



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2367/2014\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	Evgeny Bryukhanov (represented by Svetlana Bryukhanova)
<i>Alleged victim:</i>	Evgeny Bryukhanov
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	28 November 2013 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 25 March 2014 (not issued in document form)
<i>Date of adoption of Views:</i>	12 March 2020
<i>Subject matter:</i>	Detention and mistreatment of the author
<i>Procedural issue:</i>	Abuse of the right of submission
<i>Substantive issues:</i>	Torture, arbitrary arrest – detention, conditions of detention, fair trial, fair trial – witnesses, fair trial – legal assistance
<i>Articles of the Covenant:</i>	7, 9, 10, 14 (1), 14 (2), 14 (3) (b), (e) and (g) and 15 (1)
<i>Articles of the Optional Protocol:</i>	2 and 3

1. The author of the communication is Evgeny Bryukhanov, a national of the Russian Federation born in 1980. He claims that the State party has violated his rights under articles 7, 9, 10, 14 (1), 14 (2), 14 (3) (b), (e) and (g) and 15 (1) of the Covenant. The Optional Protocol entered into force for the Russian Federation on 1 January 1992. The author is represented.

\* Adopted by the Committee at its 128th session (2–27 March 2020).

\*\* The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Héléne Tigroudja and Gentian Zyberi.

\*\*\* A joint opinion by Committee members Vasilka Sancin, José Manuel Santos Pais and Gentian Zyberi (dissenting) is annexed to the present Views.



**The facts as presented by the author**

2.1 On 21 August 2010, the author was arrested on charges of sexual assault against his stepdaughter, a minor. Once in detention, he was also charged with eight other episodes of sexual assault. The author claims that he was beaten and deprived of food and sleep during his initial detention. From 21 August to 20 October 2010, during the preliminary investigation, the author did not have access to a lawyer, except on 1 October 2010. He was initially appointed a State-paid lawyer, K.B.K., but, the author claims, all interrogations were conducted in the lawyer's absence. The lawyer's signature, however, subsequently appeared on the records. On 20 October 2010, the author had an opportunity to study the criminal case against him, in the lawyer's absence. Thus, it was also impossible for the author to file all complaints regarding the procedural violations against him.

2.2 The author submits that, even though he signed a letter of confession, his acceptance of guilt should not have been retained as evidence by the court. The author claims that he was brought to the police station by police officers, without a lawyer being present. Furthermore, according to the national legislation, the courts should disregard confessions "beaten out" of a suspect. The author claims that he was "practically beaten" by the investigator, S.M.B., into signing the confession.

2.3 On 31 March 2011, the Pravoberezhny District Court of Magnitogorsk found the author guilty and sentenced him to 13 years of imprisonment.<sup>1</sup> On 26 April 2011, the author filed a cassation appeal to the Chelyabinsk Regional Court, invoking the unlawful application of the criminal law and a violation of the criminal procedure law during the criminal proceedings. The author also claimed that he had been subjected to beatings upon arrest to force him to confess guilt. On 10 October 2010, the cassation appeal court rejected the author's appeal. The court dismissed the claim that the author was beaten on the basis that the author had not invoked that claim earlier, for example during the interrogation in the presence of his lawyer. The court maintained that the author's confession was voluntary.

2.4 On 18 October 2011, the author requested that the Chelyabinsk Regional Court carry out a supervisory review of the judgments of the district and regional courts. On 20 March 2012, the Court decided to refuse to initiate a supervisory review. On an unspecified date, the author submitted an appeal against that decision to the President of the Court. On 21 June 2012, the President of the Court rejected the appeal and confirmed the decision of the Court of 20 March 2012. On unspecified dates, the author submitted requests for a supervisory judicial review to the Supreme Court and the President of the Supreme Court; those requests were rejected on 15 August 2012 and 25 March 2013 respectively.

