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International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 1834/2008

Decision adopted by the Committee at its 105th session (9–27 July 2012)

Submitted by:	A. P. (not represented by counsel)
Alleged victim:	The author
State party:	Ukraine
Date of communication:	1 November 2007 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 9 December 2008 (not issued in document form)
Date of adoption of decision:	23 July 2012
Subject matter:	Alleged arbitrary arrest and detention; imposition of a life-imprisonment sentence, based on a confession of guilt extracted under torture and following an unfair trial with no adequate remedy
Substantive issue:	Torture; arbitrary arrest and detention; inhumane treatment and respect for dignity; unfair trial; adequate time and facilities to prepare for the defence and to communicate with counsel of one's own choice; right to legal assistance; right to examine witnesses and obtain the attendance of witnesses on one's behalf; *ne bis in idem*; right to adequate remedy; measures derogating from obligations under the Covenant
Procedural issue:	Non-exhaustion of domestic remedies; insufficient substantiation of claims;
Articles of the Covenant:	2, paras. 1 and 3 (a) and (c); 4, para. 2; 7; 9, para. 1; 10, paras. 1 and 3; 14, paras. 1, 3 (b), (d) and (e) and 7; 19, para. 2
Article of the Optional Protocol:	2 and 5, para. 2 (b)

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (105th session)

concerning

Communication No. 1834/2008*

Submitted by:	A. P. (not represented by counsel)
Alleged victim:	The author
State party:	Ukraine
Date of communication:	1 November 2007 (initial submission)

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

Meeting on 23 July 2012,

Adopts the following*:*

Decision on admissibility

1. The author of the communication is Mr. A. P., a national of Ukraine born in 1975. He claims to be a victim of a violation by Ukraine of his rights under article 2, paragraphs 1, 3 (a) and (c); article 4, paragraph 2; article 7; article 9, paragraph 1; article 10, paragraphs 1 and 3; article 14, paragraphs 1, 3 (b), (d) and (e), and 7; article 19, paragraph 2, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Ukraine on 25 October 1991. The author is unrepresented.

The facts as presented by the author

2.1 On 17 January 2002, the author was arrested in Gorlovka city on suspicion of having committed several crimes. He claims that he was "picked out", because he knew the victims and had already been convicted in the past. From the moment of his arrest and until his transfer to the investigation detention facility (SIZO) No. 6 in Artemovsk city, the author was subjected to torture and beatings by police officers for the purpose of securing a confession of guilt. They, inter alia, pumped ammonia into the gas mask put over the author's head and inserted either a knitting needle or a bradawl into his urethra. Unable to withstand the torture, the author admitted that he was guilty and also falsely implicated one R. in having committed the crimes. He further claims that R. was subjected to similar

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

methods of torture and was in turn forced to falsely implicate him in having committed the crimes in question.

2.2 In February 2002, the author claims that he lodged a complaint with the Ministry of Interior about the use of torture by police officers, and requested that a medical examination be carried out in order to document the injuries he had sustained.[1] On an unspecified date, an investigating officer orally denied this request in the presence of the author's *ex-officio* lawyer assigned by the investigating team. Allegedly, the lawyer did not challenge this decision. In addition, the author claims that the lawyer was actively cooperating with the investigators in "helping" them to fabricate evidence against him.[2] He also alleges that the crime scene reconstruction experiment was carried out in the investigation detention facility (SIZO) of Gorlovka city, and not at the crime scene. Investigating officers familiarized him with the circumstances of the crime, including the position of the victims' bodies and the timeframe within which the crimes had been committed. Thereafter, he was forced to repeat all this on videotape under threat of further torture. Since he did not commit the crimes, his statements were sometimes inaccurate and therefore he was corrected and instructed by the investigative officers and his *ex-officio* lawyer on "how everything had happened". Although these episodes were subsequently deleted, the videotape allegedly presents signs of editing proving that this piece of evidence was tampered with. The author claims that his numerous complaints about the above facts remained unanswered.

2.3 The author submits that he was not allowed to retain a lawyer of his choice and that, in any case, he would not have been able to pay for the services of a private lawyer. He was not allowed to familiarize himself with the case file, but had to sign a report that he had actually done so under threat of further torture. His *ex-officio* lawyer allegedly signed the respective report in the author's absence.

2.4 On 6 December 2002, the Donetsk Regional Appeal Court found the author guilty of two premeditated murders for mercenary motives (article 115, part 2, of the Criminal Code) and robbery, and sentenced him to life imprisonment. The author claims that the court based its sentence on the forced confessions, although he and R. retracted them in court, claiming that police officers had used unlawful methods of investigation to force them to testify against themselves.[3] He stated in court that he and R. were in Moscow at the time of

[1] There are no materials on file to confirm that such complaint was indeed filed by the author.

[2] There are no materials on file to confirm that the author filed any complaints about the lawyer's unprofessionalism or improper behaviour or that he had refused his services. It appears that no such claims were raised during the trial or in his cassation appeal.

