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Views

Communication No. 1304/2004

Submitted by:	Andrei Khoroshenko (not represented by counsel)
Alleged victims:	The author
State party:	Russian Federation
Date of communication:	15 June 2003 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 25 August 2004 (not issued in document form)
Date of adoption of Views:	29 March 2011

* Made public by decision of the Human Rights Committee.

Subject matter:	Right to life/ torture/ cruel, inhuman and degrading treatment/ arbitrary detention/ fair trial/ right to retroactive application of the law with lighter penalty/ discrimination/ effective remedy
Substantive issues:	Degree of substantiation of claims
Procedural issues:	None
Articles of the Covenant:	article 2, article 6, article 7, article 9, article 10, article 14, article 15 and article 26
Articles of the Optional Protocol:	2

On 29 March 2011, the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1304/2004.

[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 (one hundredth and first session)

concerning

Communication No. 1304/2004**

Submitted by:	Andrei Khoroshenko (not represented by counsel)
Alleged victims:	The author
State party:	Russian Federation
Date of communication:	15 June 2003 (initial submission)

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

Meeting on 29 March 2011

Having concluded its consideration of communication No. 1304/2004, submitted to the Human Rights Committee by Mr. Andrei Khoroshenko 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:

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

1. The author of the communication is Mr. Andrei Anatolyevich Khoroshenko, a national of the Russian Federation, born in 1968. He claims to be a victim of violations by the Russian Federation of his rights under article 2, paragraphs 1 and 3, article 6, paragraphs 1 and 2, article 7, article 9, paragraphs 1, 2, 3 and 4, article 10, paragraph 1, article 14, paragraphs 1, 2, 3(a), 3(b), 3(c), 3(d), 3(e), and 3(g), article 15, paragraph 1 and article 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 1 January 1992.

** The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

The text of an individual opinion signed by Committee member Mr. Rafael Rivas Posada is appended to the present Views.

The facts as presented by the author

2.1 On 21 November 1994, the author was arrested on suspicion of membership in a criminal gang involved in a series of armed attacks on drivers of motor vehicles during 1993, in which several drivers were killed, and their cars stolen and sold. He was convicted of multiple murders, banditry and armed robbery by the Perm Regional Court on 13 October 1995 and sentenced to death. His cassation appeal to the Supreme Court of the Russian Federation was dismissed on 18 January 1996. On 20 March 1996, the Presidium of the Supreme Court overruled the cassation decision. On 5 June 1996, the cassation appeal was rejected for a second time and the verdict was confirmed. A further appeal to the Presidium of the Supreme Court resulted in a 15 January 1997 decision of the Presidium of the Supreme Court, which prequalified one of the crimes under a different article, but confirmed the death sentence. On 19 May 1999, his death sentence was commuted to life imprisonment by a Presidential pardon.

2.2 The author submits that upon his arrest he was not informed of the reasons for the arrest or of any charge. He was not brought before a judicial officer for the purpose of determining the lawfulness of his arrest. After two days in detention, his arrest was endorsed by a prosecutor, a non-judicial officer. The author maintains that there were no grounds that would justify his arrest under article 122 of the Criminal Procedure Code. He was not brought before the prosecutor, and had no opportunity to present arguments on the lawfulness of his arrest. He was detained for over 20 days without being formally charged, which occurred only in mid-December 1994. The author maintains that, according to article 90 of the Criminal Procedure Code, detention without charges was allowed only in exceptional circumstances and that in his case there were no such exceptional circumstances. The author also submits that while in detention, he was repeatedly beaten by investigators in order to extract a confession, and forced to make certain statements (not a confession) which he later retracted at the court hearing. He was not advised of his rights, such as his right not to testify against himself. The author also submits that, despite the fact that his relatives hired a lawyer to assist him a few days after his arrest, the latter was granted only limited access to him, and on numerous occasions he was interrogated in the absence of his lawyer. The author also submits that the investigating officer Mr. Sedov instructed in writing the Head of the detention center not to allow the author any visitors other than members of the investigating team. The author maintains that the above treatment violated his rights under articles 7, 9, 10 and 14 of the Covenant. The author also complains that although he was entitled by law to a jury trial, the investigating officer told him after the end of the pre-trial investigation that in the Perm region no jury panels had been established and therefore he must agree to be tried by a panel of professional judges, or the court will consider that he is attempting to prolong the proceedings.

2.3 The author submits that initially he was charged with one murder and that the decision regarding the charges was not reasoned, in violation of the requirements of articles 143 and 144 of the Criminal Procedure Code. He also submits that he was charged with four other murders only at the end of the preliminary investigation and that the investigators failed to inform him in a timely manner of the amended charges, in violation of article 154 of the Criminal Procedure Code. He submits that the above violated his rights under article 9, paragraph 2 and article 14, paragraph 3 (a) of the Covenant.

2.4 Throughout the proceedings the author maintained that he was innocent and that all he did was to assist a friend in moving several vehicles, without knowing that these were stolen. The author submits that in court he requested and was denied the opportunity to examine several important witnesses, in violation of his rights under article 14, paragraph (3) (e) of the Covenant. He considers that neither his version of events, nor any of the evidence that would or could have supported it, were taken into account by the court and that the latter only looked into the evidence confirming the “official” version of the events,

thus violating its impartiality obligation under article 14, paragraph (1) of the Covenant. He maintains that the verdicts were based mostly on the "confessions" of the accused, which were extracted under duress. Further, prior to his conviction, newspaper articles and television programmes announced that those guilty of the crimes in question had been apprehended. The author considers that some of the information referred to in these features suggested police officials had assisted in their preparation and that the above violated the presumption of innocence.

2.5 The author also maintains that the courts did not evaluate on the substance or investigate his claims that he was tortured, but instead chose to "compare" these with evidence presented by the prosecution, and rejected them as a defence strategy, which also violated his right to a fair trial. Moreover, the refusal of the courts to initiate an investigation into his allegations of torture, according to the author violated his rights under article 7 of the Covenant.