2.5 From 21 August to 1 November 2010, media sources reported on the author's case, without disclosing his identity but referring to him as a paedophile who had sexually assaulted his stepdaughter. On 17 November 2010, a documentary entitled "Stepfather-rapist", produced by the television station TV-IN and aired on the channel TVC-U, included interviews with investigators confirming that the author had committed a sexually motivated crime against his stepdaughter. That information was aired even before the trial had begun. On an unspecified date, the author filed a complaint to the Prosecutor of the Pravoberezhny District Court in Magnitogorsk, requesting a criminal investigation of the collaborators working with TV-IN on the basis that the documentary contained defamatory and confidential information. On 4 February 2011, the chief of the Police Department of the Ministry of the Interior decided not to initiate a criminal investigation, stating that the documentary did not disclose any confidential information and the collaborators working with TV-IN had acted lawfully.

2.6 The author submits that he has exhausted all available effective domestic remedies and notes that the subject matter of the communication is not being examined under any other procedure of international investigation or settlement.

**The complaint**

3.1 The author claims that the beatings and ill-treatment to which he was subjected while in detention amount to a violation of his rights under article 7 of the Covenant.

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<sup>1</sup> The author is currently serving his sentence in a federal prison in the region of Chelyabinsk.

3.2 He also claims that his confession was obtained in violation of the criminal procedure law, since the legal representative of the victim, in other words his stepdaughter, had also acted as a witness in the criminal proceedings and that the investigation had revealed a number of other inconsistencies, all of which breached his right to a fair trial under article 14 (1) of the Covenant. The author further claims that the presiding judge should have recused himself since he had seen or read articles about the author in the media and could not therefore be considered impartial.

3.3 Referring to *Gridin v. the Russian Federation*,<sup>2</sup> the author claims that the media coverage and the statements by his investigators undermined his right to be presumed innocent, in violation of article 14 (2) of the Covenant.

3.4 The author also claims that his inability to gain access to a lawyer from the moment of his arrest on 21 August 2010 until 20 October 2010 constitutes a violation of his rights under article 14 (3) (b) of the Covenant.

3.5 The author claims that the victim was not questioned in court and that one of the main witnesses for the prosecution, L.M.A., was questioned during the investigation but did not appear in court to testify. Additionally, several experts were questioned and provided their expert conclusions during the investigation but were not called to court and their conclusions were simply read into the record. The author therefore claims that the State party's authorities violated his rights under article 14 (3) (e) of the Covenant.

3.6 The author also asserts that the above-mentioned facts raise issues under articles 9, 10, and 15 (1) of the Covenant, without however providing further substantiation for these claims.

3.7 The author finally requests the Committee to award him just compensation, which, considering the grave nature of the charges against him, should amount to 1 million euros.

#### **State party's observations on admissibility and the merits**

4.1 By a note verbale dated 16 July 2014, the State party submits that the author was sentenced to a long prison term for repeated acts of sexual violence against his stepdaughter, a minor of less than 14 years of age. The author had previously been sentenced for rape.

4.2 The sentence was pronounced on 31 March 2011 and confirmed by the decision of the Chelyabinsk Regional Court on 10 October 2011. The State party submits that there were no violations of the rights enumerated in the communication. The author's right to a defence was assured during all stages of the proceedings, including his appeal to the court of second instance.

4.3 The author was initially apprehended on 21 August 2010 at 10 a.m., in the presence of a defence lawyer, K.B.K. The author was read his rights and his mother was informed about his detention. On the same day, the author was questioned as a suspect, in the presence of the lawyer. All other investigative actions, such as interrogations, were conducted in accordance with provisions of the criminal procedure law.

4.4 On 22 August 2010, a court decided to hold the author in pretrial detention. That decision was renewed several times. During all the related hearings, the author was present with his lawyer. The author's claims regarding lack of food, sleep and sanitary conditions in temporary detention "were not confirmed". The author was moved to a pretrial detention centre on 27 August 2010. There, the cells were equipped with private toilets, tap water and ventilation and meals were served three times a day. The author did not complain about the conditions of detention, nor did he make claims regarding other types of degrading treatment.

4.5 The State party admits that the author was not always informed in a timely manner about the decision to carry out a forensic examination. But this fact by itself cannot render the results of the examinations void and inadmissible in court. Furthermore, the author did not petition to conduct additional examinations. Upon completion of the investigation, the author and his lawyer were given the chance to study the materials of the criminal case, on 20 October 2010, from 9 a.m. to 1.30 p.m. The indictment was approved by the prosecutor

<sup>2</sup> CCPR/C/69/D/770/1997 and Corr.1.

on 29 October 2010 and, on that same date, the case was sent to court. A copy of the indictment, bearing the author's signature, was given to him.