[3] The court stated that the accused changed their statements during the pretrial investigation, claiming that police officers used unlawful methods of investigation to force them confess guilt. The court considered these claims unfounded, since the author and the co-accused were interrogated in the presence of their lawyers, made voluntary statements about the circumstances of the crimes during the crime scene reconstruction (which was conducted in the presence of lay witnesses and a forensic expert) and did not make any complaints against police officers. In addition, the author was examined by a forensic medical expert (no date indicated and no copy of it provided) who attested that there were no bodily injuries on the day of his arrest, nor did the author complain about ill-treatment. The cassation court, with reference to case file materials, stated that the accused were informed about their rights under article 63 of the Constitution not to testify against themselves and made no complaints about evidence being obtained under duress during the interrogations, including the confrontation between the author and the co-accused (recorded on videotape) which took place in the presence of their lawyers or during the crime scene reconstruction conducted in the presence of their lawyers, the forensic expert, the head of the investigative department of the Prosecutor's Office of Gorlovka city and lay witnesses. No such complaints were filed by the accused or their lawyers at the time of the pretrial investigation. The author did not submit any such complaints at the time of familiarization with the case file or during the hearing of 20 January 2002 when the court decided on the measure of

commission of the crimes and that their alibi could have been verified through the customs and border service's records of persons[4] who had crossed the border between Ukraine and the Russian Federation, as well as by the hotel registries in Moscow.[5] The court, however, failed to do so and to give due consideration to their alibi.[6] The court also refused to hear witnesses S., K., and T. who could have confirmed their alibi.[7] The author also claims that his national passport, which was seized during his arrest and subsequently "lost" at the pretrial stage of the investigation, contained the stamps of the Ukrainian Border Service bearing the dates of his departure to and return from the Russian Federation.

2.5 The author claims that the sum of US$900 which, according to the prosecution, served as a motive for committing the murders, was not found in his or the co-accused's possession. He claims that the main witness of the prosecution, one P., who identified him as being the person leaving the crime scene, is frequently used by police for obtaining statements favourable to the prosecution. In view of her antisocial behaviour, the said witness often has problems with the police, and they "disregard" petty offences committed by her exchange for statements confirming the version of the events promoted by the investigation – a widespread practice in Ukraine. The witness described in detail the clothes worn by the person who left the crime scene, mentioning that he had blond hair. However, the court ignored the fact that the author is dark-haired and that the clothes taken from him did not match the description given by the main witness.[8] His motion to have the main

restraint (detention). The court also invoked the findings of a forensic medical examination (no date indicated or copy of it provided) which identified no bodily injuries on the day of the author's arrest nor as of 4 February 2002. Moreover, the co-accused declared that he did not know, and was not able to identify, any police officer that allegedly tortured him, while the author declared that he does not remember them.

[4] The author provides a copy of a letter dated 31 March 2008 received from the Border Service of Ukraine, informing him that, as of 31 March 2008, no records existed about his alleged border crossing. The author was also informed that the database registration of border-crossing of Ukrainian nationals was possible only after the creation of the Border Service of Ukraine, that is, after 1 August 2003. Another letter from the Border Service, dated 30 May 2008, advised the author that in the period 1991-2003, no registration of Ukrainian nationals crossing the border was made. The author however maintains that this is a lie and that authorities consistently prevent him from proving his alibi.

[5] The author maintains that the court should not have used the fact that they could not remember the name of the hotel where they stayed in Moscow as evidence of their guilt. Since they were not preoccupied with creating an alibi, they did not remember all the details.

[6] During court proceedings, the author and the co-accused were unable to indicate the exact date of their travel to and length of their stay in Moscow. The author first stated that they went to Moscow on 22 -23 December 2001 and spent two or three days. Thereafter, he referred to 21-22 December as their date of travel, claiming that they returned to Ukraine on 24-25 December 2001. In his third version of facts, the author indicated that they had spent two days in Moscow and returned to Ukraine on 29 or 30 December 2001. In the light of the contradictory statements about the details of their travel to Moscow, the court rejected their arguments as unfounded.

[7] The author enclosed written statements, dated 19, 20 and 21 September 2007, respectively, addressed to "human rights organization/NGO" (without specification). In her statement, S. writes that she witnessed the author and co-accused's departure to Moscow on 24 December 2001 and confirms that they were out of the country until 29 December 2001 inclusive, therefore they could have not committed the crimes (for inconsistency regarding the dates, see also footnote 6 above). The other two witnesses in their statements simply confirm these declarations. It is not clear from the materials on file if these statements have ever been presented to the attention of court.

[8] According to materials on file, witness P. identified the author from photographs. There is no information on file to verify the author's statements regarding the clothes and his hair colour.

witness summoned and examined in court was rejected.[9] His motions to have three other witnesses, who could have confirmed his alibi, summoned and examined in court, as well as to order expert examination of the prosecution evidence, which he claims has been tampered with by the investigators, were also rejected by the court and omitted from the trial transcript.

2.6 The author claims that the forensic examinations used as evidence of his guilt cannot be regarded as conclusive evidence, since the degree of proof is reflected by such words as "may", "it is not excluded," etc. One of these forensic examinations concluded that the footprint at the crime scene was most probably left by footwear whose impression coincided with the footwear impression of his right-side footwear. However, he claims that, at the time, he was wearing boots made in China which were worn by every second person in the city, due to their low price. If the footprint identified at the crime scene had indeed been left by his boots, the conclusion of the forensic examination would have stated that it was "identical to", and not "most probably left by", his right-side footwear. In this context he claims that the sentence cannot rest on assumptions, and any doubts should be interpreted in favour of the accused. The rejection by the court of his motions to conduct further forensic examinations and summon important witnesses for testimony deprived him of the opportunity to effectively defend himself.

2.7 The author further claims that in deciding the level of punishment, the court took into account his prior conviction, which he had already served before the sentence was handed down (6 December 2002). In other words, the court tried and punished him again for an offence for which he has already been convicted.

2.8 On 8 January 2003, the author lodged a cassation appeal with the Supreme Court, which upheld the decision of the first instance court on 3 June 2004. The author filed a motion for the examination of the evidence produced during the crime scene reconstruction (the videotape) which could have proven that he had been tortured to make him admit his guilt.[10] This motion was dismissed by the court. He challenges the court's assertion that he did not complain about torture either to his lawyer[11] or during the hearing of 20 January 2002 when the court decided on the measure of restraint (detention).[12] He further challenges the court's contention that the conducted forensic medical examination did not attest any injuries, claiming that no such examination ever took place. The author also submits that the Supreme Court referred to the testimony of one Z., according to which he and R. (the co-defendant) visited her on 25 December 2001 and they left for Moscow on 27 or 28 December 2001. The author claims that she was not present during the first instance court hearings and her testimony was not referred to in the decision of the court of first instance which, in his opinion, confirms that the court attempted to fabricate incriminating evidence against him.

