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HUMAN RIGHTS COMMITTEE
Ninety-second session
17 March – 4 April 2008

VIEWS

Communication No. 1310/2004

Submitted by:	Mr. Konstantin Babkin (not represented by counsel)
Alleged victim:	The author
State party:	Russian Federation
Date of communication:	5 January 2004 (initial submission)
Document references:	- Special Rapporteur's rule 97 decision, transmitted to the State party on 21 September 2004 (not issued in document form) - CCPR/C/87/D/1310/2004 – decision on admissibility dated 6 July 2006
Date of adoption of Views:	3 April 2008

* Made public by decision of the Human Rights Committee.

Subject matter: Arbitrary arrest of a Russian citizen.

Substantive issues: Right to liberty of person; right not to be subjected to arbitrary arrest; right to a fair hearing by impartial tribunal; right to adequate time and facilities for the preparation of defence; *ne bis in idem*.

Procedural issue: None

Articles of the Covenant: 9; 14, paragraphs 1, 3(b) and 7

Article of the Optional Protocol: 2

On 3 April 2008, the Human Rights adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1310/2004.

[ANNEX]

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Ninety-second session

concerning

Communication No. 1310/2004[*]

Submitted by:	Mr. Konstantin Babkin (not represented by counsel)
Alleged victim:	The author
State party:	Russian Federation
Date of communication:	5 January 2004 (initial submission)
Decision on Admissibility:	6 July 2006

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

Meeting on 3 April 2008,

Having concluded its consideration of communication No. 1310/2004, submitted to the Human Rights Committee by Mr. Konstantin Babkin under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mr. Konstantin Babkin, a Russian citizen born in 1957, who is currently imprisoned in the Russian Federation. He claims to be a victim of violations by the Russian Federation [1] of article 9, and of article 14, paragraphs 1, 3(b) and 7, of the International Covenant on Civil and Political Rights. He is unrepresented.

1.2 During its 87th session, on 6 July 2006, the Committee considered the admissibility of the communication, and declared the author's allegations under article 9; article 14 paragraphs 1, 3 (b), and 7 of the Covenant admissible.

The facts as presented by the author

2.1 On 23 May 1999, at around 1 p.m. the author was arrested (*задержан*) by one Rakhmanin, an employee of the State Traffic Safety Inspectorate, on the basis of information received from the duty officer of the Department of Internal Affairs. He was handed over to officers of the Dmitrov Department of Internal Affairs, including one Tsvetkov, head of the criminal police. Contrary to the requirements of article 141, part 1 and article 122 of the Criminal Procedure Code then in force,[2] the arrest protocol (*протокол задержания*) was only drawn up the next day, and not by the person who effectively arrested the author. According to the protocol, prepared by one Solyanov, an investigator, at 8.35 a.m. on 24 May 1999, the author was arrested on the basis of "other information allowing the suspicion that a person committed a crime (acknowledgement of responsibility (*чистосердечное признание*))". The Criminal Procedure Code then in force did not contain "acknowledgement of responsibility" as a ground for detention, while article 111 of the Criminal Procedure Code required preparation of a "protocol of confession of one's guilt (*протокол явки с повинной*)". No such protocol was in the case file. During the hearing of 29 January 2001, Solyanov stated that a constraint measure (*мера пресечения)* for the author was determined in conformity with article 122 of the Criminal Procedure Code, after he wrote down his acknowledgement of responsibility'. The author was allegedly forced to sign the acknowledgement of responsibility. Also, contrary to provisions of the Criminal Procedure Code, he was not informed before the first interrogation what crime he was suspected of having committed,[3] and the first page of the first interrogation protocol was not signed by him.[4] In addition, he was not informed by the prosecutor or investigator of his rights and of the legal consequences of confessing his guilt.[5]

2.2 The author invokes article 122, part 2, of the Criminal Procedure Code, according to which a person can be arrested on the basis of "[…] other information allowing the suspicion that a person committed a crime', only if this person (1) attempted to escape, (2) does not have a permanent place of residence, (3) or the identity of the suspect is not established". On 29 January 2001, Solyanov testified that Babkin did not attempt to escape, that his identity was established,