4.6 Given the fact that the author was accused of crimes of a sexual nature against an underage person, the court hearings were not open to the public. The author and his lawyer actively participated during the hearings, however, including by providing evidence and questioning the conclusions of the prosecution. The author's claims were rejected during the cassation proceedings and a decision was issued on 10 October 2011.

4.7 On the basis of the author's complaints of violence against him and falsification of evidence, the State party's authorities initiated a review, as a result of which, on 9 August 2012, they refused to initiate a criminal investigation. That decision was appealed to the Pravoberezhny District Court in the city of Magnitogorsk, but the appeal was rejected on 14 September 2012. The Chelyabinsk Regional Court rejected a further appeal, on 13 November 2012.

4.8 The author's guilt was determined only on the basis of evidence adduced during the court hearings. The victim was present in court on five occasions. The fact that she was not present, as requested, on four other occasions did not prejudice the author's position, and the defence did not request postponement of the court hearings. Since the victim had refused to testify, the prosecutor read out the testimony she had given during the investigations. The victim "fully confirmed" her testimony, but refused to answer any questions, neither from the defence nor from the prosecution.

4.9 The author's allegations that the media affected the judge chairing the court hearings, P.I.P., are mere assumptions not based on facts. The defence did not request the judge to recuse himself. Since P.I.P. resigned his judgeship, the case was sent to the cassation court with the chair of the district court, judge E.A.K., who also considered the author's complaints regarding the court transcripts. E.A.K., after receiving the author's comments on the transcript, filed a criminal complaint of insult against him. Nevertheless, the law enforcement authorities refused to initiate a criminal case.

4.10 The author complains that he was not properly informed about the time of his cassation appeal and that, because of this, he was not able to prepare his defence. On 13 May 2011, the author wrote a letter, but that letter did not contain the author's request to be present during the cassation hearing. He did, however, request a defence lawyer to represent him during that stage of the court proceedings. A lawyer, L.Y.U., was appointed and participated in the cassation hearings on 10 October 2011. While that hearing was postponed several times, the author was always informed about the changes.

4.11 The author's submission is not substantiated and does not contain any information regarding violations of the Covenant. The fact that the author is not happy with the outcome of the proceedings against him does not mean that a violation occurred.

4.12 The State party, in the present circumstances, considers that the author's communication constitutes an abuse of the right to submit a complaint and a violation of article 3 of the Optional Protocol.

#### **Author's comments on the State party's observations on admissibility and the merits**

5.1 By a letter dated 16 July 2014, the author rejects the State party's observations. Regarding his previous conviction of rape, he submits that he had always maintained his innocence and that he was released after serving half of his initial prison sentence due to his good behaviour during imprisonment.

5.2 The author also rejects the State party's claims that he was always provided with a lawyer. Upon request by the author, the defence lawyer mentioned in the State party's submission, K.B.K, admitted that she had never concluded a representation agreement with the author. In addition, the author submitted a letter from the chief of the police station, in which it is stated that the author was brought to the police station at 1 a.m., not at 10 a.m., as submitted by the State party, on 21 August 2010. The author also claims that he did not have a defence attorney present at that time.

5.3 The author also affirms that, when he was taken from the pretrial detention centre to a temporary isolation ward, the lawyer was not present; only the investigator S.M.B. was there. He expresses the same concerns in relation to 19 and 20 October 2010, when,

supposedly, the author was preparing for his defence with his lawyer but the lawyer was not present. The presence of the lawyer's signature does not prove that the lawyer was actually there, as the signature could have been added post factum. In addition, the author signed an agreement with a private lawyer, K.O.N., on 6 October 2010, but was only allowed to meet with that lawyer on 18 October 2010, that is, 12 days after the agreement had been signed.

5.4 The author further submits that his detention for 23 hours in police station No. 9 in the city of Magnitogorsk violated his rights. He had to stay in a cell where he could only lie or sit on a concrete floor, without "proper nutrition" and without being able to use a toilet. During that time, he was constantly interrogated and was not given enough time to sleep. Moreover, he was forced to sign a confession and other "procedural documents" and was promised to be treated better in return, e.g. to be able to sleep on a mattress.