2.9 The author's applications for supervisory reviews (including for reconsideration of his case, based on newly discovered facts) to the Prosecutor's Office of Donetsk Region,

[9] This claim is not supported by materials available on file. According to the Supreme Court's decision, the absence of the witness during proceedings was motivated. The court consulted the parties to the proceeding on the possibility of continuing the trial in her absence and neither the accused nor their lawyers objected to this. The author did not avail himself of the right to question the witness, and did not object to having her testimony made at the time of pretrial investigation read out in court.

[10] The author claims that torture marks (signs of beatings, broken arms) are easy identifiable on a picture of him taken during the pretrial investigation and available in his criminal case file (photograph not provided to the Committee).

[11] The author claims that his complaints to his lawyer were all ignored.

[12] On the contrary, the author maintains that he drew the attention of the judge to this fact, but his claims were ignored.

the General Prosecutor's Office, and the Supreme Court were all rejected. His application to the Constitutional Court was also rejected for lack of jurisdiction.

2.10 In September 2004 and on 10 May 2005, the author requested the Donetsk Regional Appeal Court to provide him with a copy of the criminal case file in order to corroborate the claims made under the Covenant before the Committee. This request was denied by the judge and a Deputy Chair of the Donetsk Regional Appeal Court on 5 October 2004 and 1 June 2005, respectively, on the grounds that the criminal procedure law does not provide for such practice. On 14 April 2008, the author filed a complaint against the above refusal with the Sokalsky District Court. His complaint was rejected on 23 May 2008, on the grounds that such matters are dealt with under criminal, not civil proceedings. His further appeal of 24 June 2008 was rejected by the Appeal Court of Lvov Region on 1 August 2008, for failure to file the appeal within the legal deadline. On 11 September 2008, the author lodged a cassation appeal with the Supreme Court, claiming that he had respected the legal deadline, but that the court did not correctly apply the civil procedure norms regarding such submissions.[13] On 30 October 2008, the Supreme Court upheld the previous decisions. The author claims therefore that failure of the State party to provide him with a copy of his criminal case file constitutes a violation of his right to receive information under article 19, paragraph 2, of the Covenant. The author also claims that the administration of the investigation detention facility (SIZO) No. 6 in Artemevka city, as well as that of No. 5 in Donetsk city, consistently hindered his right to petition human rights NGOs by forwarding such complaints to national courts or by returning them for failure to properly indicate the address of the intended recipients.

2.11 On an unspecified date, the author was transferred to the investigation detention facility (SIZO) No. 5 in Donetsk city. He claims that all inmates sentenced to life imprisonment and serving their sentence in this facility were regularly and deliberately subjected to beatings and deprived of food by the administration. Food served to this category of inmates was always cooked in conditions lacking hygiene and from rotten ingredients. Mice corpses, cigarette stubs, glass, asphalt and stones were regularly found in the food served to these inmates. The bread, which was baked in the facility, was made of flour used for feeding animals. Money sent to inmates by their relatives was automatically confiscated by the prison administration for payment of utility bills, without inmates' consent. The hunger strike by inmates in 2003, which was prompted by inhuman conditions of detention, was severely put down by the administration. Inmates who tried to complain about the administration were subjected to a specific disciplinary action involving the use of straitjackets: the inmate would be knocked down by officers of the special unit, hit by truncheons, beaten with fists and kicked, then forced into a straitjacket with his elbows half bent behind his back, then he would be dropped onto the concrete floor with his elbows down and again hit, beaten and kicked. A medical doctor present during this disciplinary action would splash liquid ammonia on the faces of inmates who lost consciousness to make them come to their senses. The author claims that he himself was subjected to the above disciplinary action on 25 June 2003, then placed in a punishment cell. He was transferred to a normal cell on 27 June 2003 due to health problems[14] which he claims were the result of the ill-treatment.

[13] He also maintained that he was hospitalized at the time that the decision of 23 May 2008 reached the prison; it was communicated to him only upon his return from hospital.

[14] To substantiate this claim, the author provides a copy of the decision ordering his incarceration in the punishment cell for 10 days for breach of prison regulations. According to the decision, he was transferred to his cell after two days (27 June 2003) due to health reasons (reactive psychosis and schizophrenia). The same document notes that, upon incarceration in the punishment cell on 25 June 2003, a medical examination concluded that the author was fit for incarceration and did not complain

2.12 On 31 July 2004, the author was transferred to the Enakievskaya correctional facility - No. 52 where he and other inmates were subjected to daily beatings and humiliating treatment. When he complained of ill-treatment to the prosecution department in charge of penitentiary facilities, he was "disciplined" by the administration by being forced into a straitjacket, handcuffed, dropped onto the concrete floor and jumped on his stomach by officers. On a number of occasions, the author was placed into the punishment cell, where he was put to sit on a metal bed with his stretched hands "hanging in the air" handcuffed to the opposite sides of the bedposts and his legs put into irons and attached to the opposite sides of the bed frame. He was left in this position motionless for days, with 5-minute toilet breaks three times a day during the daytime, and with his hands and legs attached to the metal bed frame during the night. Irrespective of the time of the year, the temperature in the punishment cell was the same as outside, and he was deprived of the right to seek medical assistance even in critical condition. As a result of this treatment and lack of medical care, he developed many life-threatening and chronic diseases while serving his sentence.[15] His complaint regarding the conditions of detention lodged with the Prosecution Office of Donetsk Region was rejected in July 2007.[16] The author also claims that the prison administration forced him to remove from his initial submission of 1 November 2007 all information about alleged violation of article 10 of the Covenant, under threat that his submission would not leave the facility.

