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**Human Rights Committee**

 Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2411/2014[[1]](#footnote-2)\* [[2]](#footnote-3)\*\*

*Submitted by:* V.K. (not represented by counsel)

*Alleged victim:* The author

*State party:* Russian Federation

*Date of communication:* 21 March 2014 (initial submission)

*Document references:* Special Rapporteur’s rule 97 decision, transmitted to the State party on 4 June 2014 (not issued in document form)

*Date of adoption of decision:* 30 March 2016

*Subject matter:* Torture; fair trial; retroactive application of criminal law.

*Substantive issues:* Torture; conditions of detention; fair trial; fair trial – witnesses; retroactive application of criminal law.

*Procedural issues:* Exhaustion of domestic remedies; substantiation of claims.

*Articles of the Covenant:* 7, 10 (1) and (2) (a), 14 (1), (3) (b), (d), (e) and (g), 15 (1)

*Articles of the Optional Protocol:* 2, 5

 Decision on admissibility

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

 The facts as submitted by the author

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

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

2.3 On 26 December 2006, in a jury trial, the Krasnodar Territorial Court found the author guilty of planning terrorist attacks in Armavir city on 9 and 16 January 2000 under articles 33 (3) and 205 (3) of the Criminal Code of 27 December 1996 as amended on 9 January 1999 (terrorism).[[3]](#footnote-4) Both provisions were applied separately for each attempted terrorist act. The author was also found guilty of staging an attempt to his life by blowing up a grenade in his apartment on 19 April 2005 and in this connection he was found guilty under article 306 (3) (knowingly false denunciation); article 307 (2) (provision of knowingly false testimony), article 167 (1) (intentional damaging of other’s property) and article 222 (1) (illegal acquisition, transportation and storage of ammunition) of the Criminal Code. He was sentenced to 22 years in a penal colony of maximum security, deprived of the rank of colonel and of professional awards.

2.4 On 29 December 2006, the author filed a cassation appeal with the Supreme Court claiming erroneous application of criminal law by the first instance court. He argued that the Territorial Court applied an old version of the Criminal Code, while a new version entered into force on 27 July 2006, i.e. before the author’s trial took place. Since the new version of article 205 of the Criminal Code amended the subjective element of the disposition (the purpose of the terrorist act),[[4]](#footnote-5) the author argued that his actions did not constitute terrorism under the new law. His actions should have been qualified under different articles of the Criminal Code, which would entail lighter penalty. The author also claimed wrong application of articles 306 (3) and 307 (2) of the Criminal Code and of the additional penalty depriving him of the rank and awards. He as well brought up complaints concerning the procedural violations in the court of the first instance, among other, biased attitude of the presiding judge, her influencing the decision of the jury by expressing an opinion about the facts of the case and the guilt of the defendants, manipulating of the way evidence was presented and witnesses questioned, failure of the presiding judge to read in the court pre-trial statements of the witnesses - Mr. Drobotov and Mr. Sidelnik – which differed from those given by them during the hearing, and to order additional expert examination on the possible cause of fire in his apartment after a grenade explosion on 19 April 2005, as well as discrepancy between the facts of the case and the conclusions of the court.

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

2.6 On 28 August 2008, the author appealed under the supervisory review proceedings to the Presidium of the Supreme Court with the same claims as in his cassation appeal. In its decision of 19 November 2008, the Supreme Court partially changed the sentence. It ruled that articles 33 (3) and 205 (3) of the Criminal Code should have been applied once since the actions falling under the same provision of the Criminal Code formed a single and not a cumulative offence. The Court also repealed the author’s sentence under article 307 (2) of the Criminal Code. At the same time it increased the original terms in prison set by the first instance court under articles 306 (3), 167 (2) and 222 (1) of the Code and sentenced the author to 21 years in a penal colony of maximum security. The author’s claim about the breach of procedure during the hearing at the first instance court was considered groundless. The Supreme Court found invalid the author’s claim that the new version of article 205 decriminalized his actions. It ruled that the criminal liability for the actions committed by the author was not abolished by the amended provision, that the old version of the Code was applied because it provided for a lighter penalty, and that there were no grounds for a different qualification of the author’s actions.

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

2.8 On an unspecified date, the author filed an appeal under the supervisory review proceedings to the Prosecutor General’s Office, which was rejected on 27 October 2009. On 7 June 2013, the author appealed again under the supervisory review proceedings to the Prosecutor General’s Office. In his second appeal, he referred to the Resolution of the Supreme Court No.1 of 9 February 2012 “On Some Aspects of Judicial Practice Relating to Criminal Cases on Crimes of Terrorist Nature”. Article 1 of the Resolution underlined that the actions enumerated in article 205 of the Criminal Code constitute the crime of terrorism only if there is a specific purpose of influencing the decision by authorities or of an international organisation. Paragraph 11 of the Resolution further clarified that if the actions listed in article 205 of the Code pursued a different purpose, they should be qualified under other relevant articles of the Criminal Code. The Prosecutor General’s Office rejected the author’s appeal on 14 June 2013.