[1] The Optional Protocol entered into force for the Russian Federation on 1 January 1992.
[2] Reference is made to the version of the 1960 Criminal Procedure Code that was in force before the adoption of a new Criminal Procedure Code on 18 December 2001.
[3] Article 123, part 2 of the Criminal Procedure Code.
[4] Article 123, part 1 and article 151, part 5 of the Criminal Procedure Code.
[5] Article 58 of the Criminal Procedure Code and article 61 of the Criminal Code.

that he was not caught *in flagranti* and that there were no witnesses. Since none of the legal grounds listed in article 122, part 2, of the Criminal Procedure Code, nor an arrest warrant issued by the prosecutor or a judge, existed at the moment of the author's arrest on 23 May 1999, he claims that his arrest was arbitrary.

2.3 On 27 May 1999, the author was charged with three counts of murder under article 105, part 2, of the Criminal Code[6]; illegal acquisition of firearms[7] (article 222, part 1) and forgery of documents (article 327). On 28 December 1999, a jury of the Moscow Regional Court acquitted him of the murder charge, as it considered that the defendant's participation in the crimes could not be proven, and of the firearms charge, for lack of a *corpus delicti*. The Court, however, found him guilty of forgery, and he was sentenced to 2 years' imprisonment.

2.4 On 23 December 1999, the author testified in court that he witnessed all three victims being murdered but that he did not kill any of them. He was a driver of one of the victims who had been involved in an illegal vodka business. On an unspecified date, the author negotiated a deal between vodka buyers and sellers but it appeared afterwards that the vodka bottles in question contained water. Buyers and sellers started pressuring the author and the first victim to reimburse them. On 17 February 1998, he saw the first victim being shot in the head by two people who appeared to be acting on behalf of vodka sellers and who demanded reimbursement. The author survived by jumping out of the moving car. The second and the third victims were killed by the same people on 30 June 1998 and on 4 September 1998, respectively. Had the author reported these crimes to the authorities, his children would have been killed in reprisal. The individuals in question contacted him twice after the last murder and asked him to endorse responsibility for the first victim's murder, as otherwise the author's family would be liquidated. Allegedly, the last conversation with these individuals took place in the investigator's office. In court, the author gave a detailed description of the perpetrators.

2.5 On an unspecified date, the relatives of the three murder victims appealed the verdict on cassation to the Supreme Court. On 13 April 2000, the Judicial Chamber for Criminal Cases of the Supreme Court upheld the conviction of forgery and quashed the acquittals, on the ground that on one day of the trial two victims – both relatives of the murder victims – were not present in court. It found that, contrary to article 253 of the Criminal Procedure Code, the judge continued the proceedings in their absence. The Supreme Court ordered a retrial of the author on the murder and firearms charges, but with a different composition of the Moscow Regional Court.

2.6 For the author, the Juridical Chamber of the Supreme Court had no basis in law to order a retrial, as article 253 of the Criminal Procedure Code only requires the judge to consider whether proceedings should continue in the absence of the victims, which the trial judge did.[8] The victims

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[6] Reference is made to the Criminal Code as in force in 1999. The Code has since been amended.

[7] The full charge is illegal acquisition, storage, carrying and transportation of firearms and ammunition.

[8] Relevant excerpt from the trial transcript dated 27 December 1999 and available on file reads:

> 'A victim Churkin, counsel Fedotov and defendant have nothing to add to the court inquest.
> An issue of whether it is possible to complete the court inquest is open for discussion.
> Participants in the proceedings do not have any objections,

knew that the court would be sitting on the day in question and did not inform the court in advance of their absence. Their absence had no bearing on the trial or the verdict, as they had already testified, and they subsequently offered no new testimony. The author submits the trial transcripts of 10, 23 and 27 December 1999 in substantiation of his claims. He adds that the acquittals could only be revoked in circumstances that affected the outcome of these verdicts and which are listed in article 341[9] of the Criminal Procedure Code. In his situation, this was not the case.

