



International Covenant on Civil and Political Rights

Distr.: General
17 January 2022

Original: English

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2916/2016*, **, ***

<i>Communication submitted by:</i>	Evgeny Pirogov (represented by counsel, Sergei Poduzov)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	31 October 2016 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 28 December 2016 (not issued in document form)
<i>Date of adoption of Views:</i>	20 October 2021
<i>Subject matter:</i>	Arbitrary detention; fair trial
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; substantiation of claims
<i>Substantive issues:</i>	Arbitrary detention; fair trial – impartial tribunal; fair trial – legal assistance; fair trial – witnesses
<i>Articles of the Covenant:</i>	9 (1) and (5), 14 (1) and (3) (d)–(e) and 15 (1)
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1. The author is Evgeny Pirogov, a citizen of the Russian Federation born in 1982. He claims that the State party has violated his rights under articles 9 (1) and (5), 14 (1), (3) (d) and (e) and 15 (1) of the Covenant. The Optional Protocol entered into force for the State party on 1 January 1992. The author is represented by counsel.

* Adopted by the Committee at its 133rd session (11 October–5 November 2021).

** The following members of the Committee participated in the examination of the present communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

*** An individual opinion by Committee member Gentian Zyberi (dissenting) is annexed to the present Views.



The facts as submitted by the author

2.1 The author alleges that he is a human rights defender and frequently organizes protests and demonstrations to criticize the actions of the Government, for which he has been prosecuted and even physically attacked in the past.¹

2.2 On 9 July 2015, an investigation was opened against the author under article 282 (1) of the Criminal Code (inciting hatred based on race, ethnicity or origin). He was accused of posting 12 pictures on a social media site with antisemitic comments and comments directed against ethnic groups from Central Asia and the Caucasus.

2.3 During the initial stages of his trial, which started in December 2015, the author remained at liberty but was subject to travel restrictions. However, on 24 March 2016, Yoshkar-Ola City Court ordered the author's detention, and he was immediately placed in a pretrial detention facility (SIZO-1). In its ruling, Yoshkar-Ola City Court noted that the author "repeatedly disrupted the court hearing, was rude to witnesses and to the court, ignored the trial judge's warnings, and therefore violated the requirements of proper conduct while under investigation". The court considered that the author's behaviour had shown that he could potentially threaten witnesses in the case and thus placed him under arrest.

2.4 On an unspecified date, the author appealed the ruling of Yoshkar-Ola City Court. On 6 April 2016, the Supreme Court of Mari-El Republic quashed the trial court's ruling and ordered the author's release. The Supreme Court found that the trial court had erred when it ordered the author's detention for contempt of court. It recalled that, according to article 258 of the Criminal Procedure Code, defendants could be subjected to various sanctions, including removal from the courtroom, for contempt of court. However, the Supreme Court of Mari-El Republic determined that, while the author received three reprimands for his behaviour from the trial judge, he had never been removed from the courtroom. The Supreme Court also determined that there had been no evidence presented to the trial court to show that the author would have threatened witnesses.

2.5 On 29 April 2016, the author was sentenced to two years of imprisonment. On 22 June 2016, the Supreme Court of Mari-El Republic upheld the author's sentence. On 12 August 2016, the Supreme Court of Mari-El Republic rejected the author's appeal under the cassation procedure. The author submits that he has thus exhausted all effective domestic remedies.

Complaint

3.1 The author claims that his pretrial detention was arbitrary, since the court did not have the legal grounds to order it. He submits that, even though the ruling of Yoshkar-Ola City Court was later quashed on appeal, he continues to be a victim of this violation because the 13 days that he spent in detention were included in his final sentence; since this period was counted towards his final verdict, he was no longer eligible for compensation for moral damages for arbitrary detention. Therefore, the State party has violated his rights under article 9 (4) and (5) of the Covenant.

3.2 The author claims that the court proceedings against him were not conducted by an impartial tribunal, in violation of article 14 (1) of the Covenant. The trial court took him into custody on its own initiative, while usually it is an investigator or a prosecutor who invites the court to take a defendant into custody. According to the author, the court arrested him solely based on his character references and the gravity of the crime he was charged with, which shows court's prejudice towards him.

3.3 The author claims that by having him pay the costs of his two court-appointed lawyers and the forensic linguistic examination, despite his indigent status, the State party violated his rights under article 14 (3) (d).

