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International Covenant on Civil and Political Rights

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Views

Communication No. 1556/2007

Submitted by:	Marija and Dragana Novaković (represented by counsels, Dušan Ignatović and Žarko Petrović)
Alleged victims:	Zoran Novaković (son and brother of the authors)
State party:	Serbia
Date of communication:	10 November 2006 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 1 May 2007 (not issued in document form)
Date of adoption of Views:	21 October 2010

* Made public by decision of the Human Rights Committee.

Subject matter:	Right to life, lack of adequate legal remedy
Substantive issues:	None
Procedural issues:	None
Article of the Covenant:	Article 6 and article 2 in conjunction with article 6
Articles of the Optional Protocol:	2

On 21 October 2010 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. 1556/2007.

[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 session)

concerning

Communication No. 1556/2007**

Submitted by:	Marija and Dragana Novaković (represented by counsels, Dušan Ignatović and Žarko Petrović)
Alleged victims:	Zoran Novaković (son and brother of the authors)
State party:	Serbia
Date of communication:	10 November 2006 (initial submission)

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

Meeting on 21 October 2010,

Having concluded its consideration of communication No. 1556/2007, submitted to the Human Rights Committee on behalf of Mr. Zoran Novaković 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 authors of the communication, and the State party,

Adopts the following:

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

1. The authors of the communication are Marija and Dragana Novaković, Serbian nationals. They submit the communication on behalf of their son and brother, respectively, Zoran Novaković, also Serbian national, who passed away in a state-owned hospital in Belgrade, Serbia, on 30 March 2003, at the age of 25. The authors claim Mr. Novaković to be a victim of violations of article 6 and article 2, paragraph 3 in conjunction with article 6 of the International Covenant on Civil and Political Rights.[1] The authors are represented by counsel, Mr. Dušan Ignatović and Mr. Žarko Petrović.

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

[1] The Optional Protocol entered into force in relation to Serbia on 6 December 2001.

Facts as presented by the authors

2.1 The victim was admitted to the Clinic for Maxillofacial Surgery, in Belgrade on 24 March 2003 with a swelling jaw, resulting from a tooth infection. On 29 March 2003, he was transferred to the Clinic for Infectious Diseases. Both hospitals are state-owned and state-run. On 30 March 2003, Mr. Novaković died as a result of suppurating inflammation of his mouth, neck, chest and subsequent complications. The tooth at the origin of the initial infection was never extracted, basic medical tests, such as microbiological analysis, were never conducted and the surgical treatment applied was totally inappropriate. On the basis of several documents, such as the post-mortem examination carried out on the victim and findings and opinions of forensic experts, they consider that the doctors who treated Mr. Novaković in the two hospitals were responsible for serious omissions and mistakes in the medical treatment, which caused serious health deterioration and resulted in his death.

2.2 A post-mortem examination ordered by the Belgrade District Court was conducted on 1 April 2003. On 21 April 2003, the authors submitted a request to the Ministry of Health to re-examine the circumstances of the death of their son/brother. A Commission of the Ministry of Heath, established on 25 June 2003, issued a final report on 14 April 2004.

2.3 On 2 October 2003, the authors submitted to the Belgrade Municipal Prosecutor's office a complaint regarding the death of Mr. Novaković, together with his death certificate, a Specialist Report of the Clinic for Maxillofacial Surgery, which originally admitted him, and the Discharge List of the Clinic for Infectious Diseases. The Prosecutor's office initiated an investigation directed against unknown perpetrators, despite the fact that the names of the doctors who treated the victim were known to the Prosecutor's office at that time. On 5 May 2004, the authors submitted an amendment to their complaint, including the names of eight doctors the authors deemed responsible for the death of their son/brother, accusing them of grave offences against health (article 259 of the Criminal Code) and medical malpractice (article 251 of the Criminal Code). The domestic legislation envisages that the prosecutions for above crimes can only be conducted *ex officio* by the Public Prosecutor. Damaged persons may take over the prosecution only if the Prosecutor abandons the case, which has not happened in the present case (article 61 of the Criminal Procedure Code).