2.7 On 5 February 2001, the author was convicted by a different jury in the Moscow Regional Court on two of the three murder charges, and the firearms offence, and was sentenced to 23 years' imprisonment. During the retrial, he was again charged with forgery of documents, a charge on which he had already been convicted on 28 December 1999. The jury again found the author guilty of forgery but after the jury verdict had been handed down, the presiding judge issued a decision on 2 February 2001, removing the forgery charge on statute of limitation grounds. During the retrial, the author's lawyer submitted a motion to exclude, as inadmissible, evidence obtained during the period of the author's allegedly unlawful detention from 23 to 27 May 1999.[10] This motion was rejected by the presiding judge.

2.8 The author's appeal in cassation to the Supreme Court was dismissed on 5 June 2001. His appeal was considered by the same judge who had participated in the decision of the Judicial Chamber of the Supreme Court of 13 April 2000 quashing the acquittal. The author moved for this judge to be removed from the cassation panel but the motion was rejected. According to the Resolution of the Supreme Court No.4 of 1974 and No.8 of 1975, the court composition is unlawful when a case is tried by the same judge who previously participated in the trial of the case on cassation. Article 59[11] of the Criminal Procedure Code prevents a judge from

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The presiding judge decided to terminate the court inquest taking into account the opinions of the sides.

The court proceeds to the pleadings.'

[9] Article 341 'Revocation of the sentence of acquittal' of the then Criminal Procedure Code read:

'The sentence of acquittal of the court of first instance or of the sentence (decision) of the appeals instance may be revoked on cassation only on the basis of a protest submitted the prosecutor, or of a complaint submitted the private prosecutor, the victim, or of a complaint submitted by the acquitted person.'

[10] Article 69, part 3 of the Criminal Procedure Code and article 50 of the Constitution.

[11] Article 59 'Circumstances, precluding a judge from participating in the proceedings in a criminal case' of the then Criminal Procedure Code read:

The judge cannot take part in the proceedings in a criminal case, if he:

1) is the victim, civil claimant, civil defendant or witness in the given criminal case, as well as if he has participated in the proceedings in this case as an expert, specialist, interpreter, inquirer, investigator, prosecutor, counsel for the defence or legal representative of the accused, representative of the victim, of the civil claimant or of the civil defendant;

2) is a relative of the victim, civil claimant, civil defendant or their representatives, a relative of the accused or his legal representative, a relative of the prosecutor, counsel for the defence, investigator or inquirer;

3) if there exist the other circumstances giving rise to the belief that the judge is personally, whether directly or indirectly, interested in the outcome of the given criminal case […]

considering a case if there are other circumstances giving rise to the belief that this judge has a personal, direct or indirect interest in the outcome of the case. The author submits that this is the case in his situation: by upholding his complaint, the judge would have had to admit that the decision of 13 April 2000 in which he participated had been illegal.

2.9 The author states that he was not advised of the date of consideration of his cassation appeal, despite his request to be so informed. This meant that he could not prepare the appeal properly and hire a lawyer. Consequently, no lawyer appeared at the appeal on his behalf.

2.10 Two further appeals from the author to the Supreme Court, requesting the initiation of the supervisory review procedure (*надзор*), were dismissed on 3 December 2002 and 31 March 2003, respectively.

The complaint

3.1 The author claims that the State party violated article 9 of the Covenant by arbitrarily detaining him on 23 May 1999.

3.2 The author submits that article 14, paragraph 1, was violated, as the same judge who participated in the decision of the Judicial Chamber of the Supreme Court of 13 April 2000 which quashed his acquittal, was one of three members of the Supreme Court panel that considered cassation appeal. Further, the jury which heard his case on 5 February 2001 was prejudiced, as it was asked to consider evidence obtained during the author's unlawful detention from 23 to 27 May 1999, and because it examined the forgery charge, for which he had been already convicted.

3.3 He claims that he is the victim of a violation of article 14, paragraph 1, read together with paragraph 7, because the Judicial Chamber of the Supreme Court which quashed his acquittal did not base its decision on the correct legal provisions. The courts demonstrated unfairness by allowing the relatives of the murder victims to appeal against his acquittal on the basis that they had not attended one day of the trial, without requiring them to show how they had been adversely affected by this.

