



**International Covenant on
Civil and Political Rights**

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Human Rights Committee

Communication No. 2123/2011

**Decision adopted by the Committee at its 112th session
(7–31 October 2014)**

<i>Submitted by:</i>	Olga Tonenkaya (not represented by counsel)
<i>Alleged victim:</i>	The author's deceased sister, Lyudmila Golosubina
<i>State party:</i>	Ukraine
<i>Date of communication:</i>	28 October 2011 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 20 December 2011 (not issued in document form)
<i>Date of adoption of decision:</i>	28 October 2014
<i>Subject matter:</i>	Inadequate investigation into the cause of death of the author's sister
<i>Substantive issues:</i>	Right to life; fair trial
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies
<i>Articles of the Covenant:</i>	6, paragraph 1; 14, paragraph 1
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

GE.14-22194 (E)



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Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (112th session)

concerning

Communication No. 2123/2011*

Submitted by: Olga Tonenkaya (not represented by counsel)

Alleged victim: The author's deceased sister, Lyudmila Golosubina

State party: Ukraine

Date of communication: 28 October 2011 (initial submission)

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

Meeting on 28 October 2014,

Having concluded its consideration of communication No. 2123/2011, submitted to the Human Rights Committee by Olga Tonenkaya on behalf of her deceased sister, Lyudmila Golosubina, 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:

Decision on admissibility

1. The author of the communication is Olga Tonenkaya, a Ukrainian national born on 9 February 1967, who is submitting it on behalf of her deceased sister, Lyudmila Golosubina (Holoshubina), born on 5 July 1963. The author claims that there was a violation by the authorities of the State party of articles 6, paragraph 1, and 14, paragraph 1, of the Covenant in connection with the author's sister's death, which reportedly resulted from inadequate medical treatment.¹ The author is not represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Christine Chanet, Ahmed Amin Fathalla, Yuji Iwasawa, Cornelis Flinterman, Walter Kälin, Sir Nigel Rodley, Zonke Zanele Majodina, Gerald Neuman, Victor Manuel Rodríguez-Rescia, Margo Waterval, Konstantine Vardzelashvili, Yuval Shany, Fabián Omar Salvioi, Anja Seibert-Fohr, Andrei Paul Zlatescu and Dheerujall Seetulsingh.

¹ The Optional Protocol entered into force for the State party on 25 October 1991.

The facts as presented by the author

2.1 On 6 November 2006, the author's sister sought medical treatment at the Traumatology Unit of the Central District Hospital in Storozynets, Ukraine, complaining of pain in her left lower leg. She was diagnosed with a closed fracture of the left tibia. On the same day, the fractured bone was treated under anaesthesia and set in a plaster cast. On 8 November 2006, an attempt to reposition the bone was made under anaesthesia. Ms. Golosubina had otherwise been in a satisfactory health condition.

2.2 On 10 November 2006, Ms. Golosubina's health condition was considered satisfactory. She complained of the plaster cast being a little too tight, but was discharged as an outpatient.

2.3 On 27 November 2006, during a check-up, Ms. Golosubina again complained of the plaster cast being too tight. It was scheduled to be replaced on 4 December 2006. On 30 November 2006, her health deteriorated and she was transported to the District Hospital in Storozynets. A heart examination did not reveal any anomalies and the medical personnel decided that there was no reason for her to be hospitalized.

2.4 On 4 December 2006, Ms. Golosubina went for the scheduled replacement of the plaster cast. However, no treatment was received as all medical staff were out for training. The District Hospital's Traumatology Unit refused to offer treatment to her on account of a lack of urgency. She resorted to a local health clinic, which did not offer any treatment either and recommended a medical examination in a week's time.

2.5 On 5 December 2006, Ms. Golosubina's health deteriorated further and she was taken back to the District Hospital in Storozynets. According to a member of the hospital staff on duty, she was in a serious condition, reportedly as a result of neurasthenia. She was hospitalized in the Head and Neck Surgery Department that day; however she did not receive any treatment until 6 December 2006, when a request was made for her transfer to the Regional Psychiatric Hospital in Cernivitsi.

