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International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 1795/2008

Views adopted by the Committee at its 109th session (8–26 July 2013)

Submitted by:	Oleg Anatolevich Zhirnov (not represented by counsel)
Alleged victim:	The author
State party:	Russian Federation
Date of communication:	3 September 2004 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 1 July 2008 (not issued in a document form)
Date of adoption of Views:	28 October 2013
Subject matter:	Unfair trial
Substantive issues:	Right to have adequate time and facilities for the preparation of a criminal defence, to communicate with a counsel of his own choosing and to have legal assistance assigned to him, in any case where the interests of justice so require
Procedural issues:	None
Articles of the Covenant:	14, paragraphs 3(b) and (d)
Articles of the Optional Protocol:	None

[Annex]

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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 (109th session)

concerning

Communication No. 1795/2008*

Submitted by:	Oleg Anatolevich Zhirnov (not represented by counsel)
Alleged victim:	The author
State party:	Russian Federation
Date of communication:	3 September 2004 (initial submission)

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

Meeting on 28 October 2013,

Having concluded its consideration of communication No. 1795/2008, submitted to the Human Rights Committee by Mr. Oleg Anatolevich Zhinov 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. Oleg Anatolevich Zhirnov, a Russian citizen born in 1972, at the time of the submission imprisoned in the Russian Federation. He alleges that he is a victim of violations by the State party[1] of his rights under article 14, paragraphs 3(b) and (d) of the International Covenant on Civil and Political Rights. The author is unrepresented.

Factual background

2.1 The author submits that, on an unspecified date, he was arrested and charged with murder, extortion and kidnapping. He claims that when in July 2000 an investigator of the

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* The following Committee members participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Ahmad Amin Fathalla, Mr. Kheshoe Parsad Matadeen, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Mr. Lazhari Bouzid, Mr. Walter Kaelin, Mr.Yuji Iwasawa, Mr. Cornelis Flinterman, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Victor Manuel Rodríguez-Rescia, Ms. Anja Seibert-Fohr and Ms. Margo Waterval.

[1] The Optional Protocol entered into force for the Russian Federation on 1 January 1992.

Volzhskaya Prosecutor's Office of Samara, one Vasyaev, formally presented him with the evidence against him (the so-called process of 'familiarisation with the criminal case'), this occurred in the absence of his first lawyer, one Gordeeva. He submits that he and his lawyer were separately acquainted with the criminal file, despite the author having expressly requested that familiarisation be carried out together with his lawyer. He states that this contravened article 49, part 5, of the Criminal Procedure Code, as then in force, which made it obligatory for a lawyer to participate in the criminal proceedings in any case where an accused was charged with an offence for which the death penalty could be imposed. The author was charged among others with having committed a crime under article 102 of the Criminal Code (premeditated murder under aggravated circumstances) that was at the time punishable by death penalty.

2.2 On an unspecified date, the author, together with other co-accused, complained about the above matter to the Judicial Chamber for Criminal Cases of the Saratov Regional Court and requested that his criminal case be returned for a supplementary investigation.[2] He also requested, *inter alia*, that he and his second lawyer, one Abramova, be acquainted with all the case file materials, because Abramova was retained by him only on 6 May 2000. On 12 May 2000, the Judicial Chamber for Criminal Cases of the Saratov Regional Court concluded that substantial violations of the criminal procedure law were committed by the investigation authorities and that the case should be returned for a supplementary investigation to rectify the identified procedural deficiencies. The court specifically stated that in cases when a lawyer participates in criminal proceedings, the investigator should present all case file materials to the accused and his lawyer, unless the accused or his lawyer request to be acquainted with the case file separately.

