



**International Covenant on
Civil and Political Rights**

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Human Rights Committee
One hundredth and first session
14 March - 1 April 2011

Decision

Communication No. 1404/2005

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| <u>Submitted by:</u> | N. Z. (not represented by counsel) |
| <u>Alleged victim:</u> | The author |
| <u>State party:</u> | Ukraine |
| <u>Date of communication:</u> | 11 May 2004 (initial submission) |
| <u>Document references:</u> | Special Rapporteur's rule 92/97 decision, transmitted to the State party on 3 June 2005 (not issued in document form) |
| <u>Date of adoption of Decision:</u> | 25 March 2011 |

* Made public by decision of the Human Rights Committee.

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| <i>Subject matter:</i> | Torture, unfair trial and other criminal procedure violations |
| <i>Procedural issue:</i> | Non-substantiation |
| <i>Substantive issues:</i> | Torture, unfair trial, right to obtain examination of witnesses, presumption of innocence. |
| <i>Articles of the Covenant:</i> | Art. 7; Art. 14(1); Art. 14(2); Art. 14(3)(b); Art. 14(3)(e); Art. 14(3)(g) |
| <i>Article of the Optional Protocol:</i> | 2 [Annex] |

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political rights (one hundredth and first session)

concerning

Communication No. 1404/2005**

Submitted by: N. Z. (not represented by counsel)
Alleged victim: The author
State Party: Ukraine
Date of communication: 11 May 2005 (initial submission)

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

Meeting on 25 March 2011,

Adopts the following:

Decision on admissibility

1. The author of the communication is N. Z., an Ukrainian national born in 1972, who is currently serving a prison sentence in Ukraine. He claims to be a victim of violations, by Ukraine, of his rights under article 2, paragraphs 1 and 3 (a); article 4, paragraph 2; article 7; article 14, paragraphs 1, 2, 3 (b), (e), and (g), and 5; and article 19, of the Covenant. The Optional Protocol entered into force for the State party on 25 October 1991. The author is unrepresented.

The facts as presented by the author

2.1 On 15 December 2000, the author was approached by an acquaintance, one R. L., who asked for his help in settling a conflict with his creditors. The author agreed and once the conflict was settled, they decided to celebrate the event. They were joined by other friends of R.L. and went to a forest for a picnic. During the celebration, the author went away for about 15-20 minutes. When he returned, he saw that R.L. and one of his friends were beating up the creditors with tools, such as screwdrivers. The creditors soon died and the author buried the corpses as per R. L.'s instructions.

2.2 On 6 September 2002, the author was arrested on suspicion of having committed two murders. He claims that he was not granted access to a lawyer until 10 days after his

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

arrest. From the moment of his arrest, he was subjected to ill-treatment and severe beatings by the police officers, who forced him to sign a confession.

2.3 During the investigation and his trial, there were numerous reports in the media that he was guilty of the murders, which he claims influenced the testimony of witnesses. The author sought to question a witness, who could testify to his alibi, as well as to bring forward additional experts' examination; however, his requests were rejected without any explanations by the court.

2.4 On 8 May 2003, the author was convicted of murder by the Lviv Regional Court, together with several other co-accused persons. His conviction was based largely on the testimony of R. L., given during the preliminary investigation. R. L. testified that the author had poisoned the deceased by placing chemicals for meat preservation in their drinks. The medical forensic expertise found no trace of such poison in the corpses of the deceased. Their death was said to be caused from mechanical injuries. During the trial, R. L. admitted that he had concocted his testimony against the author. Despite this, the trial court convicted the author and the Supreme Court upheld the sentence. The author adds that he was not allowed to defend himself during the trial and that the court wrongly assessed the incriminating evidence. He further states that he had raised the fact of his ill-treatment by the police during the trial, but this was ignored. The court also refused to have audio and video recording of the trial in violation of domestic laws.

The complaint

3.1 The author claims a violation of his rights under articles 7 and 14, paragraph 3 (g) as he was subjected to ill-treatment by the police officers in order to coerce him to confess guilt.

3.2 He further claims a violation of article 14, paragraph 1, as he was convicted on the basis of a testimony by a co-accused; medical forensic expert's examination did not find any incriminating evidence; the court wrongly assessed the evidence and he was not allowed to defend himself during the trial.