2.6 The author submits that during the trial relatives of the deceased made threatening and abusive comments towards the accused and his wife, that his brother was beaten by some of the relatives on the first day of the trial and that the trial judge did nothing to address the hostile atmosphere in the court room. The author also submits that the judge ordered the author's and other defendants' relatives to leave the court room, and they were only readmitted when the verdict was read out. He considers the above actions to constitute violations of his rights under article 14, paragraph 1 of the Covenant.

2.7 The author submits that the very fact that he was on death row for a period of time, following an unfair trial, violated his rights under article 6 of the Covenant. He further states that, prior to the moratorium on death sentences in Russia in 1999, the punishment for the crimes he was convicted of was either death or 15 years imprisonment and after the moratorium, the crimes became punishable by life imprisonment. He considers this situation to be discriminatory and in violation of his rights under articles 15 and 26 of the Covenant and maintains that his sentence should have been commuted to 15 years of imprisonment.

2.8 The author submits that after the first instance verdict he was not afforded the possibility to adequately prepare for his appeal: all his notes from the trial were confiscated; he was not given a copy of the trial records; he was given a limited amount of paper, so that he could not even make a copy of the appeal for himself and was forced to write a draft on the back of the verdict. The author submits that the above violated his rights under article 14, paragraph 3 (b) and paragraph 5 of the Covenant.

The complaint

3.1 The author contends that he has exhausted all available and effective domestic remedies.

3.2 He claims to be a victim of violations by the Russian Federation of his rights under article 2, paragraphs 1 and 3, article 6, paragraphs 1 and 2, article 7, article 9, paragraphs 1, 2, 3 and 4, article 10, paragraph 1, article 14, paragraphs 1, 2, 3 (a), 3 (b), 3 (c), 3 (d), 3 (e), and 3 (g), article 15, paragraph 1, and article 26 of the Covenant.

State party's observations on admissibility and merits

4.1 On 17 January 2005, the State party submits that, on 13 October 1995, the author was convicted by the Perm Regional Court for the following crimes: banditry (sentenced to death), premeditated murder with aggravating circumstances (sentenced to death) and

robbery committed by an organized criminal group (sentenced to 15 years of imprisonment).[1] For the totality of these crimes he was sentenced to death in accordance with article 40 of the Criminal Code (CC) of the Russian Federation. On 18 January 1996, the Criminal Panel of the Supreme Court amended the verdict for robbery to 15 years of imprisonment, but confirmed the cumulative death sentence against the author. Following a protest of the Deputy President of the Supreme Court, the Presidium of the Supreme Court on 20 March 1996 revoked the above decision and returned the case for a new cassation procedure. On 5 June 1996, the Criminal Panel of the Supreme Court confirmed the original verdict and sentence. On 15 January 1997, the Criminal Panel of the Supreme Court, following a review of the trial, re-qualified the acts of the author from article 77 to article 209, paragraphs 1 and 2 of the Criminal Code and sentenced him to 15 years of imprisonment for that crime. The Court again confirmed the death sentence for the totality of the crimes. On 19 May 1999, the author was included in a Presidential pardon and his death sentence was commuted to life imprisonment. On 18 April 2001, the Presidium of the Supreme Court amended the judgment, excluding the convictions under article 209, paragraph 2 and article 102 (e) and confirming the remaining convictions.

4.2 The State party submits that originally a criminal investigation against the author was initiated upon the discovery of the dead body of Mr. Minosjan, under article 103 of the Criminal Code (premeditated murder) and that other charges were added subsequently. On 21 November 1994, the author was arrested in Yekaterinburg, where he was hiding in order to avoid prosecution. He was taken to Perm on 23 November 1994 and detained based on Presidential Decree No 1226 of 14 June 1994 "Regarding urgent measures for protection of the population from banditry and other organized crime". The above Decree was never declared unconstitutional and therefore the detention of the author was in accordance with the requirements of the law. On 19 December 1994, the Perm Prosecutor approved the author's detention, based on the gravity of the "crimes committed by him", as well as to prevent him from avoiding justice. On 20 January 1995, the detention was extended by the same prosecutor to 4 months and 9 days, based on the same grounds. On 13 March 1995, the detention was further extended to 7 months and 9 days by the Deputy General Prosecutor. The State party submits that there is no information in the case files that judicial appeals against the detention orders were ever filed.

4.3 The State party submits that the author was not notified of the charges until 16 December 1994, 24 days after his arrest, which was within the lawful 30-days limit established by the Presidential Decree No 1226.[2] On 19 June 1995, following the discovery of new circumstances, the author was notified of additional charges, which was in accordance with article 154 of the Criminal Procedure Code. The State party submits that it is not possible to verify whether the author was informed of his rights upon arrest, since the arrest protocol was not found in the case files. On 24 and 28 November 1994, 8 February and 1 June 1995 the author was questioned as a suspect and as an accused in the absence of his attorney. In the interrogation protocols it is noted that he was informed of his right to have an attorney and he waived that right, which is confirmed by his signature in the protocols. The State party submits that, on 29 November 1994, the Perm Prosecutor's office received information from the local Bar association that an agreement for the defence of Mr. Khoroshenko was concluded with the attorney Orlov and issued an order for the appointment of the latter as a defence attorney as of 7 December 1994. The State party maintains that the above disproves the author's statements that the attorney was foisted on him by the investigation.

[1] Articles 77, 102, 146 (2) of the Criminal Code of the Russian Federation.

[2] The State party notes that this provision of the Decree was revoked by Presidential Decree No593 of 14 June 1997.

4.4 The State party confirms that upon the presentation of the charges to the author on 16 December 1994, he was not informed of his right not to testify against himself, as provided in article 51 of the Constitution. However, he was informed of his rights under article 46 of the Criminal Procedure Code, namely not to testify, to present evidence and to make motions. After being informed of his rights, he utilized his right to make a statement, as evidenced by the interrogations' protocols. On 7 December 1994, the author was questioned in the presence of his attorney. In the protocol there is a note that he was refused the possibility to have a confidential consultation with his attorney. On 12 January 1995 the author was questioned as an accused in the absence of his attorney. The protocol notes that he agreed to give a personal statement in the absence of his lawyer. Investigatory actions took place in the presence of his attorney on 23 February 1995 and on 29 April 1995, as noted in the protocols, but the latter did not sign the protocols for unknown reasons. All other investigative activities took place in the presence of the author's attorney. Between 23 June and 9 August 1995 the author and his lawyer familiarized themselves with the case materials, as confirmed by a protocol. The author did not complain regarding the performance of his lawyer, he did not request additional investigation, nor did he complain regarding unlawful methods of investigation.