5.5 Regarding the statement by the victim, the author submits that, while he had the right to challenge witnesses testifying against him, he was not able to challenge the main witness – the victim herself, since her statements were simply read out during the court hearings. Another important witness, L.M.A., testified in court but the judge did not allow any questions to be posed to her.

5.6 The author further submits that his right to be presumed innocent until proven otherwise was violated when it was announced on television that he was a "stepdad-rapist". The author requested the presiding judge to recuse himself, but he refused.

5.7 The author also requested from the authorities that a jury trial be held, but that request too was rejected. The author wanted his fellow citizens to judge him, through a more transparent and just process, but the court did not find any reason to grant this request, which violated the author's rights to a fair trial.

### **Additional submissions**

#### *From the State party*

6.1 By notes verbales dated 13 February 2015, 30 July 2015 and 22 January 2016, the State party reiterated its previous position that the author was provided with access to a lawyer from the moment of his arrest. In cases where the defendants cannot afford a lawyer, counsel is appointed ex-officio and no contract or agreement is needed. The author provides a letter from K.B.K. simply stating that no contract had been signed. During the apprehension, the author did not have a lawyer, which is why one was appointed to him. The investigator in the case signed an order (No. 1088), appointing a lawyer, K.B.K., to represent the author. On the same day, 21 August 2010, the author was interrogated twice in the presence of the lawyer.

6.2 On 21 August 2010, as attested by the records, a police officer on duty at police station No. 9 put together a statement from the author, who had come to the police station voluntarily and admitted that on 20 August 2010 he had picked up his stepdaughter from his mother-in-law's house, had taken her to a forest and had raped her there. Upon submitting his statement, he was immediately arrested as a suspect and sent from the police station to a temporary detention ward, as required by the criminal procedure law. When the author was brought to the ward, no injuries on his body were recorded, contrary to his claims that he was beaten by police officers. The author only informed the medical personnel that he was HIV-positive and had a pain in his chest. The author did not complain about torture to his cellmates or to his lawyer.

6.3 On 22 August 2010, the Pravoberezhny District Court in the city of Magnitogorsk prolonged the author's detention pending trial.

6.4 Regarding legal representation, the author provides a letter, which, he claims, proves that the lawyer was not present in the temporary detention ward from 22 August 2010 to 30 March 2011. However, when the lawyer, K.B.K., was questioned on 24 July 2012, she confirmed having been present during the interrogations. At that time, the author did not file any complaints with his lawyer regarding the actions of the police officers.

6.5 In his efforts to mislead the Committee, the author claims that, until 18 October 2010, the law enforcement authorities impeded access to the private lawyer that he had hired, K.O.N., with whom he had signed a contract on 6 October 2010. In reality, the records that the author himself provided indicate that said lawyer spoke to his client on 7

October 2010, on the premises of the temporary isolation ward. In addition, on 14 October 2010, during the pretrial detention hearings, the author was represented by K.O.N. According to the records obtained by the State party, that lawyer and two other defence lawyers also visited the author on nine additional occasions. The visits between the author and his lawyers were not limited in time. The fact that K.O.N. had decided not to meet more often with his client proves that the author had enough access to legal assistance.

6.6 Furthermore, the author claims that, during his detention in police station No. 9, he was held in a cell where he could only lie or sit on a concrete floor, was not given food and was subjected to inhuman treatment for 23 hours. The letter that was presented by the author and signed by the chief of the police station, however, confirms that the author was held there for only two hours, from 1 to 3 a.m. on 21 August 2010. During that time, the author did not file any complaints about the conditions of his detention.

6.7 As submitted previously, the State party authorities initiated an examination under articles 144 and 145 of the criminal procedure law of the Russian Federation. The examination was triggered by the author's complaint that he had been subjected to violence and other unlawful treatment during the investigation. As a result, on 9 August 2012, no criminal case was initiated. On 14 September 2012, the Pravoberezhny District Court of the city of Magnitogorsk found the decision not to initiate a criminal case to be lawful. The trustworthiness of the allegations made is also questioned because the author never complained about the lack of food, about not having access to a toilet or about having to lie and sit on a concrete floor in the cell – not at the time, not during the investigation, not during the court hearings. Moreover, when the author was questioned on 14 May 2012, he testified that, upon being apprehended, he was brought to police station No. 9, but according to the records, the author was held in an office (No. 39), not in a cell.