3.4 The author further claims that the court violated his rights under article 14 (3) (e) of the Covenant because it did not allow the defence to call and cross-examine the experts who had carried out the forensic psychological-linguistic and forensic linguistic examinations, the

¹ In 2013, the author was found guilty of publicly insulting a government official. The author also refers to an Internet article describing a physical attack on him in 2014.

results of which were used by the prosecution as evidence against him. The court later denied the defence's motion to exclude the results of the two forensic examinations, despite the defence's arguments that they had been carried out in violation of the Criminal Procedure Code and that the defence had not been allowed to question the experts.

3.5 Finally, the author argues that when the alleged crimes he was charged with were committed, in 2012, article 282 (1) of the Criminal Code did not contain references to the Internet, while he was charged with inciting hatred based on race, ethnicity or origin using his Internet-based social media pages. The reference to the Internet was added on 5 June 2014 and, before this addition, article 282 (1) of the Criminal Code only referred to traditional media, such as newspapers. The author claims that by charging him under the provision, which was introduced after he posted the pictures and comments on the Internet, the State party violated his rights under article 15 (1). The author also claims that, until 5 June 2014, crimes under article 282 (1) of the Criminal Code were considered to be lesser offences, with a maximum sentence of up to two years in prison and a statute of limitations of two years. Thus, by the time he was sentenced in April 2016, the author was exempt from criminal liability due to the expiry of the statute of limitations.

State party's observations on admissibility

4.1 The State party submitted its observations on admissibility by note verbale dated 20 March 2017. It argues that the author's claim under article 9 (4) of the Covenant should be found inadmissible for lack of substantiation. The State party notes that the ruling of Yoshkar-Ola City Court was reviewed and quashed on appeal by the Supreme Court of Mari-El Republic, therefore there was no violation of article 9 (4) of the Covenant.

4.2 The State party notes the prohibition of arbitrary arrest established by article 9 (1) of the Covenant. It refers to the case law of the European Court of Human Rights to the effect that an applicant may lose his victim status if two conditions are met: first, the authorities must have acknowledged, either expressly or in substance, the breach of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights); and, second, they must have afforded redress for it.² Only when these conditions are satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of an application.³ The alleged loss of the applicant's victim status involves an examination of the nature of the right in issue, the reasons advanced by the national authorities in their decision and the persistence of adverse consequences for the applicant after the decision.⁴ The State party notes that article 1100 of the Civil Code permits compensation of moral damages in instances of unlawful detention irrespective of the guilt of a person who caused the unlawful detention. Since the author did not file a lawsuit for compensation of moral damages, the State party submits that he did not exhaust all available domestic remedies and his claim of arbitrary detention, as well as his claim under article 9 (5) of the Covenant, should be found inadmissible.

4.3 With regard to the author's claim under article 14 (1), the State party notes that the requirement for the court to be impartial has two aspects. Firstly, judges must not harbour preconceptions about the matter put before them and must not act in ways that promote the interests of one of the parties.⁵ Secondly, the court must be impartial in the eyes of a reasonable observer. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14.⁶ The State party submits that changing the restraint measure from travel restrictions to arrest, rendering a guilty verdict or denying motions filed by the defence does not attest to the court's prejudice towards the author. According to the State party, the mere fact that a trial judge has already taken pretrial decisions in the case, including decisions relating to detention, cannot in itself justify fears as to the judge's impartiality; only

² *Sakhnovskiy v. Russian Federation*, application No. 21272/03, Judgment, 2 November 2010, para. 67.

³ *Ibid.*

⁴ *Ibid.*

⁵ Human Rights Committee, *Karttunen v. Finland*, communication No. 387/1989, para. 7.2.

⁶ *Ibid.*

special circumstances may warrant a different conclusion.⁷ The State party submits that in the present case the author's claim relates to the evaluation of facts and evidence by the courts of the State party. It refers to the Committee's jurisprudence according to which it is incumbent on the courts of States parties to evaluate the facts and evidence in each case, or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice. Based on the above, the State party argues that the author's claim under article 14 (1) of the Covenant should be found inadmissible for failure to provide sufficient substantiation.

4.4 The State party submits that recovering the costs of State-appointed lawyers from defendants should not be viewed as a violation of article 14 (3) (d) of the Covenant. When considering the provision of free legal aid, as guaranteed by universally recognized principles and norms of international law, the State party notes that the emphasis is placed on the provision of such aid when a criminal case is in progress. It also notes that article 14 of the Covenant does not appear to exclude the possibility of charging a convicted person with the costs of a lawyer who was provided at no cost to him at the time of the criminal case.