4.5 The State party submits that the trial took place between 25 September and 13 October 1995 and the hearings were public; nothing in the case file confirms that the relatives and friends of the accused were removed from the court room at any point. During the trial the author was represented by the same attorney, who participated actively in the proceedings, asked numerous questions to witnesses, made legal statements and later submitted a cassation appeal. The author never complained regarding the quality of the defence, nor did he ask for the lawyer to be replaced.

4.6 The State party rejects the author's claim that his right to defence was violated since the court refused to question some witnesses and maintains that neither the accused, not his attorney made such requests either prior or during the trial. It also submits that in the case file there is no request from the author to allow him to familiarize himself with the protocol of the court hearing. The State party also submits that the law in force at the time provided for the death penalty for the crimes under articles 77 and 102 of the Criminal Code and therefore the sentencing was lawful. A Constitutional Court Ruling of 2 February 1999 abolished the use of the death penalty, but it did not constitute a ground for review of the criminal case against the author.

4.7 The State party also rejects the author's claim that the court panel that tried him was unlawful. In 1995, when the trial took place, article 15 of the Criminal Procedure Code provided a possibility for such cases to be heard by a panel of three professional judges, but only upon a decision of the respective court and with the agreement of the accused. Trials by panels of professional judges in capital punishment cases became mandatory only after 21 December 1996. In addition, from the case file it appears that the author did not submit a motion requesting that he should not be tried by a panel of professional judges.

4.8 The State party submits that, on 13 March 2001, the Head of the Department for Investigation of Premeditated Murders and Banditry rejected the author's request to open a criminal investigation against police officers who allegedly applied illegal investigative methods in relation to him. On 28 April 2001, the author filed a complaint against the refusal, which was granted on 17 June 2002 by a decision of the Lenin District Court of Perm. On 5 September 2002, the Criminal Division of the Perm District Court confirmed the decision granting the author's request.

4.9 On 22 July 2002, the author submitted a complaint to the Lenin District Court of Perm, requesting that the court mandates the Prosecutor's office to reopen his case based on newly discovered circumstances. The Court granted his request by a judgment dated 29

July 2002. The prosecution filed a cassation appeal against that judgment, which, on 5 September 2002, was rejected by the Criminal Division of the Perm District Court.

4.10 On 5 August 2002, the author submitted a complaint to the Lenin District Court of Perm against the refusal of the Prosecutor's office to initiate criminal proceedings against the police officers in his case, since the prosecutor considered that their acts did not constitute crimes. On 12 September 2002, the Court granted the author's request to appoint his mother and brother as his representatives. On 15 October 2002, the author's brother was approved as a representative and was allowed to familiarize himself with the case file. On the same date the Court rejected the author's complaint against the Prosecutor's office's inaction. The Criminal Division of the Perm District Court confirmed the rejection on 10 December 2002.

4.11 On an unspecified date, the author filed a complaint in the Lenin District Court of Perm against the refusal of the Prosecutor's office to review his request for re-opening the criminal investigation in his case on the ground of newly discovered circumstances. The Court rejected his complaint on 16 October 2003 and the Criminal Division of the Court confirmed the rejection on 25 November 2003. Both courts reasoned their findings on procedural grounds.

4.12 On 2 October 2003, the author submitted to the Lenin District Court of Perm an appeal against the lack of action by the Prosecutor's office on his complaint of 7 January 2003, regarding possible crimes committed by some of its staff in relation to the author's trial. On 16 October 2003, the Court decided not to review the appeal, since according to a letter from the Prosecutor's office the latter had not received such appeal. The author did not appeal that court decision.

4.13 On 10 November 2002, the author submitted to the same court a complaint that he was not allowed by the Prosecutor's office to examine the case files upon the reopening of the case in relation to newly discovered circumstances. On 15 November 2002, the Court rejected his complaint. The Criminal Division of the Court overruled that decision and, on 9 January 2003, put an end to the proceedings on procedural grounds.

4.14 The State party rejects the author's claims that his right to a defence was violated, since in 2000-2002 he was not allowed to familiarize himself with the entire case file and his relatives were not allowed to participate as defenders. The State party maintains that the domestic procedural legislation at the time did not provide for a right of the sentenced person to examine the case file while he was serving his sentence. It further maintains that according to article 47 of the Criminal Procedure Code only members of the Bar and representatives of the trade unions were allowed as defenders. The court also had the discretion to allow relatives, legal representatives or other person to participate as defenders in the trial phase of the proceedings. The law did not allow for relatives to be appointed as defenders of a convicted person.

4.15 The State party submits that according to the new Criminal Procedure Code, which entered into force on 1 July 2002, the prosecutor has the right to re-open proceedings if there are newly discovered circumstances, as well as to close the reopened proceedings in case he/she considers that the grounds are insufficient. The prosecutor's decision may be appealed in court. On 11 November 2002, the author submitted to the Supreme Court a complaint against the 11 October 2002 decision of the prosecutor to put an end to the proceedings initiated in relation to newly discovered circumstances. The complaint was reviewed by the Supreme Court as an appeal in the order of supervision against the verdict and the subsequent court decisions. At the time of the State party's submission, the above complaint was pending an examination on its merits before the Presidium of the Supreme Court.

Authors' comments and further submissions

5.1 On 11 April 2005, the author challenges the State party's submission that he was arrested while he was hiding from prosecution. He maintains that he was living with his family in a one room apartment in a student dorm, that he was registered with the local authorities at that address and that he never attempted to hide his whereabouts from the police. He maintains that in the period when the crimes with his alleged participation took place, he was attending classes and sports events in the University and that could be confirmed by numerous witnesses. Accordingly he challenges the lawfulness of his arrest, since the grounds on which it was justified were non-existent. He notes that the State party does not address his claim that after his arrest he was not brought before a judge or at least a prosecutor, nor was he given the possibility to challenge the lawfulness of his arrest, in violation of his rights under article 9, paragraph 3 of the Covenant.

