioning of witnesses, the Committee recalls that it is generally for the States parties' courts 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, or that the court failed in its duty of independence and impartiality.<sup>5</sup> The Committee notes the State party's argument, left unaddressed by the author, that the author and his counsel were given an opportunity to question the witnesses during the court hearing but did not use this opportunity. The Committee also takes note of the State party's argument that the refusal of the presiding judge to allow additional expert examination took into account the position of the participants of the trial and the reasons for a refusal were duly reflected in the transcript of the trial. Furthermore, as it transpires from the submissions of the State party, on a number of occasions the presiding judge instructed the jury not to take into account certain information and evidence. The Committee notes that the above arguments were left unaddressed by the author. In the light of the information available on file, the Committee considers that, in the present case, the author has failed to demonstrate that the trial has indeed suffered from "bias" or "lack of equality of arms", showing arbitrariness in the evaluation of the evidence and amounting to a denial of justice. The Committee therefore concludes that the author's claims under article 14 (1) and (3) (e) are insufficiently

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<sup>4</sup> See, for example, communication No. 1342/2005, *Gavrilin v. Belarus*, Views adopted on 28 March 2007.

<sup>5</sup> See, for example, communication No. 1894/2009, *G.J. v. Lithuania*, Views adopted on 25 March 2014.

substantiated for purposes of admissibility. Accordingly, the Committee declares that part of the communication inadmissible under article 2 of the Optional Protocol.

6.7 The Committee notes that the author has not provided any details concerning the alleged violation of his rights under articles 14 (3) (b) and (g) of the Covenant and finds this part of the claim insufficiently substantiated for the purposes of admissibility under article 2 of the Optional Protocol.

6.8 Concerning the author's claim that his rights under article 14 (3) (d) were violated because he was sentenced for giving false testimony, whereas under article 51 of the Constitution a person who gives false testimony when interrogated as a witness in a crime cannot be held liable for giving such testimony if he or she participated in the crime in question. The Committee notes that, on 19 November 2008, the Supreme Court repealed the author's sentence under article 307 (2) of the Criminal Code. Given these circumstances, the Committee concludes that the author cannot claim to be a victim of a violation of article 14 (3) (d). This part of the communication is therefore inadmissible under article 1 of the Optional Protocol.

6.9 As to the author's remaining claim under article 15 (1) of the Covenant regarding the qualification by the courts of his acts as terrorism, the Committee notes the argument by the State party that the national courts applied article 205 of the old Criminal Code since it provided for a lighter penalty compared to that which would have applied under the new version of the article. The Committee takes notes of Supreme Court resolution No. 1 and observes that the State party's courts should have revised the author's sentence retroactively in accordance with the guidance set out in the resolution. The Committee notes, however, that since it is up to the national courts to qualify the actions of the author under the law, it is unknown whether the penalty that could have been applied to the author after the revision of his sentence in accordance with the resolution No. 1 would have been lighter than that applied to him under article 205 of the old Criminal Code, which was in force when the crimes were committed. In that light, the Committee considers that the author failed to substantiate sufficiently his claim that his rights under article 15 (1) of the Covenant were violated. The Committee thus finds this part of the complaint inadmissible under article 2 of the Optional Protocol.

6.10 As regards the allegations of the author that the court of supervisory instance worsened his situation by increasing the prison term compared with the term imposed by the court of first instance, the Committee notes that this part of the claim raises issues under article 14 (1) of the Covenant. The Committee recalls that "the concept of a fair hearing in the context of article 14 (1) of the Covenant should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings, preclusion of ex officio reformatio in pejus and expeditious procedure. The facts of the case should accordingly be tested against those criteria."<sup>6</sup> The Committee notes that this claim concerns interpretation of national legislation and the method applied for calculating the sentence in case of multiple charges. The Committee also notes the submission of the author that the Court repealed the author's sentence under article 307 (2) of the Criminal Code and at the same time increased the prison term originally set by the court of first instance under articles 306 (3), 167 (2) and 222 (1) of the Code and thus imposed a more severe penalty. The Committee notes, however, that in principle it is up to the courts of States parties to interpret domestic legislation, unless it is clearly arbitrary or amounts to a denial of justice. From the materials on the file, the Committee cannot conclude that the calculation of the prison term by the Supreme Court was arbitrary or the result of the improper application of the law or that it amounted to a denial of justice. The Committee

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<sup>6</sup> See communication No. 207/1986, *Yves Morael v. France*, Views adopted on 28 July 1989.

can neither conclude that the sentence imposed by the Supreme Court was more severe in comparison to the original sentence imposed on the author or that the principles of adversary proceedings or of preclusion of ex officio reformatio in pejus were ignored. The Committee therefore finds this part of the author's claim insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under articles 1, 2 and 5 of the Optional Protocol;

(b) That the present decision shall be transmitted to the State party and to the author of the communication.

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