6.8 Under article 31 of the criminal procedure law in force at the time, the author's trial was not eligible for jury trial, contrary to the author's claims.

6.9 The author had attempted to initiate a criminal case against the employees of the television station TV-IN, but the complaint was rejected on 4 February 2011. On 22 December 2014, the deputy prosecutor of the Pravoberezhny District Court annulled that decision and requested an additional examination of the facts. The results of any such examination should not, however, impinge on the lawfulness of the trial against him. During the court hearings, the author did not request the judge to recuse himself. In addition, L.M.A did not testify as a witness<sup>3</sup> but as a "teacher".

6.10 The author's communication therefore contains no information to confirm any violation of the provisions of the Covenant, which can be considered as an abuse of the right of submission. The communication should therefore be considered inadmissible.

6.11 Despite the author's contentions, he was not convicted of several crimes but only of one crime, under article 132 of the criminal law in force at the time.

*From the author<sup>4</sup>*

7.1 On 13 February 2015, the author submitted additional comments, claiming that the State party distorts his claims. The State party's authorities, for example, claim that the records from the temporary detention ward are not accurate and do not reflect the full list of persons who visited the author. The author submits that, contrary to this position, the records reflect information on all visitors to the temporary isolation ward. The records indicate, for example, that the author was brought to the ward from a pretrial detention centre on 23 September 2010, upon the request of the investigator, S.M.B., as part of his investigation. The author was indeed brought to the ward but both the investigator and the lawyer failed to show up. The author claims that the same had happened on other occasions, which shows that his right to access to a lawyer was violated. The lawyer's signature appeared on various documents only later. The State party's authorities did not provide any evidence that the lawyer, K.B.K., had been appointed to represent him.

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<sup>3</sup> It appears that this witness, L.M.A., was questioned during the investigation but did not testify in court.

<sup>4</sup> Including the submission received on 23 October 2015 and an email dated 26 January 2018.

7.2 Regarding the events of 21 August 2010, the author submits that he was brought to the police station at 1 a.m. and was placed in a cell where he could only lie or sit on a concrete floor for two hours. At 3 a.m., he was brought to office No. 39, where he was interrogated for 20 hours 45 minutes, without breaks for food or rest. During all that time, he was handcuffed to a chair in order to force him to sign a document, without a lawyer being present. The fact that the author was interrogated for more than 20 hours is itself proof of inhuman treatment. It is also noteworthy that all this occurred in spite of the fact that the legislation of the Russian Federation prohibits interrogations to be carried out at night time, as well as the use of violence against detainees.

7.3 The witness L.M.A., whom the State party calls a “teacher”, testified twice during the investigation, on 7 and 15 September 2010. On neither occasion was the defence able to question her, despite the fact that L.M.A. was included in the list of witnesses for the prosecution and the defence therefore did not need to request her presence, since the author considered that she would appear in any case.

7.4 At the same time, the State party’s authorities are not denying the fact that the media called the author a “paedophile” even before a verdict and sentence against him had been pronounced. The authorities made announcements everywhere discussing the author’s guilt, in violation of his rights under the Constitution of the Russian Federation and the Covenant. The author admits that the law on jury trial was adopted after his trial but claims that the court acted unlawfully and should have explained why a jury trial was not possible in his case.

7.5 The author repeats his assertion that he was not allowed to prepare properly for his defence. On 7 October 2010, he was allowed to meet with his private lawyer, K.O.N., for only 40 minutes. It was not physically possible to discuss anything substantive during that time. The next time the author saw his lawyer was on 14 October 2010, when his pretrial detention was extended in court.

7.6 The State party’s authorities further claim that the author never complained about being subjected to violence or inhuman treatment. The author did not complain because he did not expect that any action would be taken by the investigator. The preliminary examination that resulted in the refusal by the authorities to initiate a full criminal investigation was based on testimonies of the investigator himself, S.M.B., and another police officer, P.A.V. The results of the preliminary examination should not have been based on the testimony by the perpetrators.