3.4 Article 14, paragraph 3(b), is said to have been violated, as the author was not advised of the date of consideration of his cassation appeal (paragraph 2.9 above).

3.5 The author's right not to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of the State party is said to have been violated, contrary to article 14, paragraph 7.

State party's observations on admissibility and merits

4.1 On 24 December 2004, the State party confirmed that on 5 February 2001, the Moscow Regional Court sentenced the author to 23 years' imprisonment on charges of murder and acquisition of firearms under articles 105, part 2, and article 222, part 1, of the Criminal Code. The sentence was upheld by the Judicial Chamber for Criminal Cases of the Supreme Court on 5 June 2001.

4.2 As to the author's claim under article 9, the State party submitted that according to information in the case file, the criminal case on the basis of which the author was sentenced was opened on 21 May 1998. It included counts of murder under article 105, part 1 of the Criminal Procedure Code, and was later merged with other counts. According to the arrest protocol, the basis for the author's arrest on 24 May 1999 was "other information allowing the suspicion that a person committed a crime". He was detained because he could have absconded. It transpired from the protocol that the author's rights and duties were explained to him, and that he did not object to his arrest. There was no information that the author was detained earlier than the date indicated above. Under article 122, part 3, of the Criminal Procedure Code, the inquiry body must inform the prosecutor of the arrest of any person suspected of having committed a crime within 24 hours. The prosecutor had 48 hours to either order placement into custody or release the suspect. The acting prosecutor of the Dmitrov City Prosecutor Office of the Moscow Region was informed of the author's arrest on 24 May 1999 and issued an order for his custody on 27 May 1999. He based his decision on the gravity of the crimes committed by the author and the possibility of absconding. The author's arrest thus complied with the legal requirements.

4.3 With regard to the author's claim that the overturning of his acquittal on the basis of the victim's appeal was not based on law, the State party confirmed that on 28 December 1999, a jury in the Moscow Regional Court acquitted him of the charges under article 105, part 2, and article 222, part 1, of the Criminal Code but found him guilty of forgery. On 13 April 2000, the Judicial Chamber of the Supreme Court quashed the acquittal and ordered a retrial. The basis for this decision was a substantial violation of the procedure legislation, as the court had not examined the reasons for the victims' absence at the hearing and had deprived them of the possibility to take part in the proceedings. Article 465 of the Criminal Procedure Code allows the superior court to quash or change court decisions on the ground of substantial violation of criminal procedure law. Article 345 of the Criminal Procedure Code stipulates that violations are "substantial" if they deprive or limit the rights of the parties to a case, or prevented the court in another way fully to consider the case. Article 253 of the Criminal Procedure Code provides that in the case of a victim's absence, the court shall decide whether to continue with the proceedings or to postpone them. The decision depends on whether it is possible, in the absence of a victim, fully to examine the case and to protect the victim's rights. For unknown reasons, two victims did not appear in court on 27 December 1999. The court considered whether proceedings should continue in their absence. It then proceeded with the pleadings without asking the parties about the possibility to complete the court inquest in the absence of the victims, thus violating their rights. The author's reference to article 341 of the Criminal Procedure Code was mistaken, as it provides for the possibility of quashing the acquittal at first instance only if there was either: (a) a protest from the prosecutor, (b) a complaint by the victims, or (c) a complaint by the acquitted person. In the present case complaints were made by all the victims, in addition to the prosecutor's protest.

4.4 The State party rejected the author's claim that article 60 of the Criminal Procedure Code was violated because the same judge who participated in the decision of the Judicial Chamber of 13 April 2000 quashing his acquittal sat on the Supreme Court panel which considered the author's cassation appeal. Article 59 of the Criminal Procedure Code lists the circumstances which preclude a judge from considering a case, and article 60 prohibits a judge from considering the same case twice. Under part 3 of article 60, a judge who participated in the trial of a case at second instance cannot participate in the trial of the same case at first or review

instances, nor in the retrial of a case at second instance, after the decision in which this judge participated has been annulled. The file revealed that the decision of 13 April 2000, in which the judge in question participated, had not been annulled. Therefore, his participation in the consideration of the author's cassation appeal after the re-trial had been lawful.