4.5 According to the State party, legal positions formulated by special procedures of the Human Rights Council can provide indirect support for the possibility of levying legal costs on a defendant. In a report of 2013 on legal aid, the Special Rapporteur on the independence of judges and lawyers states that national legislation should also include specific criteria to determine eligibility for legal aid, particularly with regard to the limits of the financial means that trigger eligibility. Moreover, persons who are denied legal aid on the basis of the criteria set out in national legislation should have the right to appeal the decision. In criminal cases, for instance, persons urgently requiring legal aid, such as those held at police stations or detention centres, should be provided preliminary legal aid while their eligibility is being determined. While the onus is on the accused to show that he or she lacks sufficient means, he or she need not, however, do so "beyond all doubt"; it is sufficient that there are "some indications" that this is so. It is up to the court, with due regard for the particular circumstances of the case and the situation of the accused, to determine whether the person should be provided with legal aid and whether it is in the interests of justice that this aid be provided.⁸ Therefore, the State party considers that the author's claim is incompatible with the provisions of article 14 (3) (d) of the Covenant and should be found inadmissible.

4.6 With regard to the author's claim under article 14 (3) (e), the State party notes that the right to examine witnesses or to obtain their attendance during trial is not absolute. It refers to the jurisprudence of the European Court of Human Rights, which repeatedly found that the right to call witnesses for the defence is not absolute and can be limited in the interests of the proper administration of justice.⁹ As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce.¹⁰ More specifically, article 6 (3) (d) of the European Convention on Human Rights leaves it primarily to the accused to assess whether it is appropriate to call witnesses; it does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as indicated by the words "under the same conditions", is full equality of arms in the matter.¹¹ The State party reiterates that, in accordance with the Committee's own jurisprudence, it is incumbent on the courts of States parties to evaluate the facts and evidence in each case, or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice. According to the State party, the author was not able to show that the court's denial of his request to call experts to testify during the court hearing amounted to a manifest error or denial of justice; therefore his claims under article 14 (3) (e) should be found inadmissible as lacking substantiation.

4.7 The State party notes that a literal interpretation of the provisions of article 15 of the Covenant suggests that it governs inter-State relations in respect of criminal liability of a

⁷ *Romenskiy v. Russia*, application No. 22875/02, Judgment, 3 June 2013, para. 27.

⁸ *A/HRC/23/43*, para. 54.

⁹ *Dorokhov v. Russia*, application No. 66802/01, Judgment, 14 February 2008, para. 65.

¹⁰ *Ibid.*

¹¹ *Ibid.*

person insofar as the act in question was not an offence under a State's criminal law or under universally recognized rules of international law at the time it was committed. Article 15 does not cover questions of exemption from criminal responsibility, including in relation to the expiry of the statute of limitations. At the same time, the State party notes that the author's claim of a violation of article 15 is based on the allegation of the domestic courts' failure to exempt him from criminal liability due to the expiry of the statute of limitations. The State party submits that these claims are incompatible with the provisions of article 15 (1) of the Covenant and should be found inadmissible.

Author's comments on the State party's observations on admissibility

5.1 On 5 June 2017, the author submitted his comments on the State party's observations on admissibility. He notes that there was a typo in his claim of a violation of article 9 (4) and requests that it be treated as a claim under article 9 (1) of the Covenant. The facts as submitted show that Yoshkar-Ola City Court arbitrarily placed him in detention in violation of the Covenant. The author refers to the second and third sentences of article 9 (1), according to which no one may be subjected to arbitrary arrest or detention, and no one may be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. He notes that "arbitrariness" should not be equated with "illegality", but must be interpreted more broadly to include elements of inappropriateness, injustice, unpredictability and lack of due process of law.

5.2 With regard to his claim under article 9 (5), the author reiterates that he could not submit a claim for a compensation for his detention between 24 March and 6 April 2016 because this period was counted towards his two-year prison sentence. He notes that after his conviction he filed a civil lawsuit for compensation of moral damages, but Yoshkar-Ola City Court rejected his claim.¹² Since the author was already serving his prison sentence, he could not appeal this decision. Therefore, he was unable to seek compensation for the arbitrary detention suffered.

5.3 With regard to his claim under article 14 (1) of the Covenant, the author notes that the trial court changed the restraint measure from travel restrictions to arrest on its own initiative, without a request from the prosecution that it do so. By putting the author behind bars in the middle of the trial, the judge showed that he had already made up his mind about the author's guilt and had decided that the author was too dangerous for society to be free. According to the author, in addition to deprivation of liberty, article 282 of the Criminal Code provides for alternative types of punishment. However, the court had already shown its prejudice and could no longer judge him impartially.