5.2 The author notes that the State party does not address his claim that he was beaten by the arresting police officers. The author maintains that all action and omissions that he made during the pre-trial investigation were explainable by his lack of knowledge regarding criminal proceedings, as well as by his constant fear of physical violence from the police officers. He maintains that he was systematically beaten by the detaining officers, either with the aim to extract information or confessions, or with the view to punish him when he provided "wrong" testimony, refused to speak or submitted complaints.

5.3 The author submits that even though the Presidential Decree No 1226, on the basis of which he was detained for the first 30 days, was never declared unconstitutional, its provisions are not compatible with the Russian Federation Constitution. He maintains that according to article 15 of the 1993 Constitution, it is the supreme law of the land and if another legislative act contradicts its provisions, these should not be applied, but rather the Constitutional provisions should be applied directly. The transitional provisions of the Constitution also read that, until a new Criminal Procedure Code is adopted, the previous regime regarding arrest and detention should be applied. The above regime only authorized detention for up to ten days prior to presentation of the charges. The Presidential Decree did not constitute criminal procedure legislation and therefore it should have not been applied, since it contradicted the Constitution. The author reiterates that his detention under that Decree violated his rights under article 9 of the Covenant.

5.4 The author points out that the State party in its submission justifies his detention by the gravity of the crimes that he "had committed", therefore confirming that the authorities had decided that he was guilty long before he was even charged with any criminal offences. He maintains that the above violated the presumption of innocence, guaranteed in article 14, paragraph 2 of the Covenant.

5.5 The author further reiterates that he was initially charged with one murder, but between December 1994 and June 1995 he was interrogated as suspect in another four murders, without being notified of the additional charges. He also maintains that the absence of the protocol from his arrest, (as attested to by the State party), confirms that he was not informed of his rights upon arrest in violation of his rights under article 9, paragraph 2 of the Covenant. The author also notes that the State party confirmed that he was not informed of his rights under article 51 of the Constitution - namely the right to remain silent – and maintains that the State party erroneously states that article 46 of the Criminal Procedure Code contained the above right and that he was therefore informed of it. The author submits that he was forced to utilize his "right" to make a statement and was forced to make confessions which were than used against him by the investigation.

5.6 The author notes that the State party confirmed the absence of his lawyer during some of the investigative actions and maintains that according to the domestic law the participation of a lawyer was mandatory in all investigative activities. The author maintains

that article 49 of the Criminal Procedure Code provided that a lawyer may not participate if that is requested by the accused and that he never requested his lawyer to be absent, but merely was forced to sign that he agrees with his absence under threat of ill-treatment by the police officers. He also maintains that the protocols which were not signed by him or his lawyer, (as confirmed by the State party), should not have been admitted as evidence according to the domestic criminal procedure.

5.7 The author notes that the State party confirmed that he was denied a confidential meeting with his lawyer on at least one occasion (before the 7 December 1994 interrogation); that it failed to comment on his claims that he was deprived of legal defence for the first 16 days after his arrest; that the investigator requested the Head of the detention center not to allow him any visits; and that his first meeting with his lawyer was not permitted until seven days after his relatives hired Mr. Orlov to defend him. He maintains that the above facts violated his right to defence.

5.8 The author reiterates that he did not chose to be represented by Mr. Orlov and that his relatives were only offered one lawyer by the local Bar association when they wanted to hire a defender for him. He maintains that he was prohibited from meeting or corresponding with his relatives until 1997 and could not complain regarding the inadequate performance of the lawyer and request his relatives to look for another defender. The author also maintains that the lawyer failed to provide him with an adequate defence, that throughout the investigation and the trial phases the latter did not submit a single motion, with the exception of a cassation appeal and that he only asked a few questions during the trial which did not relate to the most important issues in the author's opinion. The author maintains that he was forced to accept his "services" since he was not consulted at any point whether he wanted to be represented by him or whether he was satisfied by his work. He alleges that he requested orally another lawyer, but the Prosecutor's office ignored his request and that the investigator told him to hire one, which he could not do because he was in detention and did not have contact with his relatives. He also maintains that since he was not properly notified of his rights, he did not know that he has the right to insist on having another defender.

5.9 The author confirms that he did not complain regarding beatings inflicted on him until the trial and maintains that he did not have the opportunity to do so earlier. His attorney, rather than submitting a complaint during the pre-trial proceedings, advised him to endure it. When he attempted to file a written complaint, instead of transmitting it to the prosecutor, the staff of the detention center gave it to the investigator and afterwards the police officers "beat out" of the author any desire to complain further. The author submits that he complained about torture during the investigative phase and his confession being extracted by force to all court instances and presented as evidence among others a video recording of the 7 December 1994 interrogation, where traces of violence were visible on his face and protocols of interrogations dated 13 January, 16 February, 19 and 21 June 1995, where were noted his refusals to state that he gave statements voluntarily. His claims and evidence were ignored by the courts. The author submits that one of the individuals originally charged with the same crimes his co-accused Mr. Krapivin, died as a result of torture during the pre-trial investigation and that he was afraid of a similar faith.

5.10 In response to the State party's statement that the author's requests to access the first instance court hearings' protocols, the author maintains that he made such requests twice; on 16 October 1995 and again when submitting his cassation appeal. He maintains that he is not responsible for the fact that the above requests were not only ignored, but were not even included in the files.

5.11 The author reiterates his claim that at the time of his trial in some regions of the Russian Federation accused were tried by panels of professional judges and in others by panels with the participation of jurors. He maintains that he was discriminated against

based on geographic location, in violation of article 26 of the Covenant, since in the Perm region he could not get a jury trial. He makes reference to the Russian Federation Constitutional Court ruling No3-P, of 2 February 1999, which in a similar case recognized the existence of "temporary legal inequality of opportunities for persons subject to criminal prosecution for serious crimes against human life, for which the federal law prescribes the death penalty" in relation to the impossibility for the accused in some regions to get a jury trial. The author also maintains that the above Constitutional Court ruling created a situation, where individuals tried before its entry into force could be sentences to death and those convicted after its entry into force could no longer be sentenced to death. He maintains that the Constitutional Court ruling should have led to automatic review of his case and to the lightening of the penalty. He considers that his rights under article 15, paragraph 1 and article 26 of the Covenant were violated.