4.5 The State party rejected the allegation that the author had not been informed of the date of consideration of his cassation appeal. The case file revealed that on 31 May 2001, the author had been informed of the date of the upcoming consideration of his cassation appeal by letter of the Supreme Court addressed to the head of the detention facility, where the author was then held in custody. He was requested to ensure the author's participation in the consideration of his appeal by video link. The author participated in the hearing and moved for the judge to be removed (paragraph 2.8 above). According to the State party, the author could have requested the postponement of the hearing and to be given time to hire a lawyer. Moreover, he could have hired a lawyer after he filed his cassation appeal. Thus, the author had been fully aware of his rights but had failed to avail himself of them.

4.6 On the claim that the author was tried twice for the same offence, the State party confirmed that the author's conviction of 28 December 1999 of forgery had been overturned and that this charge was re-examined during the retrial. The jury questionnaire included two questions related to the forgery charge, and the verdict included a paragraph finding the author guilty on this count. The State party recalled that the court did not sentence the author twice for this crime, since on 2 February 2001, the judge had removed the forgery charge on statute of limitation grounds.

Author's comments

5.1 On 1 March 2005, the author contended that the State party deliberately referred to part 3 of article 122 of the Criminal Procedure Code to justify its actions and omitted any reference to parts 1 and 2 of the same article which would prove the arbitrariness of the author's arrest. He reiterated that he was forced to sign a confession which later was used to justify his placement in custody. He further rejected the State party's statement that there was no information in the file that he was detained earlier than the time indicated in the arrest protocol. In addition to the evidence presented by the author in his initial complaint, he referred to the jury verdict of the Moscow Regional Court of 28 December 1999 in support of the claim that he had been detained on 23 May 1999.

5.2 Regarding the claim that the quashing of his acquittal was unfounded, the author refered to the Compilation of Plenum Decisions on Criminal Cases, according to which violations of procedure laws are "substantial" if they prevented the court from fully examining a case. In his case, the victims' absence during one court hearing had not adversely affected the proceedings.

5.3 On the claim under article 14, paragraph 1, the author rejected the State party's reference to article 60, part 3 of the Criminal Procedure Code in justification of its actions. A law that allows consideration of a complaint against a judge by that very judge is contrary to common sense and to article 59, part 3, of the same Code.

5.4 As to the State party's argument that the author was informed of the date of consideration of his cassation appeal on 31 May 2001, the author submitted that he did not receive the letter referred to by the State party. He dismissed as irrelevant the State party's reference to the

possibility of hiring a lawyer, given that his right to defence had already been violated by the State party.

5.5 On 27 September 2005, the author submitted a carbon copy of the arrest protocol (*корешок к протоколу о задержании*) of 24 May 1999, which has the same number and is prepared at the same time as a protocol. By comparing this carbon copy and the arrest protocol, it may be concluded that the latter was tampered with after it was prepared. The author stated that 'acknowledgement of responsibility' was listed in the initial protocol as the only ground for arrest, whereas during the trial it appeared that the protocol listed an additional ground – a possibility that he could abscond. The author reiterated that the date of his actual arrest and its arbitrariness were corroborated by numerous witness statements, including that of investigator Solyanov. He refered to Solyanov's statement during the hearing of 29 January 2001, where he had admitted that 'acknowledgement of responsibility' was not a permissible ground of arrest. The author added that the investigation failed to prove that there were reasons to believe that he would abscond: he had resided in the same place between 17 February 1998, the date when the first crime attributed to him had been committed, and 23 May 1999, the date of arrest. He reiterated that the issue of legality of quashing of his acquittal was related to his claim under article 14, paragraph 7, since he could be tried twice on the murder and firearms charges only if his acquittal on these charges was quashed lawfully.