2.4 On 23 August 2005, following requests from the Prosecutor's office, the Institute of Forensic Medicine of the Belgrade Medicine Faculty issued Findings and Opinions of its Expertise on Mr. Novaković's case. An additional forensic expertise was conducted on 13 December 2005.

2.5 On 3 April 2006, the Prosecutor's office submitted a motion for criminal investigation against nine doctors suspected of having committed grave offences against the health of Mr. Novaković. On 5 July 2006, one of the suspects, Dr. Ebrahimi was interrogated and on the same day the investigative judge decided to open criminal proceedings against him. At the time of the submission of the communication, (on 10 November 2006), the above proceedings were still pending.

The complaint

3.1 The authors affirm that they have exhausted all available domestic remedies, namely the filling of a complaint under the domestic criminal procedure and the submission of a complaint to the Ministry of Health.

3.2 The authors claim that the State party violated Mr. Novaković's right under article 6 of the Covenant because it failed to protect his right to life. They state that in the case

Lantsova v. *the Russian Federation*,[2] the Committee concluded that in the case of persons in vulnerable situations, such as detainees, the authorities had a special duty to protect the right to life if they knew about or ought to have known about the danger. The authors claim that the same standard should apply to persons who entrusted themselves to the care of medical professionals of a state-run hospital. They submit that the doctors, employed by the State, should have known of the danger to Mr. Novaković, since it is clear from the submitted reports that the doctors committed gross negligence. The authors consider that gross negligence committed by government employees, including hospital personnel, triggers the State's responsibility for failure to protect life in a particular case.

3.3 The authors complain about the lack of prompt and efficient investigation into the death of the victim as required by article 6 of the Covenant. They submit that it took three years and three months before criminal proceedings against one of the responsible doctors were opened and that accordingly the investigation can not be considered efficient. The authors consider that delay excessive and refer to the jurisprudence of the European Court for Human Rights (ECHR), which considered smaller delays to be unreasonable.[3] They submit that the scrutiny by the Public Prosecutor was insufficient and make reference to the jurisprudence of the European Court for Human Rights.[4]

3.4 The authors specifically invoke a violation by the State party of their right to effective remedy under article 2, paragraph 3, read in conjunction with article 6 of the Covenant, with respect to the impossibility of challenging the promptness and effectiveness of the investigation. They claim that under the Serbian Criminal Procedure Code there is no possible action to complain about the lack of expediency of the proceedings. With regard to the complaint submitted to the Ministry of Health, the authors submit that it cannot be considered an effective remedy for the violation of the right to life, since it is purely administrative and refer to the Committees jurisprudence in that sense.[5]

State party's observations on admissibility and merits

4.1 On 30 March 2009, the State party reiterates the facts surrounding the demise of Mr. Novaković and the subsequent investigation. It adds that after the investigative actions in the case of Mr. Novaković's death were completed, on an unspecified date, a request was made to the investigative judge to undertake investigation against seven individuals on the ground of reasonable doubt of having committed the criminal offence grave offence against health, relating to the criminal offence of medical malpractice. On 19 December 2006 and 15 October 2007, motions to supplement the investigation were submitted (unclear by whom).

4.2 On 21 January 2008, the Public Prosecutor's office raised an indictment against six defendants on the grounds of committing grave offence against health to the detriment of Mr. Novaković. On an unspecified date, the Public Prosecutor issued a statement on discontinuation of the criminal proceedings against three of the defendants due to lack of evidence and, accordingly, on 1 April 2008, the investigative judge of the Second Municipal Court adopted a ruling on discontinuation of the criminal proceedings for those

[2] *Lantsova* v. *the Russian Federation*, Communication 763/1997, views of 26 March 2002, para 9.2.