## **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 rule 97 of its rules of procedure, decide whether it is admissible under the Optional Protocol to the Covenant.

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

8.3 The Committee takes note of the State party’s submission that the communication should be considered an abuse to the right of submission under article 3 of the Optional Protocol, since the author failed to substantiate his claims. The Committee finds that the material before it does not show that the author presented his communication in a bad faith, and that the author provided all the information and documents in his disposal. In the circumstances of the present communication, the Committee does not find that the author abused his right of submission under article 3 of the Optional Protocol.

8.4 The Committee takes note of the claim that the author has exhausted all available effective domestic remedies. In the absence of any objection by the State party in this connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

8.5 The Committee has noted the author’s claims under articles 9, 14 (1) (regarding the author’s right to a trial by jury), 14 (3) (b) and article 15 (1) of the Covenant. In the absence of any further pertinent information or explanations on file, the Committee considers that

the author has failed to sufficiently substantiate, for the purposes of admissibility, these allegations. Accordingly, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

8.6 The Committee considers the author's allegations that, on 21 August 2010, after having been brought to police station No. 9, he was beaten, held in a cell where he could only lie or sit on a concrete floor, not given food, not provided with access to a toilet and was not allowed to sleep. The Committee notes, however, that the State party maintains that, according to its records, the author was never placed in a cell for such a prolonged time but was, instead, brought to an office (No. 39) for two hours before being transferred to a temporary isolation ward. The Committee also notes that these allegations have been reviewed by the courts and found to lack credibility, while, in his submission, the author has failed to indicate whether and why these were decisions arbitrary or otherwise unreasonable. The Committee also notes that the author has failed to provide details regarding the alleged beatings, for example, on the methods used to beat him, exactly which parts of his body were affected, which and how many police officers caused the beatings and whether he sustained any injuries as a result.

8.7 In the light of the State party's refutation of the allegations of the author and relevant decisions of the courts, as well as the author's failure to produce documentary evidence in support of his allegations or to indicate if and why the decisions of the courts were arbitrary or unreasonable, the Committee cannot conclude that the conditions in the detention centre or the State party's actions with regard to the author constituted a violation of his rights under articles 7, 10 (1) and 14 (3) (g) of the Covenant. In the absence of any further pertinent information on file, the Committee considers that the author has failed to sufficiently substantiate, for the purposes of admissibility, these allegations. Accordingly, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

8.8 The Committee also considers the author's allegations that his right to be presumed innocent was violated when several media outlets published articles about his prosecution. The Committee notes the State party's contention that no confidential information was revealed in the media coverage. The Committee reviewed the articles in question and was able to ascertain that they do not disclose the name of the author or any other private or identifying information. In the circumstances described by the parties, the Committee cannot conclude that the media articles, which did not identify the author, violated his rights under article 14 (2) of the Covenant. The Committee therefore considers that the author has failed to sufficiently substantiate, for the purposes of admissibility, these allegations. It therefore declares this part of the communication inadmissible under article 2 of the Optional Protocol.

8.9 In the Committee's view, the author has sufficiently substantiated, for the purposes of admissibility, his claims under article 14 (3) (e) of the Covenant, declares them admissible and proceeds with the consideration of the merits.

#### *Consideration of the merits*

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

9.2 The Committee considers the author's claims that his right to call, obtain attendance of and examine witnesses was violated in that he could not question the main witness for the prosecution, in other words the victim, the victim's teacher, L.M.A., and expert witnesses, all of whom provided information against the author during the investigation but were not called to court to testify or were otherwise not available for questioning by the defence. Regarding the ability of a person to compel attendance of witnesses and to examine and cross-examine them, the Committee recalls its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, in which it underscored that this guarantee is important for ensuring an effective defence by the accused and his or her counsel. It also notes, however, that the right of the accused to obtain the examination of witnesses on his or her own behalf is not absolute. The accused only have the right to have those witnesses admitted who are relevant for the defence and the right to be given a proper opportunity to question and challenge witnesses against them at



some stage of the proceedings.<sup>5</sup> The Committee recalls its jurisprudence, according to which there can be certain restrictions on the author's right to call witnesses that are justified by the need for protection of the victim's rights,<sup>6</sup> which in the present case is particularly pertinent considering the fact that the victim was a minor. The Committee notes in this regard the approach taken by the European Court of Human Rights, which in assessing whether an accused person has received a fair trial takes into account the rights of the perceived victim<sup>7</sup> and the need to prevent revictimization.