2.6 On 6 December 2006, Ms. Golosubina was transferred to the Regional Psychiatric Hospital in Cernivitsi, where she died on 7 December 2006 without a diagnosis being established. The autopsy, which was performed on the same day, revealed thrombophlebitis of the veins in the left lower leg.

2.7 The author filed a complaint alleging medical malpractice before the Storozynetsky District Prosecutor's Office, which decided on 12 February 2007 not to initiate criminal proceedings. On 3 April 2007, the Cernivitsi Regional Prosecutor's Office dismissed the author's request to revoke the negative decision of the District Prosecutor. On 28 April 2007, the Storozynetsky District Court, Cernivitsi Region, refused to revoke the decisions of the Prosecutor's Offices and dismissed the claims by the author. On 1 June 2007, the Cernivitsky Regional Court dismissed the author's appeal, whereupon the District Court's decision became final. Given the nature and number of appeals made for criminal proceedings to be instituted, together with the absence of guidance in the Regional Court's decision on further available domestic remedies, the author maintains that all available effective domestic remedies have been exhausted.

2.8 On 21 June 2007, the author submitted a complaint to the European Court of Human Rights, which was registered under no. 27433/07, for alleged violations of articles 2, 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). However, on 22 September 2011, the European Court of Human Rights, in a decision by a single judge, considered that the author's application did not fall within the competence of the Court and that it was inadmissible under articles 34 and 35 of the Convention, without giving specific reasons for the decision.

The complaint

3.1 The author alleges violations of articles 6, paragraph 1, and 14, paragraph 1, of the Covenant, related to the death of the author's sister as a result of inappropriate treatment and the subsequent refusal of her request to initiate a criminal investigation into the matter.

3.2 The refusal to institute criminal proceedings has allegedly prevented an effective investigation into the causes of the death of the author's sister, including the exact type of medical treatment received; casts doubt on the general protection of the right to life; and makes it impossible to establish accountability for the reported negligence on the part of medical personnel or to receive adequate compensation.

3.3 The author also alleges that, in addition to the violations of the above articles, the substantial failure to comply with medical standards resulted in the signs of potential thrombosis being ignored and remaining untreated, which, together with the failure to admit Ms. Golosubina to a traumatology unit at the Regional Hospital and her ultimate admission to the psychiatric clinic, led to the death of the author's sister.

The State party's observations on admissibility and merits

4.1 On 19 July 2013, the State party submitted that the communication should be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol since the author had failed to exhaust the available domestic remedies. Specifically, the State party argues that the author had the opportunity to file a cassation appeal against the 1 June 2007 decision of the Court of Appeals in accordance with articles 383 and 384 of the Criminal Procedure Code of Ukraine. The State party submits that the cassation court verifies the legality and the validity of the lower court's decision on the basis of the record available and additional evidence, in relation to the grounds raised in the appeal. The cassation courts are obliged to remedy violations of the law committed by the courts of previous instances. The cassation court may amend the decision of the lower court, or revoke its decision and return the case for retrial on the following grounds: a substantial violation of the rules of criminal procedure and wrongful application of a criminal statute.

4.2 Regarding the merits of the case, the State party submits that, on 29 December 2006, the Cernivitsky Region Prosecutor's Office received the author's complaint, requesting the opening of a criminal investigation into the actions of the medical personnel of Storozynetska Central District Hospital for inadequate medical care, leading to the death of the author's sister. The Prosecutor's Office conducted an investigation under article 97 of the Criminal Procedure Code (1960) and decided to refuse to bring a criminal case against the doctors at the hospital "due to the absence of corpus delicti in their actions". On 28 April 2007, the Storozynetsky District Court examined the author's appeal against that decision, based on the testimony of an expert witness that there had been no mistakes in the doctors' actions in determining the correct diagnosis of the author's sister or in the timeliness of the care provided to her. Accordingly, the Court rejected the appeal. On 1 June 2007, the Court of Appeal of Cernivitsky Region reviewed and rejected the author's further appeal. It determined that, according to the conclusion of "pathoanatomical research No 47 of December 07 2006 the direct reason of death of Holosubina L.D. was thrombus pulmonary embolism". The State party further maintains that, according to the conclusion of a forensic medical expert commission of 7 February 2007, the death of the author's sister was unavoidable and "would have occurred regardless of the level and scope of medical assistance provided to her".