[3] The authors refer to *McShane* v. *UK*, Application No.43290/98, Judgement of 28 May 2002, para 113, where EHCR considered a five and a half month lapse between the first and the second interrogation of a driver of an army vehicle that killed a victim to constitute unreasonable delay.

[4] The authors refer to *Ikinsoy* v. *Turkey*, Application No.26144/95, Judgement of 27 July 2004, para 78.

[5] Reference to *Bautista* v. *Colombia*, Communication 563/1993, views of 27 October 1995, para 8.2.

defendants. Regarding the remaining defendants the State party submits that the main trial was scheduled for April 2009.

4.3 The State party submits that the communication should be declared inadmissible for non exhaustion of domestic remedies, since the Constitution of the Republic of Serbia includes a provision for a constitutional complaint, which the authors' did not avail themselves of in the present case. According to article 170 of the State party's Constitution, a constitutional complaint may be lodged against acts performed by state bodies which violate or deny human rights guaranteed by the Constitution, if other legal remedies have been exhausted or are not specified. Pursuant to article 82(2) of the Law on the Constitutional Court, complaints may also be lodged where all legal remedies have not been exhausted, in cases where the complainant's right to a trial in a reasonable time was breached.

4.4 The State party further submits that the authors' claim that the domestic legal remedies have proved inefficient is not acceptable, since the authorised prosecutor acted upon the criminal charges, initiated criminal proceedings *ex officio* and criminal prosecutions are underway. With regard to the three suspects, against whom the prosecution *ex officio* was abandoned, the State party submits that the authors may, in accordance with article 19(3) of the Criminal Procedure Code, undertake criminal proceedings as subsidiary prosecutors, and notes that the authors have not provided information whether they have exercised this right.

4.5 The State party concludes that the communication should be declared inadmissibly for non-exhaustion of the domestic remedies, as required by Rule 96(f) of the Rules of Procedure of the Human Rights Committee. As a subsidiary conclusion the State party submits that the claims of violations of article 6 and article 2 relating to article 6 of the Covenant are unfounded, since the domestic court still had to decide on the possible criminal responsibility of the defendants.

Authors' comments on admissibility and merits

5.1 The authors maintain that the State party's arguments as to the admissibility and the merits are unfounded and should be dismissed by the Committee and reiterate their complaint.

5.2 The authors submit that, even though the Serbian Constitution includes the possibility to file a constitutional complaint, this remedy is ineffective. The Constitution was promulgated on 8 November 2006, i.e. a week before the communication was lodged with the Human Rights Committee, and at the time of the authors' submission there was no domestic procedure for filing such constitutional disputes. The authors also submit that, as of June 2009, a very limited number of constitutional complaints had been discussed and decided by the Constitutional Court and a vast number of complaints had been pending for more than a year and a half, with uncertain perspective when they will be heard. Additionally, filing a constitutional complaint in 2006 was a non-realistic remedy for the authors, since the work of the Constitutional Courts was blocked between October 2006 and December 2007 because of the retirement of the Chief Justice and the insufficient number of judges.

5.3 With regard to the State party's argument that pursuant to article 82(2) of the Law on the Constitutional Court, complaints may also be lodged in cases where the complainant's right to a trial in a reasonable time was breached, the authors reiterate that they are not claiming violation of fair trial rights, but a violation of the right to life under article 6 of the Covenant, based both on the failure to protect his life and on the lack of prompt and efficient investigation into the loss of life in the case of Mr. Novaković.

5.4 The authors reiterate that the first suspect was interrogated and the criminal procedure initiated 40 months after the death of the victim and that in itself demonstrates the lack of prompt and efficient investigation. The authors' further submit that the trial, which the State party stated was scheduled for April 2009, was in fact subsequently postponed twice- first for May 2009, then for June 2009.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 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.

6.2 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.

6.3 The Committee notes the State party's challenge to the admissibility of the communication on the ground of failure to exhaust domestic remedies, as well as the authors' claim that remedies have been ineffective and unreasonably prolonged. The Committee recalls its jurisprudence that, for the purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must both be effective and available, and must not be unduly prolonged. [6] The Committee notes the authors' allegation that the complaint filed with the Ministry of Health, is a purely administrative remedy which cannot be deemed effective in the present case. This allegation has not been disputed by the State party.