5.4 The author notes that the domestic courts did not consider his financial situation when ordering him to pay for his State-appointed lawyers. He submits that by levying the legal costs on him the courts subjected him to additional punishment, as the costs were disproportionately high in comparison with his financial situation, and it became practically impossible for the author to apply for early release from prison, owing to this unpaid debt.

5.5 With regard to the admissibility of his claim under article 14 (3) (e), the author rejects the State party's argument that it is a matter of evaluation of facts and evidence. He notes that the results of the two forensic linguistic examinations in question were used as the prosecution's main evidence against him, and the trial court relied on them when finding that his posts were of a criminal nature. Therefore, the court's denial of his request to call the experts who conducted those examinations for questioning can only be viewed as a violation of the author's rights under the Covenant.

5.6 Similarly, the author rejects the State party's arguments concerning the admissibility of his claim under article 15 (1) of the Covenant. He notes that he was convicted for actions which at that time were not considered to be crimes under the law.

¹² No details provided. According to article 136 of the Code of Civil Procedure, civil lawsuits must comply with the requirements in articles 131 and 132 of the Code for them to be considered. If they do not comply with these articles, the court gives the applicant a deadline to rectify the shortcomings in the complaint. If the shortcomings are rectified, the lawsuit is accepted with the original submission date. If not, the documents are returned to the applicant without further consideration.

State party's observations on the merits

6.1 On 14 July 2017, the State party submitted its observations on the merits. It submits that, between 19 March 2012 and 10 September 2014, the author made several posts on one of his social media pages that incited hatred against Jewish persons and ethnic groups from Central Asia and Caucasus. During the trial, on 24 March 2016, the court changed the restraint measure the author was subject to from travel restrictions to arrest. On appeal, the Supreme Court of Mari-El Republic did not agree with this decision and ordered the author's release on 6 April 2016. On 29 April 2016, Yoshkar-Ola City Court found the author guilty of inciting hatred towards several ethnic groups and sentenced him to two years in prison. According to the verdict, the time spent by the author under arrest between 24 March and 6 April 2016 was counted towards his two-year prison sentence. The author was also obliged to reimburse the costs of two State-appointed lawyers and the forensic linguistic examination in the amount of 13,980 roubles.¹³ The author's appeal of his verdict was denied by the Supreme Court of Mari-El Republic on 22 June 2016. The State party submits that the author's guilt was established during the trial based on the testimonies of several witnesses, the results of the forensic psychological-linguistic and forensic linguistic examinations, and other evidence.

6.2 With regard to the author's claim under article 9 (4) of the Covenant, the State party notes that the court's decision to change the restraint measure from travel restrictions to arrest was not arbitrary but was based on the existing criminal procedure norms. Under article 255 (1) of the Criminal Procedure Code, a court may set, change or revoke measures of restraint. According to the State party, the court's decision was not spontaneous but was a result of the author's actions during the trial, which led the court to consider that his behaviour was inappropriate and in violation of the terms of his obligation to not leave the area and to maintain good conduct. Article 108 (1) of the Criminal Procedure Code allows for a measure of restraint to be changed to arrest if the requirements of the original measure were not respected. The State party notes that the law does not require a motion from the prosecution to change the restraint measures a defendant is subject to; such a change can be done on the court's own initiative. It also notes that initiating a change in the restraint measure to which a defendant is subject does not prejudice in any way the guilt of the defendant or the type or the severity of any sanction applied.

6.3 The State party notes that, during the trial, the defence did not file a motion to recuse the court for prejudice. It further notes that, even though the Supreme Court of Mari-El Republic disagreed with the decision of the trial court to arrest the author, it did confirm his inappropriate behaviour during the trial. Considering that the appellate court released the author from detention within a very short period of time, his rights under article 9 (4) of the Covenant appear to have been fully respected.

6.4 The State party rejects the author's argument that he could not submit a claim for compensation because the period of his pretrial detention was counted towards his two-year prison sentence. It submits that any detention served by a defendant before a verdict must always be counted towards the final sentence, based on article 72 of the Criminal Code. However, this does not prevent the author from filing a lawsuit for compensation of moral damages. The State party reiterates that the Civil Code allows for compensation of damages in cases of unlawful conviction, unlawful detention (when used as a measure of restraint), unlawful administrative arrest, or unlawful administrative proceedings against a legal entity. The compensation is paid out of federal or local budgets. The State party argues that nothing in the author's submissions suggests that he has tried to obtain compensation, which means that not all available domestic remedies have been exhausted.