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

 The complaint

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

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

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

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

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

 State party’s observations

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

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

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

4.4 As for the author’s allegations concerning a violation of article 7 of the Covenant, the Supreme Court notes that the trial transcript does not reflect any mentioning by the author of cruel treatment. The author submitted his comments to the trial transcript but did not mention that these particular allegations were left out by the Territorial Court. The State party concludes that the author’s complaint thus does not reveal a violation of his rights under the Covenant by the national courts.

 Author’s comments on the State party’s observations

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

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

5.3 On 20 August 2015, the author informed the Committee that he underwent a surgery on one eye and a surgery on the other one was needed, but was not possible in prison hospitals. Because of a deteriorating condition of his health, he asked the Committee to speed up the consideration of his complaint.

 Issues and proceedings before the Committee

 *Consideration of admissibility*

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

6.2 The Committee takes note of the State party’s submission that the author filed a complaint with the European Court of Human Rights in 2008. It notes also that when acceding to the Optional Protocol, the State party has made a declaration[[5]](#footnote-6), inter alia, to the effect that “the Committee shall not consider any communications unless it has been ascertained that the same matter is not being examined under another procedure of international investigation or settlement”. The Committee observes, however, that the European Court found his complaint inadmissible in April 2010. Since currently the same matter is not being examined under another procedure of international investigation or settlement, the Committee is not precluded from consideration of the author’s complaint under article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee takes note of the State party’s observation that the author has never raised a claim of ill-treatment under article 7 of the Covenant before the domestic courts. It also notes the author’s claims about having complained repeatedly about his treatment in pre-remand facility to the territorial prosecutor’s office and about making a declaration to this regard in the first instance court hearing. The Committee, however, does not find documents on file which would confirm the author’s statement about making a declaration in the first instance court regarding his treatment in violation of articles 7 and 10 (1) and (2) (a) of the Covenant. Nor has he supplied any medical documents relevant to his pre-trial detention, complaints or appeals sufficient to support his claim. In the absence of any other pertinent information on file, the Committee considers that the author has failed to sufficiently substantiate his claim under articles 7 and 10 (1) and (2) (a) of the Covenant and finds it inadmissible under article 2 of the Optional Protocol.

6.4 Regarding the author’s claims under article 14 (1) of the Covenant concerning the fact that the presiding judge prohibited carrying out an audio recording of the hearing and took away written notes by the author’s lawyer and relatives, as well as to his claims concerning violation of the principle of equality before the law in calculating his sentence comparing to the sentence of his co-defendants, the Committee notes that the author does not provide any information to support his allegations and therefore finds this part of the complaint is insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

6.5 Regarding the author’s claim under article 14 (1) of the Covenant that his sentence was excessively strict and did not take into account his personal and family circumstances, the Committee notes that this claim concerns interpretation of domestic legislation and that domestic legislation is in principle interpreted by the courts of States parties, unless it was clearly arbitrary or amounted to a denial of justice.[[6]](#footnote-7) The Committee considers that there is nothing in the submissions of the author that would indicate the evaluation was manifestly arbitrary. The Committee therefore finds this part of the author’s claim being insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

6.6 As for the author’s claims under article 14 (1) and (3) (e) in relation to the examination of facts of his case, the alleged biased behaviour of the presiding judge, the refusal to carry out an additional expert examination and questioning of witnesses, the Committee recalls that it is generally for the States parties’ courts to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice, or that the court failed in its duty of independence and impartiality.[[7]](#footnote-8) The Committee notes the State party’s argument, left unaddressed by the author, that the author and his counsel were given an opportunity to question the witnesses during the court hearing but did not use this opportunity. The Committee also takes note of the State party’s argument that the refusal of the presiding judge to allow additional expert examination took into account the position of the participants of the trial and the reasons for a refusal were duly reflected in the trial transcript. Furthermore, as it transpires form the submissions of the State party, on number of occasions, the presiding judge instructed the jury not to take into account certain information and evidence. The Committee notes that above arguments were left unaddressed by the author. In light of the information available on file, the Committee considers that, in the present case, the author has failed to demonstrate that the trial has indeed suffered from “bias” or “lack of equality of arms” showing arbitrariness in the evaluation of the evidence, or amounting to a denial of justice. The Committee therefore concludes that the author’s claims under article 14 (1) and (3) (e) are insufficiently substantiated for purposes of admissibility. Accordingly, the Committee declares that part of the communication inadmissible under article 2 of the Optional Protocol.