6.4 The Committee further notes the State party's submission that the authors did not attempt to file a recourse with the Constitutional Court for violation of the rights guaranteed by the Constitution. The authors, however, have explained that at the time of the submission of the communication, they could not avail themselves of this remedy, since it had just been created and there was no procedure for its application in the domestic legislation. This allegation has remained uncontested by the State party. Accordingly, the Committee considers that the said legal remedy cannot be considered effective and available.

6.5 The Committee also observes that in the instant case criminal proceedings were not initiated for three and half years after the death of the victim and that, to the Committee's knowledge, these proceedings are yet to be finalized. Therefore, the Committee considers that, in the circumstances of the present case, domestic remedies have been unreasonably prolonged[7] and that article 5, paragraph 2 (b), does not preclude it from considering the communication.

Consideration of the merits

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

[6] See the Committee's Views in Communication 563/1993, *Arellana* v. *Colombia*, , paras 8.2 and 10; *C*ommunication 612/1995,*Villafañe et al.* v. *Colombia*, paras 5.2, 8.8 and 10.

[7] See the Committee's jurisprudence in Communication 1560/2007, *Marcellana and Gumanoy* v. *Philippines*,, para 6.2; Communication 1250/2004, *Rajapakse* v. *Sri Lanka*, at paras 6.1 and 6.2; Communication 992/2001, *Louisa Bousroual* v. *Algeria*, at para 8.3.

7.2 The Committee must determine whether the State party failed in its obligations regarding article 6 and article 2 of the Covenant in connection with the death of Mr. Novaković as a result of inadequate medical treatment. In this regard the Committee recalls its General Comment No 6, in which it declared that the protection of the right to life requires that States adopt positive measures to this end. In some cases the Committee has found violations of this treaty obligation.[8] However, in the instant case, the Committee finds that there is insufficient evidence before it to attribute direct responsibility to the State for failure to meet its obligation under article 6 of the Covenant.

7.3 The Committee notes the State party's submission that the domestic criminal legislation establishes criminal responsibility for medical malpractice and for grave offences against health. The Committee, however, observes that the State party has failed to provide an explanation as to the functioning of the Ministry of Health's Inspectorate, or as to the efficiency of criminal prosecution in cases of medical malpractice and other offences against health. In the instant case, it notes that the first suspect was not interrogated and the criminal procedure was not initiated until 40 months after the death of the victim; an indictment against the possible perpetrators was not raised until 21 January 2008, nearly five years after the death of the victim; and the first instance trial had not started as of June 2009. The Committee also notes that a medical report regarding the cause of the death of Mr. Novaković was available on 1 April 2003; however a full forensic expertise was only conducted in August 2005. Both the initial examination and the subsequent additional expertise, issued by the Belgrade Institute of Forensic Medicine, contain strong indications that standard medical procedures had not been performed and raise questions as to the possible medical malpractice and/or offences against health. The State party has not provided any explanation in connection with these allegations, including the reasons for the delay in initiating and completing the criminal investigation and proceedings on Mr. Novaković's death. The Committee considers that these facts constitute a breach of the State party's obligation under the Covenant to properly investigate the death of the victim and take appropriate action against those responsible and, therefore, reveal a violation of article 2, paragraph 3 in conjunction with article 6 of the Covenant.

8. 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 of article 2 paragraph 3 in conjunction with article 6 of the Covenant.

9. In accordance with article 2, paragraph 3 (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. The State party is under an obligation to take appropriate steps to (a) ensure that the criminal proceedings against the persons responsible for the death of Mr. Novaković are speedily concluded and that, if convicted, they are punished, and (b) provide the authors with appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

10. 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 in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give

[8] See supra note 2.

effect to the Committee's Views. The State party is also requested 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.]