9.3 In the present case, however, the Committee notes that the victim,<sup>8</sup> her teacher L.M.A. and expert witnesses<sup>9</sup> all provided evidence against the author during the pretrial investigation, which were read into record, but that the witnesses were not made available to the defence for questioning or cross-examination. The Committee notes that the State party does not provide pertinent explanations on the unavailability during the court hearings of the witnesses, including the expert witnesses, who provided important forensic information. The Committee therefore considers that, in the circumstances of the present case and in the absence of pertinent explanations from the State party, such as, for example alternatives to direct questioning of the victim in an open court, the State party violated the author's rights under article 14 (3) (e).<sup>10</sup>

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

11. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to provide adequate compensation and other measures of satisfaction for the violations occurred. The State party is also under an obligation to take all steps necessary to prevent similar violations from 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. The State party is also requested to publish the present Views and disseminate them widely in the official language of the State party.

<sup>5</sup> See *Allaberdiev v. Uzbekistan*, (CCPR/C/119/D/2555/2015), para. 8.8.

<sup>6</sup> See *Stasaitis v. Lithuania*, (CCPR/C/127/D/2719/2016 and Corr.1), para. 8.6.

<sup>7</sup> See, inter alia, *S.N. v. Sweden*, judgment of 2 July 2002 (application No. 34209/96), para. 47; *Oyston v. United Kingdom*, judgment of 22 January 2002 (application No. 42011/98); and *Y. v. Slovenia*, judgment of 28 May 2015 (application No. 41107/10), paras. 69–72 and 106.

<sup>8</sup> Copy of the verdict and sentence, p. 3.

<sup>9</sup> *Ibid.*, p. 4.

<sup>10</sup> See *Dugin v. Russian Federation* (CCPR/C/81/D/815/1998), para. 9.3; and *Rouse v. Philippines* (CCPR/C/84/D/1089/2002), para. 7.5.

## Annex

### **Joint opinion of Committee members Vasilka Sancin, José Manuel Santos Pais and Gentian Zyberi (dissenting)**

1. We regret not being able to join the majority of the Committee in finding a violation of Evgeny Bryukhanov's rights under article 14 (3) (e) of the Covenant.
2. The facts of the case reveal that Mr. Bryukhanov was arrested in August 2010 on charges of sexual assault of his stepdaughter, a minor. Once in detention, he was also charged with eight other episodes of sexual assault (para. 2.1). The author had been previously convicted of another crime of rape (paras. 4.1 and 5.1). On the date of the sexual assault committed by the author, his stepdaughter was less than 14 years old. The author was ultimately convicted and sentenced to 13 years of imprisonment for repeated acts of sexual violence inflicted on the victim, who was a child (paras. 2.3 and 4.1).
3. The author acknowledges that he confessed his guilt but submits that his acceptance of guilt should not have been admitted as evidence by the court (para. 2.2). That notwithstanding, the author never provided any details on the alleged beatings he was subjected to in order to force him to confess. Furthermore, the cassation appeal court maintained that the author's confession was voluntary (para. 2.3). Nor did the author rebut the argument adduced by the State party according to which on 21 August 2010, as attested by the records, a police officer on duty at police station No. 9 put together a statement from the author, who had come to the police station voluntarily and admitted that on 20 August 2010 he had picked up his stepdaughter from his mother-in-law's house, had taken her to a forest and had raped her there (para. 6.2).
4. During the sexual assault, the only persons present were the author and the victim. No other persons witnessed the events.
5. The author claims that the victim was not questioned in court and that one of the main witnesses for the prosecution, L.M.A., was questioned during the investigation but did not appear in court to testify. Additionally, several experts were questioned and provided their expert conclusions during the investigation but were not called to court and their conclusions were simply read into the record (para. 3.5).
6. The Committee considered the author's claims that his right to call, obtain attendance of and examine witnesses had been violated in that he could not question the main witness for the prosecution, in other words the victim, the victim's teacher, L.M.A., and expert witnesses, all of whom provided information against the author during the investigation but were not called to court to testify or were otherwise not available for questioning by the defence (paras. 3.5 and 9.2). The Committee also rightly pointed out, however, that the right of the accused to obtain the examination of witnesses on his or her own behalf is not absolute. It is only the right to have those witnesses admitted who are relevant for the defence and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings.<sup>1</sup> There can be certain restrictions on the author's right to call witnesses that are justified by the need for protection of the victim's rights,<sup>2</sup> which in the present case is particularly pertinent considering the fact that the victim, a child under 14 years old and the stepdaughter of the author, was a minor.
7. The court hearings were not open to the public because the author was accused of crimes of a sexual nature against an underage person, but the author and his lawyer actively participated in the hearings, providing evidence and questioning the conclusions of the prosecution (para. 4.6), and were thus not prevented from presenting the arguments for the defence.
8. The victim herself was present at the court hearings on five occasions and the fact that she was not present on four other occasions did not harm the author's position, since the defence neither requested postponement of the court hearings nor complained of the