Further submissions from the parties

6.1 On 23 November 2005, the State party reiterated that according to the arrest protocol, the author was detained on 24 May 1999. According to the trial transcripts of 9 December 1999 and 15 January 2001, the author confirmed in court that he had been taken into custody on 24 May 1999. The sentence of 28 December 1999 and 5 February 2001 had been calculated to run from 24 May 1999. This date was challenged by the author in his cassation complaint on the basis of the witness statement given on 20 December 1999 by Rakhmanin. The State party claimed that during the trial Rakhmanin did not mention the exact date of arrest but had rather stated that the author and his passengers had been arrested as suspects of having committed a crime. During the preliminary investigation the same witness had stated that at around 9 p.m. on 23 May 1999 he had received information that the author had not stopped his car upon the militia's request. Some time later he had stopped and searched the author's car, finding a truncheon and a pen-knife. After being stopped, the author had produced a driving licence issued in the name of one Buzin.[12] Rakhmanin then called for the militia to transfer the author and his passengers to the Dmitrov Department of Internal Affairs.

6.2 On the allegation that the author was tried twice on the forgery charge, the State party added that on 29 July 2005 the Deputy General Prosecutor of the Russian Federation has initiated a review procedure before the Judicial Chamber for Criminal Cases of the Supreme Court, requesting the rescission of the decision of 2 February 2001, since the author had been tried twice and found guilty of the offence under article 327 of the Criminal Code. On 2 August 2005, the Supreme Court dismissed the request based on article 405 of the Criminal Procedure Code, which prohibits the revision of court decisions which would aggravate the situation of a

[12] On 27 May 1999, the author was charged with forgery of documents under article 327 of the Criminal Code.

convicted or acquitted person once a case has been closed. On 11 May 2005, the Constitutional Court held article 405 of the Criminal Procedure Code to be unconstitutional and introduced an interim measure, allowing, *inter alia*, the revision of court decisions on the closure of criminal cases by a review procedure initiated by the prosecutor within a year of the decision becoming executory. In this regard, the State party noted that the author's sentence of 5 February 2001 was appealed and became executory more than four years earlier, while the decision of 2 February 2001 was not appealed by either the author or his lawyer and became executory.[13]

7. On 25 December 2005, the author drew the Committee's attention to the discrepancy in the date of his actual arrest in the State party's observations of 1 March and 23 November 2005. He argued that Rakhmanin's testimony during the trial should prevail over the statements allegedly given by him during the preliminary investigation, because Rakhmanin explained in court that the protocol of interrogation attached to the file was different from the one that he saw at the preliminary investigation. According to Rakhmanin, he gave exactly the same statement as the one before the court, and he did not know how different statements appeared in the file. As to the State party's claim that the author did not object to the initial arrest protocol of 24 May 1999, it was noted that he feared negative consequences at that time. On cassation and in his request for supervisory review he had challenged the legality of his arrest, as soon as corroborating evidence became available to him.

8. On 24 May 2006, the State party added that on an unspecified date, the Deputy Chairman of the Supreme Court concurred with the decision of 2 August 2005, dismissing the request of the Deputy General Prosecutor of the Russian Federation. On 31 October 2005, the Deputy General Prosecutor initiated another review procedure before the Supreme Court.

9. On 15 May 2006, the author transmitted a copy of the decision of the Judicial Chamber for Criminal Cases of the Supreme Court (dated 20 April 2006), which found that during the retrial, the trial court mistakenly examined the author's case on all charges and mistakenly requested the jury to decide also on his guilt in relation to the forgery charge. The Judicial Chamber of the Supreme Court concluded that the author was punished twice for the same offence and rescinded the decision of 2 February 2001. This decision did not mention possible repercussions on the author's conviction by the same jury on the murder and firearms charges.

Committee's admissibility decision

10. On 6 July 2006, during its 87th session, the Committee considered the admissibility of the communication. The Committee noted the author's allegations of violations of article 9, and of article 14, paragraphs 1, 3(b) and 7 of the Covenant and detailed information adduced by the author in support of his claims. The Committee further noted that the State party had also submitted specific information refuting the author's allegations without, however, providing copies of the trial transcripts corroborating the State party's arguments. The Committee concluded that the communication was admissible in so far as the author's claims under article 9; article 14 paragraphs 1, 3(b) and 7 were sufficiently substantiated. The State party was requested to provide copies of the trial transcripts (1) of the Moscow Regional Court that acquitted the

[13] See paragraph 2.7 above.

author of the murder and firearms charges on 28 December 1999; and (2) of the Judicial Chamber for Criminal Cases of the Supreme Court that quashed the acquittal on 13 April 2000.