3.3 The author claims also a violation of 14, paragraph 3 (b) as he was not provided with a legal assistance until 10 days after his arrest.

3.4 He claims a violation of his rights under article 14, paragraph 2, as it was reported in the media that he was guilty of murder before the court proceedings had been completed.

3.5 According to the author, his rights under article 14, paragraph 3 (e) were also violated, as his requests to obtain additional expert's examination and to question several witnesses were denied.

3.6 The author further contends that the Supreme Court of Ukraine upheld the sentence of the Appellate Court of Lviv Region, in violation of article 14, paragraph 5, of the Covenant.

3.7 The author claims that all the above mentioned violations also amount to a violation of his rights under article 2, paragraphs 1 and 3 (a), and article 4, paragraph 2, of the Covenant.

3.8 Finally, the author claims a violation of article 19, since his correspondence of a newspaper article was intercepted by the authorities.

State party's observations on admissibility and merits

4.1 On 29 December 2005, the State party submitted first, that article 2, paragraph 1, is of a general nature, and that, therefore, it does not find it necessary to comment thereon.

4.2 As for the author's allegations under article 2, paragraph 3 (a), the State party submits that in the author's case, the court of first instance was the Appellate Court of Lviv Region and both the appeal and cassation instances were at the Supreme Court. The author appealed his sentence to the Supreme Court. It refers to the jurisprudence of the European Court of Human Rights and argues that the remedy does not mean a remedy which is bound to succeed, but an accessible remedy before an authority competent to examine the matter on the merits. The remedy which the author claims to be ineffective was accessible to him and therefore its effectiveness does not depend on the certainty of a favorable outcome for the applicant.

4.3 As for his allegations under article 7, the State party submits that under the national legislation the author could complain of ill-treatment to the relevant authorities. Such complaint would serve as a basis to initiate criminal proceedings. However, the author did not avail himself of such remedy. It submits that there is no evidence of beatings, and no medical records were submitted by the author in support of his allegations. On the contrary, there is a record that he was examined by medical doctor on the day of his confession and no bodily injuries were revealed. Therefore, he had confessed guilt of his own free will. The author stated during the court proceedings on 12 February 2003 that he had been coerced by the policemen during his interrogation on 4 December 2002. The judge, in reply presented him the interrogation record of 4 December 2002, which stated that the interrogation was carried out in the presence of his counsel. On 6 September 2002, counsel asked the author whether he had been subjected to coercion, to which the author replied: "No". The State party thus submits that the author was not treated in a manner violating the requirements of article 7.

4.4 On the author's claim that his trial was unfair and that his guilt was not proven as no poison was found by the forensic medical examination, the State party submits that although the forensic medical expert failed to find any chemical agents in the victims' bodies, he underlined that bearing in mind the period of 1.5-2 years during which the corpses were in the soil, it did not mean that those chemical agents could not initially have been there. According to the decisions by the Appellate Court of the Lviv Region and the Supreme Court, the author was found guilty as there was an intent and *a fortiori* initial agreement between him and the other co-accused to kill the deceased; he at least intended to poison them; he took part in the murder also by beating one of them; he buried the corpses and concealed the evidence of the crime; he failed to inform the police about the crime; he also took part in another crime (theft) considered by the court in the same proceedings; and finally, he had a previous conviction when he committed the crime.

4.5 The State party submits that the author's sentence was well grounded. In addition, the Supreme Court re-examined the lower court's decision and found it legitimate. It refers to the author's argument that he was slandered in the media by the co-accused and submits that the national court examined the guilt of each accused separately. Therefore, no violation of the author's rights under article 14, paragraph 1, of the Covenant, has occurred in the present case.

4.6 As to the author's allegations under article 14, paragraph 2, that he was declared guilty by the media of the murder of two persons before the court handed down its judgment, it argues that the author did not provide any evidence, e.g. copy of the newspaper article containing such information. The only announcement in the press was the article "Criminal Chronicle" published on 17 September 2002 in a local newspaper, "Our Region". According to that article, local police and prosecution apprehended four persons on suspicion of murder. The State party submits there was no report of any guilty person in that article and considers it to be impartial. It submits thus, that there was no violation of article 14, paragraph 2, of the Covenant.