The complaint

3. The author claims that his arrest, trial and ill-treatment whilst in custody constitute violations of article 2, paragraphs 1, 3(a) and (c); article 4, paragraph 2; article 7;[17] article 9, paragraph 1; article 10, paragraphs 1 and 3; article 14, paragraphs 1, 3(b), (d), (e) and 7; article 19, paragraph 2, of the Covenant.

State party's observations on admissibility and merits

4.1 On 9 June 2009, the State party submitted its observations on the admissibility and merits of the complaint. It submits that on 6 December 2002 the Appeal Court of the Donetsk Region found the author guilty of premeditated murder of two persons and robbery, and sentenced him to life imprisonment with confiscation of property. On 3 June 2004, this decision was upheld by the Supreme Court. The author's guilt was duly established by his own statements made as a suspect, statements made by the other co-suspect, the confrontation between them, testimonies of the victims' relatives and of witnesses, the crime scene reconstruction report, the conclusions of forensic expert examinations, as well as by other evidence.

about any health problems. The author also provides a letter written by a fellow inmate who confirms that they were subjected to frequent beatings, incarceration in the punishment cell and other forms of inhuman treatment.

[15] The author provided several medical certificates (some of which are illegible). Most of them document health conditions such as chronic haemorrhoids, emotionally unstable personality disorder, chronic bronchitis, chronic gastritis, eczema, high blood pressure. Based on the certificates, medical treatment was prescribed to the author following each medical examination.

[16] No copy provided, nor is there any information on file to confirm that the author appealed this refusal to the hierarchically superior prosecutor or in court.

[17] The author submits that he is aware of the lack of factual evidence concerning the violation of his rights under article 7 of the Covenant. However, he requests the Committee to conclude a violation of this provision in his case, on the basis of the widespread use of torture in Ukraine in order to extract confessions. He also refers to precedents from the European Court of Human Rights, which found a violation of article 3 of the European Convention on Human Rights, based on general information about widespread use of torture in countries where the applicants risked being deported.

4.2 With regard to the author's allegation of the use of unlawful methods of investigation, the State party submits that the author and the other co-accused were interrogated during the pretrial investigation in the presence of their lawyers. During the crime scene reconstruction (which was conducted in the presence of lay witnesses and a forensic expert), they did not make any complaints against police officers and made voluntary statements about the circumstances of the crimes, that could only have been known to the persons who committed them. The author changed his testimony several times, first indicating that he had committed both murders with the assistance of the other co-accused, then arguing that he had committed only one of the murders in the heat of passion. The author was examined by a forensic medical expert on the day of arrest, no bodily injuries were attested to, and he made no complaints about ill-treatment. A verification conducted by the General Prosecutor's Office into the author's claims about the fabrication of materials of his criminal case found his allegations groundless.

4.3 The alleged presence of the author and other co-accused in Moscow at the time of commission of the crimes was also not confirmed. During the court hearings, they were unable to indicate the exact date of their departure to Moscow or the name of the hotel where they allegedly stayed, and they made contradictory statements about their travel: the co-accused first mentioned that they had spent the night at the railway station, then, following the author's statements, claimed that they had spent the night in a hotel. In addition, one witness, Ms. P., said that she had seen the author on the day of the commission of the crimes (24 December 2001) near the crime scene.

4.4 The State party further states that the database containing information about persons who cross the border of Ukraine contains no relevant information in respect of the author. In 2001, no records were made concerning Ukrainian nationals who crossed the State border at Ukrainian-Russian border-crossing checkpoints. According to the Resolution No. 57 of the Cabinet of Ministers of Ukraine of 27 January 1995 (On approving the rules for crossing the State border by Ukrainian nationals), which was in force at the time of the alleged border crossing by the author, the registration of nationals crossing the border was made by exit and entry stamps in their passports.

4.5 As to the written testimonies of S., K., and T., the State party submits that they should have been sent to the Prosecutor's Office. Should the testimonies be deemed credible after their verification, they may serve as grounds for reconsideration of the author's case under the extraordinary proceedings pursuant to Chapter 32 of the Criminal Procedure Code (Reopening of criminal cases based on newly discovered facts). The State party also draws the Committee's attention to the fact that those statements were written in 2007, almost six years after the commission of the crimes.

4.6 The author was given the opportunity to familiarize himself with the materials of the case file and to take notes therefrom. He may file a request for familiarization with his case file, however, domestic legislation does not provide for giving away case file materials or copying them. The author may also avail himself of the services of a lawyer who may request to be acquainted with the case file materials on his behalf and take the required notes therefrom. If the author cannot afford a lawyer due to financial difficulties, he can seek free legal assistance from NGOs.

4.7 With regard to the conditions of detention, the State party submits that the author was transferred from the investigation detention facility (SIZO) in Artemsk city to the one in Donetsk city on 6 December 2002. On 31 July 2004, he was transferred to the Enakievskaya correctional facility No. 52. The verification conducted by the State Department for the Execution of Sentences did not establish any breaches of national legislation, unlawful actions or biased or unfair treatment of the author by prison staff at Donetsk SIZO or Enakievskaya correctional facility. During his detention, the author committed nine breaches of prison regulations, for which he was disciplined, including by

detention (six times) in the punishment cell. He never appealed against these disciplinary actions according to the established procedure. According to the materials of the internal investigation, staff at Donetsk SIZO made use of special means of restraint in respect of the author on 25 June (rubber truncheon, straitjacket) and on 24 December 2003 (straitjacket) in response to breaches of prison regulations committed by him. The use of special means of restraint was duly recorded and was proportional to the gravity of the breaches committed by the author. Following their use, the author was subject to a medical examination which concluded that he did not require any medical aid. The State party also submits that no unit of Special Forces or other law enforcement bodies were introduced on the territory of Donetsk SIZO in order to counter the unlawful actions committed by inmates.