6.5 With regard to the author's claim under article 14 (1) of the Covenant, the State party notes that the criminal case against the author was examined by a competent, independent and impartial court established by law in accordance with provisions of the Covenant. It reiterates that changing the restraint measure without a request from the prosecution cannot be attributed to the court's lack of impartiality. The State party notes that, in its decision dated 22 March 2005, the Constitutional Court held that courts could change restraint measures on

¹³ Approximately 190 euros.

their own initiative. In accordance with the trial transcript, the court raised the issue of restraint measures after the author rudely addressed a witness, H., shouted remarks at him and ignored the warnings of the trial judge. The State party notes that after the restraint measure to which the author was subject was changed to arrest, neither the author nor his lawyer raised the issue of the court's impartiality or submitted a motion requesting the trial judge's recusal.

6.6 With regard to the author's claim under article 14 (3) (e), that his rights were violated because the court refused his request to call experts to testify, the State party submits that the courts are not required to grant all such motions by the defence. In accordance with the trial transcript, during the trial the author's counsel submitted two motions to call experts who had conducted two forensic examinations during the pretrial investigation. Both motions were rejected by the court as unsubstantiated. The State party submits that the Covenant provides for the right to obtain the attendance and examination of witnesses on a defendant's behalf under the same conditions as witnesses against him. However, the Criminal Procedure Code distinguishes the procedural status of a witness and an expert. A witness is a person who may have knowledge of any circumstances relevant to the resolution of a criminal case and has been called upon to testify, while an expert is a person who possesses special knowledge and is appointed to conduct a forensic examination. Therefore, the State party argues, an expert cannot be considered a witness within the meaning of article 14 (3) (e) of the Covenant and called to testify against a defendant because he or she may not have knowledge of any circumstances relevant to the resolution of a criminal case. The State party notes that all the experts in the case were warned about the criminal responsibility for perjury. It further notes that, in his motion, the author's counsel indicated that his request to call the experts was not due to necessity, to clarify or explain their conclusions, as required by the Criminal Procedure Code, but to verify the competence of the experts and the compliance of their conclusions with the Criminal Procedure Code, which is the prerogative of the trial court. Moreover, the counsel's motion to exclude the results of the two forensic examinations were later denied by the trial court because the court found the examinations to have been carried out in compliance with the law. The court held that during the pretrial investigation, the author's counsel did not raise any objections concerning the appointment of the two forensic experts or their conclusions. The State party notes that the conclusions of the forensic examinations are consistent with the testimonies of several witnesses who testified during the trial. It further notes that in addition to the two above-mentioned motions that were denied by the trial court, the author's counsel submitted other unrelated motions and some of those motions were granted by the court. Therefore, the author's claim that the court lacked impartiality is not supported by the documents contained in the case file.

6.7 The State party submits that, in accordance with article 132 of the Criminal Procedure Code, procedural costs in criminal cases, which include legal costs, must be paid by defendants or be reimbursed from the federal budget. A trial court can order the costs to be reimbursed from the federal budget if the defendant is indigent or it finds that there are other grounds for reimbursement. The State party notes that the issue of procedural costs related to the author's case was discussed during the trial and sentencing, and the author was given an opportunity to explain his position. The prosecution argued that there were no grounds to exempt the author from paying the procedural costs. Having discussed the arguments of both the author and the prosecution, the court concluded that there were no grounds to exempt the author from the reimbursement of the procedural costs, as there were no sufficient circumstances indicating the author's indigence. The State party explains that the absence of financial means at the time of the verdict does not mean that the defendant cannot pay the procedural costs in the future. In the author's case, the court took into consideration his age, employability, lack of dependants, health and the amount of the procedural costs and determined that he would be able to pay for the costs himself. The State party rejects the author's claim that having an unpaid debt renders his early release from prison impossible. It notes that, according to article 79 of the Criminal Code, when considering early release, only repayment of damages caused by a crime is taken into account, and not repayment of procedural costs.