2.3 The supplementary investigation was completed on 20 June 2000. The author submits that, contrary to the 12 May 2000 decision of the Judicial Chamber for Criminal Cases of the Saratov Regional Court, he was again familiarised with part of the case file materials in the absence of his lawyer. On an unspecified date in July 2000, the author's second lawyer, Abramova, successfully passed an exam to become a magistrate judge and could no longer act as defence attorney. Despite the author's numerous oral motions to either assign a new lawyer to him or to adjourn the familiarisation with the case file,[3] the investigator in charge continued to formally present him with the case file in absence of a lawyer. Specifically, on 18, 19, 20 and 21 July, the author was presented with parts of volumes 6 and 7, and with volumes 12, 13 and 14 of his case file in the absence of a lawyer. On 21 July 2000, the author's third lawyer, Nekhoroshev, was retained. On 24 July 2000, the author was familiarised with volume 15 of his case file separately from Nekhoroshev. In addition, the investigator did not present to the author certain video evidence, despite his numerous oral motions to view it together with his lawyer. Consequently, the author saw the said video evidence for the first time only during the court proceedings. Transcripts of the video were admitted by the court as evidence.

2.4 On 29 August 2000, during a trial hearing the author complained about this matter to the Judicial Chamber for Criminal Cases of the Saratov Regional Court.[4] The author's third lawyer added that each of the preceding lawyers represented his client at different stages of the proceedings and that he had acquainted himself with all case file materials, whereas the author was presented only with part of the case file and in Nekhoroshev's absence. The author explained to the court that there should be a certificate of 13 August 2000 in his case

[2] It transpires from the procedural decision of the Judicial Chamber for Criminal Cases of the Saratov Regional Court that the author's request was supported by the public prosecutor.

[3] Reference is made to article 49, part 4, of the Criminal Procedure Code.

[4] It transpires from the trial transcript that the composition of the Judicial Chamber for Criminal Cases of the Saratov Regional Court on 29 August 2000 was different from the one of 12 May 2000.

file, confirming that his previous lawyer Abramova had successfully passed an exam to become a magistrate judge and that, subsequently, he retained Nekhoroshev as his new defence counsel. The public prosecutor commented on the author's intervention and stated that there was no data confirming that the lawyer Abramova was indeed appointed as a magistrate judge. The court adjourned the author's motion to be familiarised with the case file together with Nekhoroshev, pending verification of the information provided with regard to the lawyer Abramova. Ultimately, the matter was never decided by the Judicial Chamber for Criminal Cases of the Saratov Regional Court. [5]

2.5 On 1 November 2000, the author was found guilty of premeditated murder under aggravated circumstances (article 102 of the Criminal Code) and of three other charges under article 146, parts 2 and 3; article 126, part 2, and article 148, part 2, of the Criminal Code by the Saratov Regional Court and sentenced to 11 years of imprisonment. The author's cassation appeal was dismissed by the Judicial Chamber for Criminal Cases of the Supreme Court on 25 April 2001. His request for a review in the order of supervision to the Supreme Court was dismissed on 17 July 2003. The Supreme Court stated that it had not identified any violations of the procedural law which would provide grounds to alter the sentence of the first instance court. The author's appeal of the 17 July 2003 decision of the Supreme Court was dismissed by the Deputy Chair of the Supreme Court on 12 November 2003.

The complaint

3.1 The author claims a violation of his rights under article 14, paragraph 3 (b) and (d), to have adequate time and facilities for the preparation of his defence, to communicate with counsel of his own choosing, and to have legal assistance assigned to him in any case where the interests of justice so require. The entire case file consisted of nineteen volumes, many of which over 200 pages thick. Pursuant to article 201, part 6, of the Criminal Procedure Code, as it was in force at the time, the investigator established a tight schedule, according to which the author was allocated only one day (4-5 working hours a day) to get familiarised with one of the volumes of the case file. After his second lawyer quit, the author had to review on his own certain volumes of the case file on 18, 19, 20, 21 and 24 July 2000. Subsequently when the author retained another defence attorney, he requested, but was not allowed to familiarise himself with the same case file materials one more time in the presence of his attorney.

3.2 The author maintains that, in the absence of a lawyer, he could not obtain expert legal advice on the content of the case file materials immediately after being familiarised with them. Additionally, the author was unable to meet the tight schedule imposed by the investigator as he was not allowed to make copies of the case file but had to take notes by hand and, on 2 August 2000, he had to sign a protocol of 'completion of the familiarisation with the case file' without, in fact, being familiarised in full with all the prosecution evidence. The author noted in this protocol the number of volumes that he had reviewed in the lawyer's presence and the number of volumes that he did not see at all. He claims that he was deprived of the right to obtain expert legal advice on the content of certain case file material prior to trial and of the opportunity to, jointly with his lawyer, timely file motions on matters vital for his defence and for the determination of the case at trial (for example, requesting to summon additional witnesses and appoint additional expert examinations). The author concludes that the violation of his right to defence had a negative impact on the

[5] The information in this paragraph, including the fact that the motion was never decided by the court, is supported by the trial transcript presented by the author as evidence.

legality and validity of his sentence, as he was deprived of the possibility to defend himself by all lawful means and methods.