4.8 The State party further states that the disinfection of the premises of the Donetsk SIZO and Enakievskaya correctional facility is done on a daily basis in order to prevent tuberculosis and other diseases. The sanitary-epidemiological situation is satisfactory and there has been no outbreak of infectious, viral and parasitic diseases. The author was subject to preventive medical examinations repeatedly and received adequate treatment for his health conditions (chronic haemorrhoids, bronchitis, chronic gastritis and emotionally unstable personality disorder).

4.9 All the author's letters were dispatched to the recipients and he received all the answers to his petitions under signature. The State party also submits that persons sentenced to life imprisonment and detained in the Enakievskaya correctional facility have the possibility of using the books, journals and newspapers provided by the facility's library or brought by their relatives and other persons. They may also watch television and go for a one-hour walk daily.

4.10 On 5 October 2005 the Prosecutor's Office of Donetsk Region received a complaint from the author's mother about her son's conditions of detention in the Enakievskaya correctional facility, the threats of physical abuse he had received and the psychological pressure exerted on him. These allegations were not confirmed in the course of the verification conducted by the Prosecutor's Office of Gorlovka city, which decided on 18 October 2005 not to open a criminal case. The author's mother was informed about this decision, which was not appealed in accordance with the established procedure.

4.11 On 6 October 2005, the author's mother filed another complaint to the Prosecutor's Office of Donetsk Region regarding her son's unlawful conviction and the need to ensure his security in the Enakievskaya correctional facility. Following the verification of her allegations, the Prosecutor's Office concluded that they were unfounded and informed her accordingly on 20 October 2005.

4.12 On 25 September 2007, the Prosecutor's Office of Donetsk Region received the author's complaint about the living and medico-sanitary conditions of detention in the Enakievskaya correctional facility. The verification carried out jointly with specialists of the State Department for the Execution of Sentences did not identify any violations of the author's constitutional rights as alleged in his complaint. The author was informed accordingly on 25 October 2007.[18]

[18] According to the decision (copy available on file), the Prosecutor's Office of Donetsk Region carried out a verification of the author's allegations jointly with specialized bodies of the State Department for the Execution of Sentences, including safety and security, health care and epidemiological control and jail facilities maintenance. In the course of the verification, it was established that the author had been disciplined for violations of prison regulations. The measures of restraint employed were lawful and in conformity with article 134 of the Criminal Procedure Code. The verification concluded that

4.13 The State party also submits that the author had lodged an application with the European Court of Human Rights. As of 29 May 2009, the author's application had not been communicated to the State party.

Author's comments on the State party's observations

5.1 In his comments dated 1 September 2009, the author rejects the State party's observations, arguing that they are false and that they refer to facts and evidence fabricated by the authorities. He reiterates his previous claims and submits that the State party did not provide any information refuting his well-substantiated allegations under article 14 of the Covenant.

5.2 He claims that the information provided by the State party regarding the use of unlawful methods of investigation was invented. The presence of State-appointed lawyers during interrogations cannot be regarded as a guarantee of respect for the rights of the accused, since they do not fulfil their responsibilities. This "caste" is formed exclusively by "loser lawyers" and most of them are former employees of the Prosecutor's Office or former policemen.

5.3 He challenges the State party's argument that he testified about the circumstances of the crimes that could have been known only by the persons who committed said crimes, claiming that the circumstances were known by police officers present at the crime scene, who forced him and the co-accused to write down "reliable" statements based on their dictation. They were also taken to the crime scene[19] where they were forced to follow police's instructions and read out their "confession". He made no voluntary statements, since he did not commit those crimes and he had an alibi which could have been easily verified. The confession of guilt was extracted under torture. The author challenges the findings of the forensic medical examination that attested to no injuries, claiming that the

the living conditions of inmates were in conformity with hygiene and sanitary regulations. According to article 115 of the Criminal Procedure Code, not less than 3 m^2 of living space shall be allotted to each inmate: the cell in which the author was detained was built to hold four people (14,56 m^2 in size). The cell was furnished in compliance with the regulations in force and the ventilation system was functioning. The author's allegations of ill-treatment and psychological pressure were not confirmed during the course of the verification. The verification also established that showers were available on a weekly basis, the building being equipped with two showers and two mirrors; availability of cold and hot water was in conformity with sanitary norms, and the quality of potable water also complied with sanitary and hygienic standards; the prison facility was connected to the urban water supply and sewage systems; the author availed himself of his right to receive visits. With regard to medical assistance, the author was registered at the medical unit of the prison facility with the following diagnosis: rectal mucosal prolapse and chronic haemorrhoids, eczema, emotionally unstable personality disorder. He underwent inpatient medical treatment from 9 to 23 February 2007 in the Surgery Department of the Inter-Regional Hospital of Donetsk Region; no surgical intervention was recommended by the doctor. His state of health was deemed satisfactory. The verification further found that there is a medical unit in the prison facility, and the following specialists provide medical assistance: therapist, dentist, psychiatrist, psychologist-narcologist and radiologist. The unit also has 12 beds for inpatient treatment. For any other specialized treatment, inmates are hospitalized in the medical institutions of the State Department for the Execution of Sentences. In the light of the above, the specialists who carried out the verification identified no violations with regard to the medical or sanitary conditions of detention, therefore the Prosecutor's Office found the author's allegations groundless. The author was notified about the decision and advised about his right to appeal it to the hierarchically superior prosecutor or in court, as provided for in article 12 of the law "On the Prosecutor's Office". It appears that no such appeals were filed by the author.