5.12 The author submits that, on 23 March 2005, his appeal against the 11 October 2002 decision of the prosecutor to put an end to the proceedings initiated in relation to newly discovered circumstances was granted by the Supreme Court. The author maintains, however, that he had not received a copy of that court decision, not has the prosecutor complied with it by the date the author submitted his complaint to the Committee.

5.13 On 23 May 2005, the author submitted additional comments, pointing out that the protocol of his arrest was listed among the case materials and therefore the State party should have been able to verify that he was not informed of his rights upon arrest. He maintains that the State party's officials have either destroyed that document or are refusing to make it available to the Committee, because it would confirm his claim.

State party's additional observations

6.1 On 26 December 2005, the State party confirms that on 23 March 2005, the Presidium of the Supreme Court revoked the 11 November 2002 decision of the prosecutor to close the proceedings opened on the basis of new circumstances in the case of the author. The State party submits that the Prosecutor's office reopened the proceedings and that the latter were still pending, since the author was held in Moscow, in relation with his appearance at the hearing before the Supreme Court.

6.2 The State party confirms that the original warrant was issued by the investigator for a search for Khoroshenko, Nikolay Nikolayevich and not Khoroshenko, Andrei Anatolyevich (the author). It submits that a search warrant for the author is not available in the case file. It also reiterates that the author was arrested on 21 November 1994 and that the protocol of his arrest was not available in the case file. The State party submits, however that the "stub" of the protocol was "available in the case file", which allegedly meant that "the protocol had been prepared" and, possibly, a "copy could be found" in the prosecutor's files.

6.3 The State party submits that at the time of the author's arrest, the officer competent by law to authorize detentions was the prosecutor, who had the discretion to decide whether to remand into custody with or without questioning the detainee. The State party maintains that in the instant case the prosecutor did not deem it necessary to question the author before authorizing the remand into custody and that his decision was in accordance with the Criminal Procedure Code. The State party denies that the author was questioned as an accused in four murders before he was formally notified of the additional charges.

6.4 The State party reiterates that written requests from the author to access the court hearings' protocols are not available in the case file. The State party reiterates that the author complained for the first time of being ill-treated by police officers only at the first instance trial. Simultaneously he filed requests with the Prosecutor's office to open investigation in the ill-treatment. The State party reiterates that the Prosecutor's office twice

refused to open an investigation and that the first of these decisions was subsequently revoked by the courts. Regarding the author's claims that he was not allowed visits of and correspondence with his relatives the State party submits that the latter did not submit and written complaints to the Prosecutor's office in that regard, nor did he submit written complaints regarding his conditions of detention to the Presidents of the Lenin District Court of Perm and the Perm City Court.

Further submissions by the parties

7.1 On 5 September 2005, the author submits a letter from the wife of one of his co-accused, confirming that she and the wife of another co-accused were removed from the court room during the first day of the trial immediately after the charges were read and that they were not allowed to return until the verdict was read.

7.2 On 25 February 2006, the author submits comments on the State party's observations, reiterating that his arrest was illegal under the domestic law and therefore his rights under article 9 of the covenant were violated. He reiterates that the absence of the protocol of his arrest confirmed that he was not informed of his rights and that the State party was attempting to hide that fact from the Committee. He reiterates that in the period between 16 December 1994, when he was notified of the initial murder charge and 19 June 1995 (when he was notified of the additional charges), he was questioned as an accused in relation to four murders, banditry and robbery.

7.3 The author reiterates that he complains to the Committee regarding the torture he was subjected to during the pre-trial investigation and regarding the first instance court's and the Prosecutor's office's failures to investigate his claims in 1994- 1995. He reiterates that he is not complaining to the Committee regarding the refusal to allow visits of his relatives per se, but that the lack of contact with them prevented him from obtaining adequate legal assistance, since he could not communicate his wishes and address the problems with the lawyer hired to represent him. The author submits that he received a copy of the 23 March 2005 decision of the Supreme Court and stresses that the Court had recognized that the lower courts failed to assess some of the evidence relevant to the author's guilt and failed to question some witnesses which could have confirmed the author's alibi.

7.4 On 24 May 2006, the State party reiterates facts related to the author's conviction and sentencing and submits that his allegations regarding unlawful methods used by the investigating officers and falsification of evidence had been evaluated by the Prosecutor's office three times, and the latter issued refusals to start a criminal investigation respectively on 28 June 2000, 7 May 2004 and 11 May 2004. The above decisions have been appealed by the author and confirmed by the courts.

7.5 On 27 July 2006, the author reiterates that the fact that his death sentence was not automatically subjected to a review following the 2 February 1999 Constitutional Court decision, declaring the death sentence anti-constitutional, constituted a violation of his rights under articles 15, paragraph 1 and 26 of the Covenant. He refers to a case, similar to his, where the Zlatoustov City Court reviewed a 1993 verdict of the Krasnodar court and, on 29 January 2001, commuted the 25 years sentence to 15 years, based on the said Constitutional Court's ruling.

7.6 On 29 September 2006, the State party resubmits its observations, previously sent to the Committee on 26 December 2005.

7.7 On 1 November 2006, the author submits that he was finally provided with copies of some documents, which he had repeatedly requested before, *inter alia*: "stubs" from arrest protocols, dated 21 and 23 November 1994, which do not specify whether he was informed of his rights; first sheet of an interrogation protocol, dated 24 November 1994, specifying

that the author was informed of the right to "give explanations, file requests and demand recusations, and file complaints against acts of the investigation and the prosecution and have a lawyer from the moment of his arrest"; copy of a note signed by the Senior investigator Mr. Sedov, requesting the Head of the Perm detention center not to allow any visitors to the author with the exception of investigators, dated 1 December 1994; copies of the first and the last pages of interrogation protocols, dated 7 December 1994 and 12 January 1995, with handwritten notes, signed by the author that he was refused the permission to consult confidentially with his lawyer; a copy of the protocol of the presentation of the charges, dated 16 December 1994, confirming that he was detained without charges for 25 days; copies of interrogation protocols, dated 13 January and 16 February 1995, in which the author refused to respond to the question whether he made statements voluntarily; protocols of eight investigative actions, which took place in the absence of the lawyer of the author. The author notes that the protocol's "stubs" explicitly list as reasons for his arrest that he had "committed heavy crimes" and was hiding from prosecutions, which prior to a conviction, violated the presumption of innocence. The author also submits a copy of his cassation appeal, evidencing that he had raised all of the above issues in the domestic courts.