State party's observations on merits

4.1 On 29 October 2008, the State party submits that the author's complaints regarding violations of his procedural rights to defence had been reviewed on numerous occasions by the General Prosecutor's office and no violations had been found. The State party also submits that his case had been reviewed by all court instances, including the Constitutional Court, and neither of them found a violation of his rights. It further submits that the author's submission that he had to acquaint himself with the case file in the absence of his lawyer does not correspond to the reality. According to a protocol of 21 June 2000, the accused was informed of the termination of the preliminary investigation and he was explained the right to review the case file personally and together with his attorney, in the presence of his lawyer Abramova. The examination of the case file by the author and his lawyer, started on 22 June 2000. On 30 June 2000, the author was warned in writing by the investigating officer that it is unacceptable to protract the review of the case file. Since the investigating officer considered that the author is deliberately protracting the review, on 6 July 2000, the investigating officer issued an order giving the author a deadline till 28 July 2000 to acquaint himself with the case file. On 18 July 2000, the author requested to be represented by another lawyer, one Nekhoroshev and accordingly the examination of the file continued with the participation of the above lawyer.

4.2 The State party further submits that on 29 August 2000 the court rejected the author's motion to return the case for additional investigation on the ground that his right to familiarise himself with the case file had been violated. Accordingly the State party maintains that there was no violation of the author's rights under article 14, paragraph 3 (d) of the Covenant.

Author's comments on the State party's observations

5. On 28 November 2008, the author submits he started reviewing the case file and preparing his defence together with his lawyer Abramova on 22 June 2000. In order to prepare, they were making notes and copying the addresses of the prosecution witnesses and the interrogation protocols. On 30 June 2000, the investigator warned the author that it was unacceptable to protract the review of the case file. The author explained that he is suffering from myopia and that the doctor advised him to take 15 minutes breaks from reading every hour, that copying protocols took time and that he had no intention to protract the case file review. Regardless of his explanations, on 6 July 2000, the investigator imposed on him a deadline for reviewing the file till 28 July 2000. The author reiterates that he had one day to review on average 200 pages and that he could not manage to adequately prepare his defence in the short time allocated. He also reiterates that, on 29 August 2000, during the court hearing he submitted a motion claiming that his right to acquaint himself with the case file in the presence of his lawyer had been violated, but that the court never ruled on that motion.

State party's further observations on the merits

6.1 On 9 June 2009, the State party submits that the author's submission of 28 November 2008 does not contain any new information. It further submits that the author's criminal case had been examined by the court and returned for additional investigation twice and that the author had the opportunity to familiarise himself with the case file twice, once between 1 February 1999 and 12 April 1999 and again between 6 January 2000 and 7 April 2000. For a third time the author was presented the case file between 22 June 2000 and 28 July 2000. On that occasion the review of the case file began with one defence

attorney and was finalised with another, because the author refused the services of Abramova. The State party submits that the author's argument that on 13, 20, 21 and 24 July 2000 he reviewed case file materials without his lawyer(s) are contrary to the information contained in the schedule for examination of the case file.[6]

6.2 Concerning the author's allegation that he was not given sufficient time to acquaint himself with the case file, the State party submits that according to article 201 of the Criminal Procedure Code that was in force at the time, the investigator had the right to issue a ruling, approved by the prosecutor, establishing a deadline for examining the case file if the accused and his defender evidently protracted its review. The State party maintains that the accused evidently protracted the review of the case file,[7] and that contrary to his submission on 29 August 2000 the court reviewed and rejected his motion that his right to familiarise himself with the case file had been violated.