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<sup>1</sup> See *Allaberdiev v. Uzbekistan* (CCPR/C/119/D/2555/2015), para. 8.8.

<sup>2</sup> See *Stasaitis v. Lithuania* (CCPR/C/127/D/2719/2016 and Corr.1), para. 8.6.

absence of the victim. As the victim refused to testify, the prosecutor read the testimony she had given during the investigations. The victim “fully confirmed” her testimony but refused to answer any questions, neither from the defence nor from the prosecution (para. 4.8). There was therefore no violation of the principle of equality of arms and the refusal to testify by the victim is fully understandable due to the particular circumstances of the case and the need to avoid her further revictimization. In cases concerning minors subjected to rape, article 14 (3) (e) cannot be interpreted as requiring in all cases that questions be put directly to the victim by the accused or his or her defence counsel through cross-examination or by other means.<sup>3</sup>

9. The author also complains that another important witness, L.M.A., testified in court but that the judge did not allow any questions to be posed to her (para. 5.5). The author himself acknowledges, contradictorily, that L.M.A. was questioned only during the investigation but did not appear in court to testify (para. 3.5), so we fail to see how the judge could have prevented questions to be posed to her. Furthermore, L.M.A. did not testify as a witness, but as a “teacher” (para. 6.9) and in the end the author did not ask for her presence (para. 7.3), despite having had the possibility of requesting a postponement of the proceedings to that effect. In this respect, the court verdict reveals no attempt by the author to call the missing witnesses or ask for the postponement of hearings when such witnesses were not present or did not testify. The same applies to several experts who provided their expert conclusions during the investigation but were not called to court and whose conclusions were simply read into the record (para. 3.5).

10. The author had thus the possibility of questioning the victim, witnesses and experts during the investigation (as mentioned in paragraph 9.2, the right of the accused to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings) and was able to freely challenge the victim’s and L.M.A.’s testimonies, as well as the expert conclusions, during the trial, since they were read into the record. Therefore, the author’s defence rights were not unduly restricted, particularly since he did not react to such alleged violations then, while he could have done so.

11. It is not sufficient for a defendant to complain about not being allowed to question certain witnesses. A defendant must support his or her request by explaining why it is important for the witnesses concerned to be heard, and their evidence must be necessary for the establishment of the truth and the rights of the defence.<sup>4</sup> The author has not adequately explained why it was important to question those witnesses, including the victim; how this negatively affected his case; or why he did not react to such alleged violations during the legal proceedings. It is normally for the domestic courts to decide whether it is necessary or advisable to examine a witness, especially such a vulnerable one as the one in the case at hand, and the admissibility of evidence is primarily a matter for regulation by national law.

12. We would, therefore, have concluded that the author’s rights under article 14 (3) (e) of the Covenant were not violated in the present case.

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<sup>3</sup> See European Court of Human Rights, *S.N. v. Sweden*, judgment of 2 July 2002 (application No. 34209/96), para. 52; and *W.S. v. Poland*, judgment of 19 June 2007 (application No. 21508/02), para. 55.

<sup>4</sup> See, among others, European Court of Human Rights, *Perna v. Italy*, judgment of 6 May 2003 (application No. 48898/99), para. 29.