State party's further observations on the merits

11.1 On 24 November 2006, the State party transmitted a copy of the trial transcript of the Moscow Regional Court and explained that its criminal procedure law did not envisage the preparation of a trial transcript during the examination of a case by the second instance court.

11.2 The State party for the first time acknowledges that, as established during court proceedings, Rakhmanin had stopped a car driven by the author after he had received information at around 9 p.m. on 23 May 1999 that the driver of the car in question had not complied with the militia's request. It insists, however that the author was arrested by the investigator of the Dmitrov City Prosecutor Office only after he had made a statement in which he had admitted having murdered three persons. The author was interrogated as a suspect and testified about the circumstances and the manner in which he murdered three persons. A crime scene inspection was carried out with the author's participation the same day and three corpses were uncovered in the places indicated by him. On 26 May 1999, he participated in another inspection of the murder scene. He was placed into custody on 27 May 1999 and charged under article 222, part 1, and article 105, part 2, of the Criminal Code on 31 May 1999. The State party affirms that all investigative actions with the author's participation were carried out after his arrest and that they complied with criminal procedure law and were correctly qualified by the court as admissible evidence. His arrest under article 122 of the Criminal Procedure Code and subsequent placement in custody under article 90 of the same Code were lawful.

11.3 The State party rejects the author's claim that the participation of the same judge in the consideration of the author's cassation appeal on 5 June 2001 violated criminal procedure law.

Author's comments

12.1 On 7 June 2007, the author submits that irrespective of the terminology used by the State party, he was deprived of his liberty at the moment when his car was stopped by Rakhmanin. Subsequently, he was handcuffed and escorted by officers of the Department of Internal Affairs to the Dimitrov Department of Internal Affairs, where he was kept the whole night and interrogated.

12.2 The author submits that the State party mistakenly characterised the circumstances of his actual arrest and tried to portray his arrest by the officer of the State Traffic Safety Inspectorate as 'accidental' and linked to the ordinary violation of traffic regulations. It is claimed by the State party that he was formally detained only after he was taken to the Department of Internal Affairs, where he 'suddenly' confessed to three murders. The author refers to the trial transcript of the Moscow Regional Court of 20 December 1999 in support of his own description of the facts. Rakhmanin testified in court that day that he stopped the author's car at around 1 – 2 p.m. He searched the car and found a driving licence issued in the name of Babkin. He confirmed that the author did not violate any traffic regulations, and that the only ground for his arrest was information received from the duty officer of the Department of Internal Affairs. He handed over the author to officers of the Dmitrov Department of Internal Affairs; no protocol was prepared.

The author argues that since he was arrested by Rakhmanin as a suspect, article 122 of the Criminal Procedure Code required the preparation of an arrest protocol by him.

Consideration of the merits

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

13.2 The Committee has noted the author's claim that he was arbitrarily arrested on 23 May 1999, as at that time no permissible legal grounds for his arrest under the Criminal Procedure Code existed. It further notes that this claim was brought before the State party's courts and was rejected by them. The Committee notes the repeated discrepancies in the State party's explanations on this matter (paragraphs 4.2, 6.1 and 11.2 above), and the fact that in its latest merits observations the State party acknowledges that the author's car was stopped by an officer of the State Traffic Safety Inspectorate on 23 May 1999, and that the author was subsequently taken to the Dimitrov Department of Internal Affairs. This date differs from that contained in the arrest protocol and the interrogation protocol. The exact circumstances of the author's arrest and interrogation protocols remain obscure despite the voluminous pleadings by both parties. The Committee recalls its jurisprudence that it is generally for the courts of States parties to review or to evaluate facts and evidence, or to examine the interpretation of domestic legislation by national courts and tribunals, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice.[14] In the circumstances of the present case, and in absence of any other pertinent information by the parties in this respect, the Committee is unable to conclude that the State party has violated the author's rights under article 9 of the Covenant.