Author's further submission

7. On 6 December 2009, the author presents to the Committee copies of the last page of the protocol of the finalization of the examination of the case file, parts of the schedule for case file review established by the investigator and parts of the investigator's ruling giving the author a deadline for examination of the case file. The copy of the protocol presented by the author includes a note from him that he did not fully acquaint himself with the case file, that on 13, 20 and 21 July 2000 his defence attorney was not present and that he would like to review the video evidence together with his lawyer. A note from the lawyer Nekhoroshev reads that he had read the entire case file.

State party's further observations on the merits

8. On 13 August 2010, the State party reiterates is previous observations and submits that the schedule of examination of the case file bears the signatures of both the author and his attorneys and that the above disproves the note that he made at the end of the protocol of the finalization of the examination of the case file.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

9.3 The Committee notes that the State party did not raise any objections to the admissibility of the communication. The Committee declares the communication

[6] The State party maintains that according to the schedule on 13 July 2000 the author and his first lawyer reviewed volume 11 of the case file and on 20, 21 and 24 July 2000 the author and his second lawyer reviewed respectively volumes 12, 14 and 15 of the case file and that the above was evidenced by the signatures of the author and his lawyers. No copy of the schedule is presented by the State party.

[7] The State party submits that on 26, 27, 28, 29 and 30 June the author reviewed respectively 22, 9, 16 and 31 pages and that during the next four days he reviewed respectively 26, 68, 18 and 2 pages.

admissible in so far as it appears to raise issues under article 14, paragraphs 3 (b) and (d) of the Covenant, and proceeds to its consideration on the merits.

Consideration of the merits

10.1 The Human Rights Committee has considered this communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee takes note of the author's allegations that he did not have adequate time and facilities for the preparation of his defence and could not communicate with counsel of his own choosing, since he was mandated to review the entire case file, consisting of 19 volumes (over 4000 pages), in 37 days, he did not manage to review all case materials and he was not allowed to familiarise himself with certain case file materials in the presence of his attorney(s). The Committee also notes the State party's observation that the author's allegations that he had to review parts of the case file in the absence of his defence attorney were disproved by his and his lawyer's signatures on the case file review schedule. The Committee, however, observes that the author had made a note, stating that he did not manage to review the entire case file at the end of the case file review schedule. The Committee also observes that from the transcript of the trial hearing of 29 August 2000 in the Saratov Regional court it transpires that the author's lawyer confirmed the author's allegations that the latter did not have sufficient time to review the entire case file.

10.3 The Committee recalls that subparagraph 3 (b) of article 14 provides that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms[8]. The Committee further notes that, in its 12 May 2000 decision, the State party's Saratov Regional court had ruled that the fact that the author was presented certain case materials in the absence of his defence lawyer constituted a violation of the domestic criminal procedure and for that reason returned the case for additional investigation. The Committee also notes that from the transcript of the subsequent trial it appears that the same court had failed to rule on an identical motion and proceeded to convict the author. The Committee further notes the State party's submission that the court had rejected the above motion, but it did not submit documentary evidence in support of its contention.

10.4 The Committee observes that the author was not provided with the opportunity to make copies of the case file materials and that the limited time granted for review did not allow him to take notes by hand. Furthermore, he did not have the opportunity to review parts of the case file at all, including a video evidence that he saw for the first time during the trial. The Committee also notes that on 13, 20 and 21 July 2000, the author was denied the opportunity, to review certain case files in presence of his lawyer, as he was entitled to under the domestic procedure law. Taking into consideration the seriousness of the charges against the author, one of which was punishable by death at the time of the proceedings, the Committee considers that the author was not provided with adequate time and facilities for the preparation of his defence and thus his rights under article 14, paragraph 3 (b) of the Covenant have been violated.

10.5 In the light of the above finding, the Committee decides not to examine the author's claim of a violation of article 14 (3) (d) of the Covenant.

[8] Human Rights Committee General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (article 14), U.N. Doc. CCPR/C/GC/32 (2007), paragraph 32.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by the State party of the author's rights under article 14, paragraph 3 (b) of the Covenant.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate and appropriate compensation. The State party is also under an obligation to take steps to prevent similar violations occurring in the future.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy 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.

[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.]