7.8 On 9 May 2007, the author submits that the review of his case, (following the discovery of new circumstances), which the Supreme Court ordered the prosecution to conduct on 23 March 2005, was first postponed for nine months and than concluded with another decision of the prosecution to terminate the proceedings, dated 29 December 2005. The author submits that he was not given a copy of the decision, and therefore could not appeal it until four months later. He submitted an appeal to the Presidium of the Supreme Court on 17 May 2006. The Court returned the appeal six months later, requesting a copy of the prosecutor's decision, which the author supplied. By 9 May 2007, there was no response to the appeal.

7.9 On 22 January 2008, the author reiterates some of the facts of his complaint and submits a letter signed by one of his classmates confirming that the author was with him when one of the murders for which the latter was convicted took place.

7.10 On 19 March 2008, the State party submits that complaints of the author regarding his inability to access case files, were reviewed on numerous occasions by the Perm courts in the period 2001-2004; that the case files related to those complaints had been destroyed after the expiration of the files conservation period and that for that reason it is not possible to ascertain if and why the author had not been informed timely of the dates of the court hearing and what were the reasons for the lengthy review of the complaints. The State party also submits that the appeal of the author against the 29 December 2005 decision of the prosecution to terminate the proceedings arrived in the Supreme Court on 28 November 2006. On 15 May 2007, the Court granted the author's request to participate in its hearing. On 12 September 2007, the Supreme Court rejected the author's appeal and on 5 October 2007 copy of its decision was sent to the author.

7.11 On 2 May 2008, the author submits that according to the State party's submission his appeal arrived on 28 November 2006 and the court hearing took place on 12 September 2007, while the article 406, 407 and 416 of the Criminal Procedure Code prescribe that such appeals should be reviewed within two months.

7.12 On 17 June 2008, the author reiterates the facts related to his attempts to obtain a review of his case based on newly discovered circumstances. He maintains that the lengthy proceedings (over 7 years) and the controversial actions of the prosecutor's office and the courts led to systematic violations of his rights under article 14, paragraph 3(c) and of article 2, paragraph 3, in conjunction with article 14, paragraph 3(c) of the Covenant. The author maintains also that the lengthy periods when he had to wait for procedures to start or for decisions to be issued led to moral suffering, since he was suspended for years between

hope and desperation and that violated his rights under article 7 and article 10, paragraph 1 of the Covenant.

7.13 The author maintains that the courts were well aware that letters of convicts are subjected to mandatory censorship, which delays the delivery of all correspondence by at least 10 days. Nevertheless, he was never informed of the dates of the court hearings sufficiently early, to allow him to inform his relatives or human rights defenders of the hearings' dates. The author maintains that that was done deliberately so that interested individuals and organizations could not attend the court hearings and that the above violated his rights under article 14, paragraph 1 of the Covenant.

7.14 The author also submits that according to articles 917 and 918 of the Criminal Procedure Code, a case can be re-opened based on new circumstances only if the Prosecutor's office submits to the court a conclusion that such new circumstances exist. He maintains that the above violates the principle of procedural equality, since even if a convict has new evidence, he/she is not entitled to submit it to the court, but must request the prosecution, which is a party to the trial to do so. The author submits that in his case he had new evidence, which could have exonerated him, but the prosecution repeatedly refused to acknowledge that because they did not want to admit that their officers had made mistakes or even committed crimes in 1993-1995. The author maintains that the above violates his rights under article 14, paragraph 1 of the Covenant.

7.15 The author submits that, during the proceeding related to the re-opening of his case, in accordance with article 47 of the Criminal Procedure Code, he retained his status as an accused and therefore should have been entitled to free legal assistance. He maintains that not only the State party did not provide him with free legal assistance, but that, as a prisoner convicted to life imprisonment, he was not allowed to work, nor did he receive any pension or social assistance and therefore it was impossible for him to hire a lawyer. He maintains that the above violates his rights under article 14, paragraphs 3(b) and 3(d) of the Covenant.

7.16 The author submits that at the Supreme Court hearings on 23 March 2005 and 12 September 2007, as well as in his motions to the prosecution he requested a number of witnesses to be summoned, in order to confirm the new circumstances based on which he requested the reopening of his case. His motions were ignored by the Court and the prosecution and the author maintains that the above violated his rights under article 14, paragraphs 3 (b) and 3 (e) of the Covenant. He submits that, despite his request to participate, the prosecution questioned some of these witnesses without his participation and that the above violates the principle of equality between the parties as established in article 14, paragraphs 1, 3 (b) and 3 (e) of the Covenant.

7.17 The author submits that during the hearing in the Supreme Court on 12 September 2007, the judges interrupted him repeatedly and did not allow him to explain his arguments. He also submits that following the hearing the judges deliberated for seven minutes, before announcing their decision. He maintains that he alone had submitted hundreds of pages of material and that the length of the deliberation indicated that the judges did not examine the material, but had decided in advance on the outcome of the case. The author maintains that the proceedings were not fair, nor did they constitute an effective legal remedy and therefore his rights under article 14, paragraph 1 and under article 2, paragraph 3 in conjunction with article 14 were violated.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.[3] In the absence of any objection by the State party, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met.

8.3 The Committee notes the author's claims that the presumption of innocence with regard to him was violated, since there were publications and broadcasts in the media during the first instance trial declaring that he was guilty of the crimes he was convicted of later and since the State party's authorities referred to him as having "committed" crimes already at the pre-trial stage of the proceedings. The Committee, however, observes that these claims do not appear to have been raised at any point in the domestic proceedings. The part of the communication relating to the alleged violations of article 14, paragraph 2, of the Covenant is accordingly inadmissible for failure to exhaust all domestic remedies in accordance with article 5, paragraph 2 (b) of the Optional Protocol.