[19] This contradicts his statement in para. 2.2 above, that the crime scene reconstruction was carried out in the investigation detention facility (SIZO) at Gorlovka city, and not at the crime scene.

medical expert refused to listen to him and did not asked him to take off his clothes in order to perform a thorough examination. He submits that he was held in pretrial detention for 30 days and was subjected to beatings and torture daily. Since the medical examination was conducted only once, it cannot be deemed conclusive.

5.4 The author further claims that the systematic and widespread use of torture in Ukraine is documented by numerous print publications, judgements of the European Court of Human Rights and reports of human rights organizations,[20] and that this information confirms indirectly his allegations of torture. He rejects the State party's contention that his allegations were verified by the Prosecutor's Office and were not confirmed, claiming that his complaints were dismissed without being duly examined.

5.5 As to the alibi, he could not remember the exact number of the train nor the exact date of departure to Moscow because of the length of time that had passed since the event. Since only two trains per week depart to Moscow, this could have been easily verified by the investigation. Moreover, their stay in the Russian Federation was registered by immigration authorities and also recorded in the register of the hotel, the description of which he provided to the investigation team.

5.6 The author claims that witness P. is a false witness (see para. 2.5 above) who made contradictory statements and invented facts that do not correspond with reality, for example that she had seen him at the crime scene.

5.7 The author notes the State party's information that at the time of his departure to Moscow (2001), the registration of nationals crossing the border was made by exit and entry stamps in their passports. However, the State party is silent about the presence or absence of such stamps in his passport. He also recalls that his passport "disappeared" from his case file during the pretrial investigation.

5.8 The author claims that he sent the statements of S., K., and T. to the investigative bodies and Prosecutor's Office repeatedly. He forwarded them to the Prosecution Office in 2004, but received no response.

5.9 He submits that he is not interested at all in consulting the materials of his criminal case in order to get acquainted with them. He requested to have a copy of his criminal case, to which he is entitled according to article 32 of the Constitution,[21] articles 23-32 of the law "On Information", as well as article 19, paragraph 2, of the Covenant. The State party's refusal to provide him with a copy of the case file represents an attempt to impede the establishment of truth in his case and amounts to a violation of article 19, paragraph 2, and article 2, paragraph 1, of the Covenant.

5.10 The author reiterates his claims under article 10 of the Covenant regarding inhuman conditions of detention and ill-treatment that, in his opinion, are uncontested by the State party. He further acknowledges that he lodged an application with the European Court of Human Rights in 2004 on a different matter. His application was declared inadmissible by a three-judge panel in 2006 for non-compliance with procedural requirements.

5.11 In conclusion, the author requests the Committee not to take into account the State party's observations, which are unfounded, fabricated and false.

[20] The author provided copies of materials purporting to support this contention.

[21] One of the paragraphs of this article reads: "Every citizen has the right to examine information about himself or herself, that is not a state secret or other secret protected by law, at the bodies of state power, bodies of local self-government, institutions and organisations."

5.12 On 30 September 2009, the author provided a copy of a newspaper article on ill-treatment of inmates in the detention facility at Vinnitsa city as indirect evidence of systematic and widespread use of torture in places of detention in Ukraine.

5.13 On 10 August 2011, the author provided additional comments, claiming that the forensic psychiatric examination of 27 February 2002 is fabricated as such examination had never been conducted. The examination in question refers to his alleged mental condition and anti-social behaviour as established by the psychiatric hospital in Gorlovka city in 1993. He explains that in 1993 he was beaten by police officers because of his refusal to write a confession of guilt for another crime. In order to cover up the beatings, police officers interned him in the psychiatric hospital, stating that he had self-inflicted injuries in a fit of madness. He was discharged from hospital after refusing any treatment, but doctors illegally recorded his alleged mental illness in his medical book. The author further claims that the forensic psychiatric examination of 2002 was fabricated (he never signed it) in order to create a negative image of himself before the court; he submits a letter from a fellow inmate, as well as the latter's forensic psychiatric examination report, to substantiate his argument. The author claims that the conclusions of their examinations are identical, as is the language used in both documents, which confirms that they were fabricated.

Further submissions by the State party

6.1 On 28 November 2011, the State party submitted further observations, stating that the author and the co-accused never complained about unlawful methods of interrogation during the pretrial investigation, the interrogations conducted in the presence of the lawyer, the confrontation between them, the crime scene reconstruction nor the court hearing of 20 January 2002. Such complaints were never received from the lawyer either.

6.2 Although the author claims that he has exhausted all domestic remedies in respect of the alleged violation of article 7, the State party states that he never appealed the Prosecutor's Office's refusal to initiate criminal proceedings, as provided for under article 12 of the law "On the Prosecutor's Office" and article 99 of the Criminal Procedure Code. Therefore, his allegations under article 7 should be declared inadmissible for failure to exhaust domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol.

6.3 As to the author's claim under article 14, paragraph 1, of the Covenant, that the evaluation of evidence by national courts in his case was arbitrary and constituted a denial of justice, that the court established his guilt exclusively on the basis of imprecise conclusions of forensic examinations, the State party submits that, according to article 323 of the Criminal Procedure Code, the court assesses evidence in accordance with its inner conviction based on thorough, complete and objective examination of all circumstances in the case and guided by law. The accused's statements, including those in which he pleads guilty, are subject to verification. A confession of guilt may be used as a basis for conviction only if it is corroborated by cumulative evidence. The State party submits that based on the content of the criminal file as well as the court decisions adopted in the author's case, the courts complied with the above norms and assessed all evidence and circumstances of the case in their entirety. Thus, the author's guilt was fully established by the Appeal Court of Donetsk Region (sentence of 6 December 2002) and confirmed by the Supreme Court (judgement of 3 June 2004) not only on the basis of his own testimony, but also based on the confrontation with the co-accused, the statements made by the latter, the witness testimonies, the crime scene reconstruction report, the conclusions of forensic expert examinations, as well as other evidence. Therefore, the author's allegations under article 14, paragraph 1, are unfounded.