6.8 With regard to the author's claim under article 15 (1) of the Covenant, the State party submits that the author posted material inciting hatred based on race, ethnicity or origin on his social media page between 19 March 2012 and 10 September 2014. It notes that, despite

the author's argument that each post should have been viewed as a separate, completed crime, the domestic courts viewed all the episodes as one continuous crime. According to article 9 of the Criminal Code, punishment is determined by the law that was in force when a crime was committed. Since the amendments to article 282 (1) of the Criminal Code were introduced on 28 June 2014, that is, before the author concluded his crime, he was charged under provisions of the new Criminal Code. Moreover, the author's posts were publicly available on his social media page until 15 March 2015, when they came to the attention of the law enforcement officials, which, according to the State party, serves as proof that the author's crime was of a continuous nature. Similarly, by amendments of 28 June 2014, crimes defined in article 282 (1) of the Criminal Code were reclassified as offences of intermediate gravity. Since the statute of limitations for such crimes is set at six years, at the time of the author's trial he was not exempt from criminal liability.

Author's comments on the State party's observations on the merits

7.1 On 5 June 2017, the author submitted his comments on the State party's observations on the merits. With regard to his claim under article 9 (1) of the Covenant, he rejects the State party's arguments that the trial court's decision to change the restraint measure from travel restrictions to arrest was not arbitrary and was based on the existing criminal procedure norms. The author refers to the decision of the Supreme Court of Mari-El Republic that determined that the trial court did not have any legal grounds to change the restraint measure to arrest. The author submits that even if formally the Criminal Procedure Code allows for a change in the restraint measure applied to the defendant, in his case this right was used by the trial court in an arbitrary manner.

7.2 With regard to his claim under article 9 (5) of the Covenant, the author reiterates that he has attempted to submit a civil lawsuit for compensation of moral damages for his arbitrary detention; however, it was never considered by the court, which rejected his application. He was unable to appeal the court's decision because he was serving his prison sentence. The author argues that the State party has not shown that he had any available and effective domestic remedies to receive compensation for his arbitrary detention.

7.3 Similarly, the author reiterates his arguments with regard to his claims under articles 14 (1) and (3) (e) of the Covenant and argues that the courts were not impartial in their handling of the case, as shown by their refusal to allow him to question the experts who conducted the two forensic examinations, used as the basis for the entire criminal case against him. The author submits that the criminal case under article 282 (1) of the Criminal Code was opened on 9 July 2015; however, he was not formally charged until 28 October 2015, while the two forensic examinations were concluded on 28 September and 26 October 2015, respectively. Therefore, he should have been allowed to question the key experts who conducted the examinations with regard to their qualifications and examination methods and to seek necessary clarifications of their conclusions.

7.4 With regard to his claim under article 14 (3) (d), the author submits that the procedural costs imposed on him by the trial court also included the cost of the forensic linguistic examination which was ordered by the prosecution.

7.5 Finally, with regard to his claim under article 15 (1) of the Covenant, the author reiterates that he was convicted for actions which at that time were not considered to be crimes.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

8.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee notes the State party's contention that the author's claims related to his arrest by Yoshkar-Ola City Court should be declared inadmissible because the author has not exhausted available domestic remedies. The Committee recalls its jurisprudence according to which the author must exhaust, for the purpose of article 5 (2) (b) of the Optional Protocol, all judicial or administrative remedies that offer him or her a reasonable prospect of redress.¹⁴ The Committee takes note of the State party's objection that the author has failed to seek monetary compensation of moral damages for his unlawful detention. The Committee also notes the author's submission that, after his conviction, he filed a civil lawsuit for compensation of moral damages, but it was rejected by Yoshkar-Ola City Court. The Committee further takes note of the author's argument that he was unable to appeal the court's decision because he was serving his prison sentence. However, the Committee considers that this argument does not explain why the author did not submit his appeal through a lawyer or after his release. In the absence of any other information or explanation of pertinence on file, the Committee considers that the author has not exhausted all available domestic remedies concerning his claims under article 9 (1) and (5) of the Covenant and finds them inadmissible under article 5 (2) (b) of the Optional Protocol.

8.4 The Committee notes the author's claim that the court proceedings against him were not conducted by an impartial tribunal, as the trial court took him into custody on its own initiative, while usually it is an investigator or a prosecutor who petitions the court to take a defendant into custody, and the same court later decided on the merits of his case. It also notes the State party's argument that the Constitutional Court has held that courts may change measures of restraint on their own initiative, and that the author's claim in fact relates to the evaluation of facts and evidence by the domestic courts. In the absence of any further pertinent information on file, the Committee considers that the author has failed to sufficiently substantiate, for the purposes of admissibility, how the trial court's decision to hold him in contempt of the court violates his rights under article 14 (1). Accordingly, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

8.5 With regard to the author's claim under article 14 (3) (d), the Committee notes his argument that the trial court required him to pay the costs of his two State-appointed lawyers and the forensic linguistic examination, despite his indigent status. The Committee also notes the State party's submission that a trial court can order the costs to be reimbursed from the federal budget if it determines that the defendant is indigent or that other grounds for reimbursement exist. The Committee observes that the issue of procedural costs related to the author's case was discussed during the trial and the author was given an opportunity to explain his position; however, the court concluded that there were no grounds to exempt the author from the reimbursement of the procedural costs. In the absence of any other information in support of his allegations, the Committee considers that this claim by the author has been insufficiently substantiated for the purposes of admissibility and therefore considers it inadmissible under article 2 of the Optional Protocol.