13.3 The Committee has noted the author's claim that his rights under article 14, paragraph 1, were violated as the same judge who participated in the decision of 13 April 2000 which quashed the acquittal was one of three members of the Supreme Court panel that subsequently considered the author's cassation appeal. In this regard, the Committee gives due consideration to the State party's explanation of its criminal procedure which distinguishes between circumstances that preclude a judge from considering a case and those which prohibit the judge from considering the same case twice. The Committee notes that in the present case the subject matter of the author's cassation appeal should have related only to his second retrial by the jury, and not to the decision of the Judicial Chamber of the Supreme Court of 13 April 2000 quashing his acquittal. Therefore, the Committee considers that the author's cassation appeal *de jure* does not affect the decision of 13 April 2000 quashing his acquittal and, therefore, participation of the same judge in the latter decision and in the consideration of the author's cassation appeal does not raise issues of the impartiality of the court within the meaning of article 14, paragraph 1, of the Covenant.

13.4 On the claim of a violation of the author's rights under article 14, paragraph 3 (b), in that he was not informed of the date of consideration of his cassation appeal, the Committee recalls that the guarantee provided for in this provision is to have adequate time and facilities for the

[14] See Communication No. 541/1993, Errol Simms v. Jamaica, Inadmissibility decision adopted on 3 April 1995, paragraph 6.2.

preparation of one's defence and to communicate with counsel of one's own choosing. The Committee notes the State party's explanation that its criminal procedure allows for a motion for postponement of the hearing and the granting of time to hire a lawyer, and that the author failed to avail himself of these rights. Even though the author dismisses the State party's argument as irrelevant, the Committee considers that although not effectively informing him of the date of consideration of his cassation appeal, the State party did not deprive him of the right to apply for the postponement of the hearing. In these circumstances, the Committee considers that there is no basis for a finding of a violation of article 14, paragraph 3(b).

13.5 The author has claimed that he is the victim of a violation of his rights under article 14, paragraph 1, read together with article 14, paragraph 7, because the Judicial Chamber for Criminal Cases of the Supreme Court that quashed his acquittal did not base its decision on law. The Committee notes in this regard that the requirement of being in 'accordance with the law and penal procedure of each country' defines the term 'finally' and not 'convicted or acquitted'. It further notes that the author's acquittal was overturned by the Judicial Chamber of the Supreme Court on the basis of the victims' cassation appeal, i.e., before his acquittal became final. Article 14, paragraph 7, however, is only violated if a person is tried again for an offence for which he already was finally acquitted, which does not appear to have been the case here. Therefore, the Committee finds that this part of the author's communication do not disclose a violation of article 14, paragraph 1, read together with article 14, paragraph 7.

13.6 As to the author's claim that, contrary to article 14, paragraph 7, he was tried and punished twice on the forgery charge, the Committee notes that the Supreme Court by its decision of 20 April 2006 determined that the author was indeed punished twice for an offence for which he had already been finally convicted. Therefore, the Committee also concludes that the State party has violated article 14, paragraph 7, of the Covenant. This violation of article 14, paragraph 7, is compounded in the present case by reason of its effects on the possibility of a fair trial. The author had not appealed against his conviction for forgery. By having that charge brought against him again, in combination with the more serious charges, the jury was exposed to potentially prejudicial material having no relevance to the charges which the author was properly facing, contrary to article 14, paragraph 1. Therefore, the Committee considers that the violation of article 14, paragraph 7, was only partly remedied by rescinding the decision of 2 February 2001 on 20 April 2006.

14. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 1, read in conjunction with article 14, paragraph 7, of the Covenant.

15. In accordance with article 2, paragraph (3)(a), of the Covenant, the State party is under an obligation to provide the author with such appropriate forms of remedy as compensation and a retrial in relation to the author's murder charges. The State party is also under an obligation to prevent similar violations in the future.

16. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has

undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[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.]