6.4 In response to the author's claim that the forensic psychiatric examination of 27 February 2002 is fabricated, the State party submits that the respective examination was

carried out in accordance with the "Procedure of conducting the forensic psychiatric examination" approved by the Order No. 397 of the Ministry of Health of 9 October 2001. According to national legislation, the signature of the person subjected to the examination is not required. Therefore, the absence of the author's signature on the document is not an evidence of its fabrication.

Further comments by the author

7.1 In a letter dated 3 January 2012,[22] the author challenges the arguments advanced by the State party in its observations. He claims that he complained repeatedly about the use of unlawful methods of interrogation and pressure by police officers to the courts, as well as during the pretrial investigation. However, his complaints were "thrown out" by the investigative officers. He and the co-accused also raised this issue during their confrontation, but their complaints were not duly registered. The author also claims that he had exhausted all domestic remedies and submits that any further appeals would have been ineffective, taking into account the absence of information from the State party that such appeals filed in court against the decision of the Prosecutor's Office by a person convicted for murder in fact led to the reversal of the sentence and release of the convicted person. The refusal of the Prosecutor's Office and of the Supreme Court to review the unlawful decisions adopted by national courts confirms that such applications are unreasonably prolonged, therefore his communication is admissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.2 With regard to the State party's arguments in respect of article 14, paragraph 1, the author claims that article 62 of the Constitution stipulates that a sentence shall not be based on illegally obtained evidence or on assumptions. Therefore, any reference to article 323 of the Criminal Procedure Code and the court's "inner conviction" is unlawful. The principle laid down in article 62 of the Constitution had been confirmed in the Constitutional Court decision No. 1-31/2011 of 20 October 2011. Also, the Pechersk District Court in Kiev city confirmed in a judgement handed down on 11 October 2011 that only those forensic examinations that take the form of categorical conclusions may be used as evidence.

7.3 The author recalls that the statements made by the co-accused to which the State party refers were extracted under torture, as a result of which the co-accused incriminated himself and also implicated the author himself in the commission of the crimes.[23]

7.4 As to the forensic psychiatric examination, the author reiterates his previous claims and refers to a judgement of the European Court of Human Rights that, according to him, confirms the authorities' practice of subjecting persons to psychiatric evaluation unlawfully.[24] He recalls that he did not consent to it, a fact proven by the absence of his signature on the document.

7.5 The author requests the Committee to disregard the State party's observations, since they are untrue, anonymous and represent an abuse of the right of submission of such observations. Instead, due weight must be given to his allegations and all the documentary evidence provided.

[22] On 6 December 2011, the author provided a copy of the ruling of the Constitutional Court No. 1-31/2011 of 20 October 2011, in which the Court delivered its opinion on the interpretation of article 62 of the Constitution to which he refers in his comments (see para. 7.2).

[23] The author submits that the co-accused died of internal organ failure, a consequence of the torture endured.

[24] The author refers to the judgement of the European Court of Human Rights of 7 July 2011, in the case *Fyodorov and Fyodorova* v. *Ukraine* (application No. 39229/03), concerning the applicants' forced and arbitrary internment in a mental institution without the review of such decisions.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement.

8.3 The Committee takes note of the author's claims under articles 7 and 10, paragraph 1, of the Covenant about inhuman conditions of detention and the physical abuse and psychological pressure to which he was allegedly subjected while serving his conviction in the Enakievskaya correctional facility. The Committee notes in this respect the State party's arguments that the investigation carried out by the Prosecutor's Office in Gorlovka city found the author's allegations of ill-treatment groundless and on 18 October 2005 refused to open a criminal case for lack of evidence, and that this decision was never contested by the author. Another verification conducted by the Prosecutor's Office in 2005 and 2007 following the author's complaints about inhuman conditions of detention also established that his allegations were without merits, and the author failed to appeal any of these decisions in accordance with the procedure established by domestic law. The State party therefore challenges the admissibility of these claims on the grounds of non-exhaustion of domestic remedies. In the light of the State party's arguments and noting that the author has not argued the ineffectiveness of the remedies in question, the Committee declares this part of the communication inadmissible for failure to exhaust domestic remedies, in accordance with article 5, paragraph 2 (b) of the Optional Protocol.

8.4 The Committee notes the author's claim under article 14, paragraph 3 (b) and (d), of the Covenant, that he was not allowed to retain a lawyer of his choice, that the lawyer did not provide him with adequate legal assistance and acted contrary to his interests by assisting the prosecution in the fabrication of evidence against him, and that he was not allowed to familiarize himself with the case file, but signed a report that he had actually done so, under threat of torture. Based on the materials before it, the Committee observes that the author does not appear to have raised at any point during the domestic proceedings the alleged lack of adequate legal representation, nor the lawyer's inappropriate behaviour or that he had ever requested a change of his lawyer or complained about not being acquainted with the case file. Therefore, the Committee declares this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust domestic remedies.

8.5 With regard to the author's claim under article 2, paragraphs 1 and 3 (a) and (c), the Committee recalls its jurisprudence in this connection, according to which the provisions of article 2 of the Covenant, which lay down general obligations for States parties, cannot, in and of themselves, give rise to a claim in a communication under the Optional Protocol. The Committee therefore considers that the author's contentions in this regard are inadmissible under article 2 of the Optional Protocol.[25]

8.6 Since the author failed to provide any information in substantiation of his claims under article 4, paragraph 2, and article 9, paragraph 1, of the Covenant, the Committee

[25] See, for example, communications No. 802/1998, *Rogerson* v. *Australia*, Views adopted on 3 April 2002, para. 7.9; No. 1887/2009, *Basso* v. *Uruguay*, Views adopted on 19 October 2010, para. 9.4.

finds these claims insufficiently substantiated, for purposes of admissibility, and declares them inadmissible under article 2 of the Optional Protocol.