8.6 The Committee further notes the author's claim that the State party violated his rights under article 15 (1) of the Covenant by convicting him for actions which at that time were not considered to be crimes under the Criminal Code. The Committee also notes the State party's submission that the author's crime was of a continuous nature; that, according to article 9 of the Criminal Code, punishment is determined by the law that was in force when a crime was committed; and that, since the amendments to article 282 (1) of the Criminal Code were introduced on 28 June 2014, before the author concluded his crime, he was charged under provisions of the new Criminal Code. In the absence of any other information in support of his allegations, the Committee considers that this claim by the author has been insufficiently substantiated for the purposes of admissibility and therefore considers it inadmissible under article 2 of the Optional Protocol.

8.7 The Committee takes note of the State party's submission that the author's remaining claims should be considered as incompatible with the provisions of the Covenant since the author failed to substantiate his claims. In the Committee's view, however, the author has sufficiently substantiated, for the purposes of admissibility, his claims of the violation of his

¹⁴ *Patiño v. Panama* (CCPR/C/52/D/437/1990), para. 5.2.

rights under article 14 (3) (e) of the Covenant. The Committee therefore declares them admissible and proceeds with its consideration of the merits.

Consideration of the merits

9.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

9.2 The Committee notes the author's claim that Yoshkar-Ola City Court violated his rights under article 14 (3) (e) of the Covenant because it did not allow the defence to call and cross-examine the experts who had carried out the forensic psychological-linguistic and forensic linguistic examinations, the results of which were the prosecution's main evidence against him. The Committee also notes the State party's argument that an expert cannot be considered a witness within the meaning of article 14 (3) (e) of the Covenant, and that during the pretrial investigation the author's counsel did not raise any objections regarding the appointment of the two forensic examiners or their conclusions (see para. 6.6). The Committee further notes, in this regard, that the court's refusal to order expert testimony may constitute a violation of article 14 (3) (e) of the Covenant, since the purpose of the experts in the procedure may be assimilable by analogy to that of the witnesses expressly mentioned in article 14 (3) (e) in the sense that may both be required to testify to provide relevant information on the facts.¹⁵ Therefore, the Committee considers that it is up to the State party to demonstrate that the author, who was being tried for a serious hate crime, punishable by up to five years of imprisonment, was able to fully exercise his right to call, obtain the attendance of and examine witnesses under the same conditions as the prosecutor. In this regard, the Committee notes the State party's submission that it is incumbent on the courts of States parties to evaluate the facts and evidence in each case, or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice. The Committee also notes the State party's argument that the Covenant provides for the right to obtain the attendance and examination of witnesses, but that that right is not absolute and may be limited in the interests of the proper administration of justice, once the principle of equality of arms in the matter is respected (see para. 4.6). The State party also submits the author's guilt was established during the trial based on the testimonies of several witnesses, the results of the forensic psychological-linguistic and forensic linguistic examinations, and other evidence (see para. 6.1).

9.3 In the present case, the Committee observes that, according to the information on file, the conclusions of the two forensic examinations were of crucial importance to the case and that the trial court based a large part of its decision on those findings. Furthermore, the author was formally charged under article 282 (1) of the Criminal Code only after the conclusions of the two forensic examinations were made available to the pretrial investigation authorities. In such circumstances, the Committee considers that the trial court was under an obligation to request the presence of the experts and to allow the author and his counsel to cross-examine them. Based on the materials on file, the Committee is of the view that the consideration of the author's case by the courts did not observe the minimum procedural guarantees set out in article 14 (3) (e) of the Covenant.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the information before it discloses a violation by the State party of the author's rights under article 14 (3) (e) of the Covenant.

11. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. That requires it to make full reparation to individuals whose Covenant rights have been violated. In the present case, the State party is under an obligation, inter alia, to provide adequate compensation to the author for the violations suffered. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

¹⁵ *Shchetka v. Ukraine* (CCPR/C/102/D/1535/2006), para. 10.4; and *Fuenzalida v. Ecuador* (CCPR/C/57/D/480/1991), para. 9.5.