Author's comments on the State party's observations

5.1 On 11 December 2013, the author submits that the post-mortem examination of her sister's body of 7 December 2006 revealed a second, one-month old, closed fracture of a

bone in the heel of her foot, which had not been detected by the doctors and which could have caused the thrombophlebitis.²

5.2 The author further submits that, on 19 December 2011, the author filed a civil law suit before the Storozynetsky District Court, requesting compensation for distress caused by the death of a physical person resulting from neglect in determining a correct diagnosis and treatment. In the course of the court proceedings the author repeatedly requested an independent post-mortem, but her requests were ignored. On 20 March 2013, the Central Forensic Bureau of the Ministry of Health of the State party conducted a forensic examination, which was not comprehensive or objective, and according to the author, was “suspicious”. The examination could not provide comprehensive responses regarding the death of the author’s sister, since the court had not provided the initial medical documentation on her sister’s case. The author submits that the Prosecutor’s Office had taken all the initial medical documentation in 2007 and that the documents had later disappeared.³ She maintains that all court instances rejected her compensation claims and requests the Committee to review the merits of her communication.

Further submission from the author

6.1 On 13 January 2014, the author reiterated that on 19 December 2011, she and the mother of the victim filed a civil law suit before the Storozynetsky District Court, requesting compensation for distress caused by the death of a physical person resulting from neglect in determining the correct diagnosis and treatment of the victim. After the rejection of their claim by the first instance court and the appellate instance, they filed a cassation appeal. Despite the numerous procedural violations raised by them in the appeal, the High Specialized Court of Ukraine refused to open a case. In the light of the above, the State party’s assertion that the cassation courts review and remedy all violations committed by lower instances does not accord with the facts, as evidenced by the outcome of the author’s cassation appeal. She maintains that cassation appeal is not an effective remedy and that she has exhausted all available effective remedies.

6.2 Regarding the State party’s observations on the merits of the case, the author reiterates the facts regarding her attempts to initiate criminal proceedings in relation to her sister’s death; underlines the fact that the original medical documentation had been lost; and maintains that, in 2007, the Prosecutor’s Office and the courts did everything possible to “hide the crime in the actions of the doctors”. She challenges the objectivity of the forensic medical examination and reiterates that the doctors had failed to discover a second fracture in her sister’s heel and to adequately treat the thrombophlebitis.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 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 the communication is admissible under the Optional Protocol to the Covenant.

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

² The author encloses a copy of the document in Ukrainian.

³ The author submits a copy of the judge’s request addressed to the Prosecutor’s Office, in Ukrainian.

7.3 The Committee notes the author's claims of violations of article 14, paragraph 1, of the Covenant, but observes that the author has not substantiated for the purposes of admissibility how the facts as presented by her would contravene article 14 and accordingly finds that it is inadmissible under article 2 of the Optional Protocol.

7.4 On the matter of exhaustion of domestic remedies, with regard to the remaining claims, the Committee notes the State party's argument that the author failed to file a cassation appeal against the 1 June 2007 decision of the Court of Appeals in accordance with articles 384 and 385 of the Criminal Procedure Code. The Committee notes the author's submission that the above appeal would not have been effective, but recalls that mere doubts about the effectiveness of domestic remedies do not absolve an author of the requirement to exhaust them, and that the fulfilment of reasonable procedural rules is the responsibility of the applicant himself.⁴ Thus the Committee considers that the author has failed to exhaust domestic remedies, under articles 2 and 5, paragraph 2 (b), of the Optional Protocol.

8. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under articles 2 and 5, paragraph 2(b) of the Optional Protocol;

(b) The present decision shall be transmitted to the State party and the author.

⁴ See communications No. 1578/2007, *Dastgir v. Canada*, decision adopted on 30 October 2008, para. 6.2 and No. 1543/2007, *Aduhene and Agyemam v. Germany*, decision adopted on 21 July 2008, para. 6.2.