8.4 The Committee notes the author's claim that he did not choose to be represented by the lawyer Mr. Orlov, that the latter was foisted on him and his relatives by the local Bar association and that he did not provide the author with adequate legal assistance. The Committee, however, observes that this claim does not appear to have been raised at any point in the domestic proceedings. Accordingly the Committee considers that the above claim is inadmissible for failure to exhaust all domestic remedies in accordance with article 5, paragraph 2 (b) of the Optional Protocol.

8.5 The Committee has noted the author's claim under article 15 of the Covenant (see paragraph 2.7 above). In the absence of any further pertinent information on file in this connection, the Committee considers that this part of the communication is insufficiently substantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

8.6 The Committee notes the author's claim that he had been discriminated against since in some regions of the Russian Federation accused were tried by panels with the participation of jurors and that in the Perm region he could not have a jury trial. Based on the material before it, the Committee considers that the author has not shown sufficient grounds to support his argument that the above facts resulted in violation of his rights under article 26 of the Covenant. Accordingly, the Committee considers that this part of the communication is unsubstantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

[3] In his initial submission, the author stated that he had filed applications with the European Court for Human Rights (ECHR), and maintained that these related to a different matter than the petition submitted to the Human Rights Committee (namely to the refusal of the State party to reopen proceedings in his case in 2001-2002). The State party did not challenge that assertion. According to the registry of the ECHR the author's applications were joined and then declared inadmissible according to Articles 34 and 35 of the European Convention by a Committee of 3 judges on 16 December 2005.

8.7 In the Committee's view, the author has sufficiently substantiated, for purposes of admissibility, his claims under article 2, paragraphs 1 and 3, in conjunction with article 14, article 6, article 7, article 9, paragraphs 1, 2, 3 and 4, article 10, paragraph 1, article 14, paragraphs 1, 3 (a), (b), (c), (d), (e), and (g),of the Covenant and therefore proceeds to their examination on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information submitted by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes the author's claims that upon his arrest he was not informed of the reasons for the arrest or of any charge; that upon arrest he was not advised of his rights, such as his right not to testify against himself or to have legal aid free of charge; that he was never brought before a judicial officer for the purpose of determining the lawfulness of his arrest; that there were no grounds that would justify his arrest under article 122 of the Criminal Procedure Code, nor were there in his case exceptional circumstances to justify his detention without charges in accordance with article 90 of the Criminal Procedure Code. The Committee observes that the State party does not refute the allegations that the author was not informed of his rights upon arrest, that he was not informed of any charges until 25 days later, that the detention was sanctioned by a prosecutor, who was not a judicial officer, and that the author did not have the opportunity to challenge the lawfulness of the arrest in front of the prosecutor. Accordingly, the Committee concludes that the author's rights under article 9, paragraphs 2, 3 and 4, of the Covenant were violated.

9.3 On the question of whether the authors' placement in custody was carried out in conformity with the requirements of article 9, paragraph 1, of the Covenant, the Committee notes that deprivation of liberty is permissible only when it takes place on such grounds and in accordance with such procedure as are established by domestic law and when it is not arbitrary. In other words, the first issue before the Committee is whether the authors' deprivation of liberty was in accordance with the State party's relevant laws. The Committee also observes that the State party justified the lawfulness of the arrest and the detention without charges, stating that it was in compliance with the Presidential Decree No 1226 "Regarding urgent measures for protection of the population from banditry and other organized crime". The Committee, however, observes that the Decree authorizes detention for up to 30 days when there is sufficient evidence of the involvement of a person in a gang or other organized criminal group suspected of committing serious crimes. Considering that, according to the State party's own submission, the original search warrant was issued against another person; that the Presidential decree did not in itself revoke the general criminal procedure rules regarding the grounds for arrest; that no judicial authority ever reviewed whether there was sufficient evidence that the author belonged to the said category of suspects; and in the absence of further justification by the State party, the Committee concludes the authors' deprivation of liberty was not in accordance with the State party's relevant laws. Consequently, the Committee finds a violation of article 9, paragraph 1, of the Covenant.

9.4 The author claims that he was beaten and tortured by the police immediately after his arrest, during the 25 days when he was detained without charges, and throughout the pre-trial investigation, and he was thus forced to make statements confirming the version of the events promoted by the investigation. The author provides information regarding his ill-treatment, and claims the complaints made to this effect were ignored by the prosecution and the courts.

9.5 The Committee recalls that once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially.[4] Although the verdict of the Perm District Court of 13 October 1995 mentions Mr. Khoroshenko's torture allegations, the latter rejects these with a blanket statement that the evidence in the case confirms the guilt of the accused. The Committee observes that, according to the State party's submission, the Prosecutor's office issued decisions refusing to open an investigation into the author's torture allegations on three occasions and that the above decisions ultimately had been confirmed by the courts. At the same time the Committee observes that neither the verdict and the decisions of the Prosecutor's office, nor the State party's numerous submissions in the present proceedings provide any detail as to the concrete steps taken by the authorities to investigate the author's allegations. The Committee considers that in the circumstances of the present case, the State party has failed to demonstrate that its authorities did address the torture allegations advanced by the author expeditiously and adequately, in the context of both domestic criminal proceedings and the present communication. Accordingly, due weight must be given to the author's allegations. The Committee, therefore, concludes that the facts before it disclose a violation of the rights of Mr. Khoroshenko under articles 7 and 14, paragraph 3 (g), of the Covenant.[5] In the light of this conclusion, it is not necessary to examine separately the author's claim under article 10, paragraph 1, of the Covenant.

9.6 The Committee notes the author's claim that he was not informed of some of the charges against him until 25 days after his arrest and that he was informed of the rest of the charges at the end of the pre-trial investigation. The Committee observes that the State party has confirmed the above facts. In this respect, the Committee finds a violation of article 14, paragraph 3 (a), of the Covenant.