8.7 The Committee takes note of the author's claim under article 7, that following his arrest he was tortured for the purpose of eliciting a confession of guilt. The State party rejects the allegations, arguing that the author was interrogated in the presence of his lawyer and made voluntary statements about the circumstances of the crime, that several investigative actions were conducted in the presence of his lawyer, forensic expert and lay witnesses, and that neither the author nor his lawyer ever complained about ill-treatment during the pretrial investigation. These arguments are disputed by the author who claims that his complaints in this regard were "thrown out" by investigative officers and were ignored by his lawyer.

8.8 The Committee notes that the author's claim under article 7 is intimately linked to the quality of the legal assistance he received from his *ex-officio* lawyer, that is, the lawyer's alleged cooperation with the prosecution and failure to lodge any complaints on his behalf, including about ill-treatment during the pretrial investigation. In this respect, the Committee has already determined that nothing in the material before it reveals that the author complained about the alleged lack of adequate legal representation or the lawyer's inappropriate behaviour or that he ever requested a change of lawyer at any point during the domestic proceedings (see para. 8.4). The Committee notes the author's failure to raise these claims during domestic proceedings, especially in view of his argument that the presence of State-appointed lawyers during the interrogations cannot be regarded as a guarantee of respect for the rights of the accused (see para. 5.2).

8.9 The Committee further notes the State party's argument that a forensic medical examination did not reveal any bodily injuries on the author at the time of arrest and as of 4 February 2002 (i.e., 18 days following his arrest). It observes that the author gave contradictory information about the medical examination in question, claiming initially that no such examination ever took place (see para. 2.8 above), and later stating that the medical expert did not ask him to take off his clothes in order to perform a thorough examination and refused to listen to his complaint (see para. 5.3 above). The Committee also notes that the author's allegations were examined by both the trial and cassation court and were found to be groundless (see footnote 5 above). In light of these inconsistencies and in the absence of any factual evidence in support of his allegations under article 7, the Committee is unable to find that the author has sufficiently substantiated this claim for purposes of admissibility, and therefore declares it inadmissible under article 2 of the Optional Protocol.

8.10 The Committee further notes the author's claims under article 14, paragraphs 1 and 3 (e), of the Covenant that the court based his conviction on his confession made during the pretrial investigation, which he subsequently retracted in court, that his alibi was not duly considered and verified, that the findings of forensic examinations were not conclusive, that his requests to order expert examination of the fabricated evidence were rejected and that the court refused to summon and examine the main witness of the prosecution in court and failed to address the contradictions arising out of her testimony.

8.11 With regard to the author's claim that the court based his conviction on his confession, the Committee notes that the court did not establish the author's guilt solely on the basis of his own testimony, but also based on the confrontation with the co-accused, statements made by the latter, witness testimonies, the crime scene reconstruction report, conclusions of forensic expert examinations, as well as other evidence (see paras. 4.1, 4.2 and 6.3). Thus, the Committee therefore considers the author's claim to be insufficiently substantiated and therefore inadmissible under article 2 of the Optional Protocol.

8.12 As to the rest of the author's claims under article 14, paragraphs 1 and 3(e), the Committee observes that they relate primarily to the evaluation of facts and evidence by the

State party's courts, and recalls its jurisprudence in this respect that it is generally for the relevant domestic 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.[26] The Committee considers that the materials made available to it do not suggest that the courts acted arbitrarily in evaluating the facts and evidence in the author's case or that the proceedings were flawed and amounted to a denial of justice. The Committee therefore finds that the author has not sufficiently substantiated his claims under article 14, paragraphs 1 and 3(e), of the Covenant and that this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

8.13 With regard to the author's claim under article 14, paragraph 7, of the Covenant, that the court, by taking into account his prior conviction, tried and punished him again for an offence for which he had already been convicted, the Committee observes that the author has not provided any information about his previous conviction or explanations as to how it affected the level of his punishment. Accordingly, the Committee considers this claim to be insufficiently substantiated and therefore inadmissible under article 2 of the Optional Protocol.

8.14 The author also claims a violation of his rights under article 19, paragraph 2, of the Covenant in view of the authorities' refusal to provide him with a copy of his criminal file. The Committee notes in this respect the State party's argument that domestic legislation does not provide for such practice. It further notes the State party's argument that the author had the opportunity to request to be acquainted with the materials of his case file or to authorize a lawyer to do so on his behalf. The Committee also notes that the author never claimed in court that his right to be acquainted with the materials of his case file was violated (see para. 8.4 above). In the circumstances, the Committee considers that the author has failed to substantiate his claim that his right to obtain information was affected, and thus declares it inadmissible under article 2 of the Optional Protocol, for insufficient substantiation.

9. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under article 2 of the Optional Protocol;

(b) This 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.]

[26] See, for example, communications No. 1212/2003, *Lanzarote* v. *Spain*, decision of inadmissibility of 25 July 2006, para. 6.3; No. 1616/2007, *Manzano et al.* v. *Colombia*, decision of inadmissibility of 19 March 2010, para. 6.4; No. 1771/2008, *Gbondo Sama* v. *Germany*, decision of inadmissibility of 28 July 2009, para. 6.4; No. 1758/2008, *Jessop* v. *New Zealand*, Views adopted on 29 March 2011, para. 7.11; No. 1532/2006, *Sedljar and Lavrov* v. *Estonia*, Views adopted on 29 March 2011, para. 7.3.