12. 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 and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, 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 present Views and to have them widely disseminated in the official language of the State party.

Annex

Individual opinion of Committee member Gentian Zyberi (dissenting)

Introduction

1. I do not agree with the finding of the Committee in this case, concluding that there was a violation of article 14 (3) (e) of the Covenant. The author was accused of posting 12 pictures on social media with antisemitic comments and comments directed against ethnic groups from Central Asia and the Caucasus (para. 2.2). He was charged under article 282 (1) of the Criminal Code with inciting hatred based on race, ethnicity or origin through his social media pages.

Right to call expert witnesses

2. The Committee has not had an opportunity to deal with the issue of administering expert witness testimony in its case law.¹ Hence, there is a greater need for it to look more closely at the jurisprudence of other human rights bodies.² The main issue on the merits of this case was whether the trial court was under an obligation to request the presence of the linguistic experts and to allow the author and his counsel to cross-examine them. According to the Committee, the conclusions of the two forensic examinations were of crucial importance to the case and the trial court based a large part of its decision on those findings (para. 9.3). Hence, the Committee concluded that the consideration of the author's case by the courts did not observe the minimum procedural guarantees of article 14 (3) (e) of the Covenant (ibid.).

3. Unsurprisingly, the author and the State party took different positions. According to the author, the results of the two forensic linguistic examinations in question were used as the prosecution's main evidence against him and the trial court relied on them when finding that his posts were of criminal nature (para. 5.5). According to the State party, the author's guilt was established during the trial based on the testimonies of several witnesses, the results of forensic psychological-linguistic and linguistic examinations, and other evidence (para. 6.1).

4. As the State party explained, the author's counsel indicated that his request to call the experts was not due to the necessity of clarifying or explaining their conclusions, as required by the Criminal Procedure Code, but to verify the competence of the experts and the compliance of their conclusions with the Criminal Procedure Code, which is a prerogative of a trial court (para. 6.6). Moreover, the counsel's motion to exclude the results of the two forensic examinations was later denied by the trial court because the court found the examinations to have been carried out in compliance with the law (ibid.). Hence, the Committee had to decide the more narrow and specific issue of whether the domestic court should have allowed the defence counsel's request to cross-examine the expert witnesses on matters concerning their competence.

5. In accordance with the Committee's own jurisprudence, it is incumbent on the domestic courts to evaluate the facts and evidence in each case, or the application of domestic

¹ See, among others, William A. Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary*, 3rd revised edition (Kehl, Germany, N.P. Engel Verlag, 2019), pp. 404–408; and Paul M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge, United Kingdom, Cambridge University Press, 2020), pp. 411–413.

² See, among others, Registry of the European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights: Right to A Fair Trial (criminal limb)*, available at www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf.

legislation,³ unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.⁴ In addition to the Committee's own jurisprudence,⁵ the European Court of Human Rights has also repeatedly found that the right to call witnesses for the defence is not absolute and can be limited in the interests of the proper administration of justice.⁶ While it is for a domestic court to decide on issues concerning the admissibility of evidence, equality of arms requires those courts not to deprive a defendant of the opportunity to challenge the findings of an expert effectively, in particular by introducing or obtaining alternative opinions and reports. The defence motion to exclude the results of the two forensic examinations was assessed by the court. At the same time, the author and his counsel do not seem to have made any effort to introduce or obtain alternative forensic reports.

6. The author has not demonstrated why the court's refusal to call the experts to testify during the court hearing amounted to a manifest error or denial of justice. He did not provide a plausible explanation to the Committee as to why these experts were incompetent, or why their expert reports were incorrect or invalid.

Concluding remarks

7. The Committee should have given due consideration to the assessment by the domestic authorities and found that the complaint was not substantiated, or otherwise that there was no violation of article 14 (3) (e) in this case.

³ *Khoroshenko v. Russian Federation*, (CCPR/C/101/D/1304/2004), para. 9.9; and general comment No. 32 (2007), para. 39.

⁴ *Riedl-Riedenstein et al. v. Germany* (CCPR/C/82/D/1188/2003), para. 7.3; *Schedko v. Belarus*, (CCPR/C/77/D/886/1999), para. 9.3; and general comment No. 32 (2007), para. 26.

⁵ General comment No. 32 (2007), para. 39.

⁶ *Murtazaliyeva v. Russia*, application No. 36658/05, Judgment, 18 December 2018, paras. 139–140.