4.7 The State party submits that the investigator issued an order to provide the author with a counsel on the same day, when he initiated the criminal proceedings, i.e. on 6 September 2002. Henceforward, the author was represented by a counsel of his own choice. Thus, there was no violation of the author's right to have access to a lawyer.

4.8 With regard to the author's claim that he was not able to obtain the attendance and examination of witnesses on his behalf, the State party submits that such a right is not absolute and refers to the case law of the European Court of Human Rights. It contends that the national court examined all the witnesses who could contribute to establishing the fact and achieving justice, in particular the relatives of the deceased, all the persons who saw the deceased together with the author on 15 December 2000, experts, etc. It submits that the author's claim that he was refused the possibility of calling witnesses who could attest his alibi is not justified. The testimonies of all the accused, including the author's own statement suggest that the author was present at the time and at the place where the crime was committed. Thus, the author's defense of alibi could not exist in the present case. Therefore, the State party submits that there was no violation of article 14, paragraph 3 (e) of the Covenant.

4.9 As to the author's claim that he was forced to confess guilt by the police, the State party refers to the Committee's general comment No 13 pursuant to which "in considering this safeguard the provisions of articles 7 and 10, paragraph 1, should be born in mind." Therefore, it does not find it necessary to reiterate the same arguments again and maintains that there was no breach of the author's right not to be compelled to testify against himself.

4.10 As to the author's claim that the Supreme Court violated his right under article 14, paragraph 5, for having upheld the sentence of the Appellate Court of the Lviv Region despite his innocence, the State party submits that such an interpretation of the said article is unsubstantiated, as it cannot guarantee a favorable outcome for the author. The term "review" does not imply reversal of the judgment, but means "re-examination" thereof.

4.11 The State party reiterates that the Supreme Court of Ukraine assessed the arguments presented by the parties, re-examined the compliance of the judgment to the facts and laws of Ukraine and arrived at the conclusion that the Appellate Court of the Lviv Region had not breached Ukrainian legislation by sentencing the author to life imprisonment.

Author's comments on the State party's observations

5.1 On 10 March 2006, the author submitted that the State party's legislation as well as the judicial practice contradicts the provisions of the Covenant. He claims that the Supreme Court examines appeals superficially, as no more than 15-20 minutes are spent on each appeal and only the incriminating material is examined. He argues that such procedure cannot be considered as constituting an "effective judicial remedy".

5.2 The author further refers to the State party's arguments denying his ill-treatment and beatings, and claims that he was beaten while he was detained at the police station, and he would have to send his complaint through the same people who beat him. He refers to reports stating that torture and ill-treatment are systematic in places of detention in Ukraine. He also claims that he did not undergo medical examination on the day of his ill-treatment, but he only had a conversation with a psychiatrist, in the presence of the police.

5.3 The author reiterates that he does not agree with the arguments of the State party in that his trial was fair. He argues that the court relied only on the assumption that there could have been a poison in the bodies of the victims while the expert's conclusion showed this was not the case. He adds that the "poison" in question was not even deadly. The testimonies by the co-accused persons cannot be accepted as evidence as they were not witnesses. He argues that his co-accused tried to place the blame on him in order to avoid liability.

5.4 As to the State party's argument that he participated in the beatings of one of the deceased, the author claims that he hit him only once when he tried to attack him, being already wounded by another co-accused person. He was coerced to help bury the bodies, this he did for fear for his life and thus he cannot be considered as accomplice. For the same reasons, he did not report the events to the police. He argues that the fact that he participated in a theft does not prove his guilt in the murders, as they are not connected with each other.

5.5 As to his previous convictions, the author explains that he was convicted of that crime much later. He argues that it was related to a minor offence, which does not make him "dangerous to the society".

5.6 On his claims under article 14, paragraph 3 (b), the author submits that it is possible that counsel was appointed on the day of his arrest, but his first meeting with the counsel was held only 10 days later. Moreover, the same counsel was appointed not only to him, but also to all four co-accused persons with a clear conflict of interest between the co-accused.