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

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

6.9 As to the author’s remaining claim under article 15 (1) of the Covenant regarding the qualification by the courts of his acts as terrorism, the Committee notes the argument by the State party that the domestic courts applied the old version of article 205 of the old Criminal Code since it provided for a lighter penalty comparing to the new version of this article. The Committee as well notes the Supreme Court’s Resolution No. 1 of 9 February 2012 “On Some Aspects of Judicial Practice Relating to Criminal Cases on Crimes of Terrorist Nature” and observes that that the State party’s courts should have revised the author’s sentence retroactively in accordance with the guidance set out in the Resolution. The Committee notes, however, that since it is up to the domestic courts to qualify the actions of the author under the domestic law, it is unknown whether the penalty which could have been applied to the author after the revision of his sentence in accordance with the Resolution No. 1 would have been lighter than that applied to him under article 205 of the old Criminal Code in force when the crimes were committed. In this light, the Committee considers that the author failed to sufficiently substantiate his claim that his rights under article 15 (1) of the Covenant have been violated. The Committee thus finds this part of complaint inadmissible under article 2 of the Optional Protocol.

6.10 As regard the allegations of the author that the supervisory instance court worsened his situation by increasing the term in prison, compared to the terms imposed by the first instance court, the Committee notes that this part of the claim raises issue under article 14, paragraph 1 of the Covenant. The Committee recalls that “the concept of a fair hearing in the context of article 14 (1) of the Covenant should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings, preclusion of ex officio reformatio in pejus,[[8]](#footnote-9)and expeditious procedure. The facts of the case should accordingly be tested against those criteria. The Committee notes that this claim concerns interpretation of domestic legislation and the method applied for calculating the sentence in case of multiple charges. The Committee also notes the submission of the author that the Court repealed the author’s sentence under article 307 (2) of the Criminal Code and at the same time increased the original terms in prison set by the first instance court under articles 306 (3), 167 (2) and 222 (1) of the Code and thus imposed more severe penalty. The Committee notes however that in principle it is up to the courts of States parties to interpret domestic legislation, unless it is clearly arbitrary or amounts to a denial of justice. From the materials on the file the Committee cannot conclude that the calculation of the prison term by the Supreme Court was arbitrary, or result of the improper application of the law or amounted to denial of justice. The Committee can neither conclude that the sentence imposed by the Supreme Court was more severe in comparison to the original sentence imposed on the author, or that the principles of adversary proceedings or that of preclusion of ex officio reformatio in pejus were ignored. The Committee therefore finds this part of the author’s claim being insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

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

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

1. \* Adopted by the Committee at its 116th session (7-31 March 2016). [↑](#footnote-ref-2)
2. \*\* The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Ahmed Amin Fathalla, Yuji Iwasawa, Ivana Jelic, Duncan Muhumuza Laki, Photini Pazartzis, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval. [↑](#footnote-ref-3)
3. Article 205 in this version of the Criminal Code reads as follows:

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

 3. Deeds stipulated in the first or second part of this Article, if they have been committed by an organized group or have involved by negligence the death of a person, or any other grave consequences, and also are associated with infringement on objects of the use of atomic energy or with the use of nuclear materials, radioactive substances or sources of radioactive radiation,
shall be punishable by deprivation of liberty for a term of 10 to 20 years.’ Source: <http://www.russian-criminal-code.com/PartII/SectionIX/Chapter24.html>. [↑](#footnote-ref-4)
4. Article 205 of the Criminal Code as amended on 27 July 2006 reads as follows:

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

 3. Acts stipulated by Parts one or two of this Article if they:

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

 b) have entailed intentional causing of death to a person -

 - shall be punishable with imprisonment for fifteen to twenty years or with a life sentence.’ Source: <http://legislationline.org/documents/section/criminal-codes/country/7>. [↑](#footnote-ref-5)
5. Declaration: “The Union of Soviet Socialist Republics, pursuant to article 1 of the Optional Protocol, recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Union of Soviet Socialist Republics, in respect of situations or events occurring after the date on which the Protocol entered into force for the USSR. The Soviet Union also proceeds from the understanding that the Committee shall not consider any communications unless it has been ascertained that the same matter is not being examined under another procedure of international investigation or settlement and that the individual in question has exhausted all available domestic remedies”. [↑](#footnote-ref-6)
6. See for example Communication No. 1342/2005, *Gavrilin v. Belarus,* Views adopted on 28 March 2007. [↑](#footnote-ref-7)
7. See for example Communication No. 1894/2009, *G.J. v. Lithuania*, Views adopted on 25 March 2014. [↑](#footnote-ref-8)
8. Yves Morael v. France, Communication No. 207/1986, U.N. Doc. Supp. No. 40 (A/44/40) at 210 (1989). [↑](#footnote-ref-9)