9.7 The Committee notes the author's claims that he was not given adequate time and facilities to prepare his defence in that he did not have the opportunity to always freely and privately meet with his lawyer during the pre-trial proceedings, that he did not receive copy of the trial's records immediately after the first instance verdict was issued, that despite numerous requests, he was not given some documents, he considered relevant for his defence, and that he was even limited in the amount of paper he was given to prepare his appeal to the second instance. The Committee observes that these allegations are confirmed by the materials submitted to it by the author and some are not refuted by the State party. In this respect, the Committee finds a violation of article 14, paragraph 3 (b), of the Covenant.

9.8 The Committee notes the author's claim that upon his arrest he was not informed of his rights to have legal assistance and to remain silent and observes that the State party did not refute this claim, but merely stated that the protocol of the arrest was missing and that the author was informed of his rights when he was notified of the initial charges, 25 days after the arrest. In this respect, the Committee finds a violation of article 14, paragraphs 3 (d) and 3 (g), of the Covenant.

9.9 The Committee notes the author's claim that during the first instance trial the court refused to hear several witnesses which could have confirmed his innocence and that the court only accepted and evaluated evidence that supported the prosecution's version of the events. The Committee also notes the State party's objection that neither the accused nor his attorney made requests to question witnesses either prior or during the trial. The Committee also observes that according to the author's own submission, in its decision of 23 March 2005 the Supreme Court ordered the prosecution to reopen the proceedings and

[4] General Comment on article 7, No. 20 [44], adopted on 3 April 1992, para 14.

[5] See, for example, communication Nos. 328/1988, *Zelaya Blanco* v. *Nicaragua*, para. 10.6; 1096/2002, *Kurbanov* v. *Tajikistan*, para 7.4; 330/1988, *Berry* v. *Jamaica*, para 11.7

question some of these witnesses. The Committee recalls its jurisprudence and reiterates that, generally speaking, it is for the relevant domestic courts to review or evaluate facts and evidence, unless their evaluation is manifestly arbitrary or amounts to a denial of justice.[6] The Committee accordingly concludes that the material before it is insufficient to reach a finding of a violation of article 14, paragraph 3(e), of the Covenant.

9.10 Having examined the author's claims under article 14, paragraph 3 (a), (b), (d) and (g) of the Covenant the Committee finds that the above violations of the author's rights also constitute a violation of article 14, paragraph 1, read in conjunction with article 14, paragraphs 3 (a), (b), (d) and (g) of the Covenant.

9.11 The Committee notes the author's claims that the public and in particular his relatives and the relatives of other accused were excluded from the main trial. The Committee observes that the State party does not refute this claim, other than stating that nothing in the case file confirms the author's claim and notes that, according to the State party's own observations, the case files appear to be incomplete. The Committee recalls that all trials in criminal matters must in principle be conducted orally and publicly and that the publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. [7] The Committee observes that no such justifications have been brought forward by the State party in the instant case. In this respect, the Committee finds a violation of article 14, paragraph 1 of the Covenant. In light of this conclusion, and given that the author has been sentenced to death following a trial held in violation of the fair trial guarantees, the Committee concludes that the author is also a victim of a violation of his rights under article 6, read in conjunction with article 14, of the Covenant.

9.12 The Committee notes the author's claims that his attempts to obtain a review of his case based on newly discovered circumstances led to proceedings of excessive length (over 7 years) and that the above delay caused him moral suffering, which he equates with torture and ill-treatment. The Committee observes that the State party does not dispute the alleged duration of the proceedings, but simply notes that about eleven months passed between the decision of the prosecution not to reopen the case and the date when the author's appeal arrived in the Supreme Court. In the absence of any other pertinent information on file, the Committee considers that, in the present case, the facts before it do not permit it to conclude to a violation of the author's rights under article 2, paragraph 3 (a) in conjunction with article 14, paragraph 3 (c), of the Covenant.

10. 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 State party has violated article 6 read together with article 14; article 7; article 9, paragraphs 1, 2, 3 and 4; article 14, paragraphs 1 and 3 (a), (b), (d), and (g), of the International Covenant on Civil and Political Rights.

11. Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee considers that the State party is under an obligation to provide the author with an effective remedy

[6] See, for example, communication No. 1212/2003, *Lanzarote* v. *Spain*, decision of inadmissibility of 25 July 2006, para. 6.3.

[7] See the Committee's General Comment No 32, at paras 28 and 29 and communication No. 215/1986, *Van Meurs* v. *The Netherlands*, paras 6.1- 6.2.

including: conducting full and thorough investigation into the allegations of torture and ill-treatment and initiating criminal proceedings against those responsible for the treatment to which the author was subjected; a retrial in compliance with all guarantees under the Covenant; and providing the author with adequate reparation including compensation. The State party is also under an obligation to take steps to prevent similar violations occurring in the future.

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 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 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. In addition, it requests the State party 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.]

Appendix

Individual opinion of Committee member Mr. Rafael Rivas Posada (partially dissenting)

The Human Rights Committee, in paragraph 10 of its Views on Communication No. 1304/2004 Andrei Khoroshenko v. the Russian Federation, was of the view that the State party had [directly] violated article 6 [of the Covenant] read together with [several paragraphs of] article 14 of the Covenant. In my opinion, there was no direct violation of article 6, in view of the fact that the author was not subjected to the death penalty to which he had been sentenced, since his sentence was commuted to life imprisonment. I believe that the correct interpretation of article 6 of the Covenant consists in considering that direct violation of that article occurs only if the victim is deprived of life, which did not occur in this case.

The Committee took the view, quite rightly, that the State party had violated several provisions that guarantee the right to due process to which all accused are entitled. According to the jurisprudence it developed recently, it considered that if there has been a violation of the guarantees enshrined in article 14 of the Covenant and the trial leads to the death penalty, there is a direct violation of article 6 "read together with article 14". I do not agree with this formulation, although I would agree with the formulation whereby there was a violation of article 14 "read together with article 6 of the Covenant". That would have been in conformity with the meaning and scope of article 6, without any need to extend its interpretation unduly to cases where the victim has not been deprived of life.

I agree with all the other conclusions contained in paragraph 10 of those Views.

[*signed*] Mr. Rafael Rivas Posada

[Done in English, French and Spanish, the Spanish 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.]