5.7 As to the State party's argument that the right to obtain the questioning of witnesses is not absolute, the author argues that such statement contradicts the criminal procedure law of Ukraine. The court invited only those witnesses who supported the accusation. He submits he made a mistake using the term alibi, in fact he meant that he did not participate in the murder.

5.8 With regard to the violation of article 14, paragraph 3 (g), he submits that it is linked to his claims under article 7. He also maintains his claims under article 14, paragraph 5, since the Supreme Court has failed to eradicate the subsisting contradictions in his case.

5.9 On 17 March 2008, the author submitted that he sent a copy of the newspaper article which he alleges violates his right to the presumption of innocence and submits that it is common practice in Ukraine to intercept correspondence addressed to international organizations. He assumes that his correspondence might have been intercepted as he did not receive any acknowledgement letter.

5.10 The author finally refers to the State party's argument that he did not complain of torture in court, and notes that in a letter of the Ministry of Interior it is stated that he did complain of torture and psychological pressure.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim 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.

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

6.3 The Committee notes the author's arguments in relation to articles 7 and 14, paragraph 3 (g) that he was subjected to ill-treatment by the police officers to force him confess guilt. The State party has refuted this claim and has argued that no medical records were submitted in support of his allegations and that, on the contrary, there is a record that he was examined by medical doctors on the day of his arrest, which revealed no bodily injuries. The author, in turn, claims that he only had a conversation with a psychiatrist in the presence of the police officers but has offered no details of the alleged ill-treatment. On the basis of the conflicting information before it, the Committee concludes that the author has failed to sufficiently substantiate his claim of ill-treatment and forced confession, for

purposes of admissibility, and therefore declares these claims inadmissible under article 2, of the Optional Protocol.

6.4 With regard to the author's allegation of a violation of article 14, paragraphs 1, 3 (e) and 5, of the Covenant, on the grounds that he was convicted based on a false testimony, that the medical forensic experts' examination did not find incriminating evidence, that the court wrongly assessed the evidence, that he was not allowed to defend himself during the trial, that his requests to obtain an additional experts' examination and questioning of a witness were denied, and that the Supreme Court considered his appeal superficially and upheld the sentence of the Appellate Court of the Lviv Region despite his innocence, the Committee recalls its jurisprudence to the effect, that it is for the courts of the States parties to assess the facts in a particular case, and that the Committee will defer to this assessment, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice¹. The Committee considers that the author has failed to substantiate, for purposes of admissibility, that the conduct of the courts in the present case were arbitrary or amounted to denial of justice, and therefore declares these claims inadmissible under article 2 of the Optional Protocol.

6.5 The Committee has noted the author's claims under articles 14, paragraphs 2 and 3 (b), of the Covenant, that as he was not provided with legal assistance until 10 days after his arrest and that during the investigation and his trial, there were numerous reports in the media stating that he was guilty of the murders. The Committee notes that the State party has refuted these allegations by contending, first, that no media has designated the author as a criminal, and, second, that the author has been assigned an *ex-officio* lawyer on the day his criminal proceedings were initiated, i.e. on 6 September 2002. The Committee notes that, despite its inquiry with the author, it did not receive any documentary evidence to support his claims. In the absence of any other information in this connection on file, the Committee considers that this part of the communication is insufficiently substantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

6.6 The Committee has noted that the author has also invoked articles 2, 4, and 19, of the Covenant. With regard to article 2, the Committee recalls that article 2 of the Covenant, can only be invoked in conjunction with a substantive rights protected by the Covenant² and only if a violation of that right has been sufficiently well founded to be arguable under the Covenant.³ The Committee further considers that the author has failed to provide any information to substantiate his allegations under articles 4 and 19 of the Covenant. Accordingly, the Committee concludes that this part of the communications is insufficiently substantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

- a) That the communication is inadmissible under article 2 of the Optional Protocol;
- b) That this decision shall be communicated to the State party and to the author.

¹ See, for example, communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, paragraph 6.2.

² See, for example, communication No. 275/1988, *S.E. v. Argentina*, inadmissibility decision adopted of 26 March 1990, para. 5.3

³ See, for example, communication No. 972/2001, *Kazantzis v. Cyprus*, inadmissibility decision adopted on 8 August 2003, para. 6.6

[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.]
