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International Covenant on Civil and Political Rights

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Views

Communications No. 1346/2005

Submitted by:	Vyacheslav Tofanyuk (represented by his mother, Tamara Shulzhenko)
Alleged victim:	The author
State party:	Ukraine
Date of communication:	5 November 2004 (initial submission)
Document references:	Special Rapporteur's rule 92/97 decision, transmitted to the State party on 18 January 2005 (not issued in document form)
Date of adoption of Views:	20 October 2010

* Made public by decision of the Human Rights Committee.

Subject matter:	Retroactive application of an interim law
Procedural issue:	Non-substantiation
Substantive issues:	Right to retroactive application of the law with lighter penalty.
Articles of the Covenant:	15, paragraph 1
Article of the Optional Protocol:	2

On 20 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. 1346/2005.

[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. 1346/2005**

Submitted by:	Vyacheslav Tofanyuk (represented by his mother, Tamara Shulzhenko)
Alleged victim:	The author
State Party:	Ukraine
Date of communication:	5 November 2004 (initial submission)

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

Meeting on 20 October 2010,

Having concluded its consideration of communication No. 1346/2005, submitted to the Human Rights Committee on behalf of Mr. Vyacheslav Tofanyuk under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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

1. The author of the communication is Mr. Vyacheslav Tofanyuk, a Russian speaking national of Ukraine born in 1974, who is serving a life sentence in Ukraine. He claims that his rights have been violated by the State party, but invokes no specific articles of the Covenant. However, the communication may raise issues under articles 7, 14, and 15, paragraph 1, of the Covenant. The Optional Protocol entered into force for Ukraine on 25 October 1991. He is represented by his mother, Tamara Shulzhenko.

** 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. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Fabian Omar Salvioli.

The facts as presented by the author

2.1 On 10 April 1998, the Kiev City Court found the author guilty under section 93 of the Criminal Code of 1960 for premeditated murder and sentenced him to death. His cassation appeal was dismissed by the Supreme Court on 2 July 1998.

2.2 On 29 December 1999, the Constitutional Court declared that capital punishment was unconstitutional. From that date, the most severe punishment, with capital punishment removed, under the old Criminal Code of 1960 was 15 years of imprisonment or 20 years of imprisonment in case of a pardon. The author contends that following the decision of the Constitutional Court, he was entitled to have his sentence reviewed and his punishment changed to 15 years imprisonment under sections 6 and 54 of the Criminal Code and section 58 of the Constitution.

2.3 On 22 February 2000, the Parliament (Verhovnaya Rada) adopted a law "On amendments to the Criminal Code, the Criminal Procedure Code and the Correctional Labour Code", which entered into force on 4 April 2000. Under this law the death sentences were commuted to life imprisonment. The commutation of the author's death sentence to life imprisonment was confirmed on 23 August 2000. The author submits that he was unaware of the commutation of his sentence and that the new penalty means that he was convicted twice for the same crime in violation of section 61 of the Constitution. He claims that the new law increased the penalty for the offence which he committed, vis-à-vis the penalty under the "transitional law" – the Criminal Code, which was in force between 29 December 1999, when the decision of the Constitutional Court was adopted, and 4 April 2000, when the law on amendments to the codes entered into force.

2.4 The author adds that there were several mistakes in his indictment and judgment in relation to his employment status, educational background as well as discrepancies in witness testimonies. He contends that the judges were not impartial and that the sentence was based only on his confession and did not take into account the mitigating circumstances. He adds that the well argued cassation appeal prepared by his lawyer was replaced by another one, which was inconsistent and vague, also prepared by the same lawyer.

2.5 The author argues that he submitted a petition to the Kiev City Court on 20 January 2000 under section 74, parts 2 and 3, of the Criminal Code. He claims that under section 411 of the Criminal Procedure Code the court had an obligation to invite him to the court proceedings and re-examine his case. However, the court secretly commuted his death sentence to life imprisonment and responded to his petition only in 2004. He claims that his petition was submitted before the law on amendments to the Criminal Code was adopted, and that the court should have responded within the time limits established by law.

2.6 The author adds that, after his arrest on 29 June 1997, he was subjected to ill-treatment during the interrogations by the police. In particular, he was beaten with a rubber truncheon and, as a result, he lost consciousness.

The complaint

3.1 The author claims that his right to retroactive application of the law with lighter penalty was violated as the court did not apply the "transitional law" when commuting his death sentence.

3.2 The author claims that there were factual mistakes in his indictment and judgment and that the judges were not impartial. Furthermore, his conviction was based only on his confession and did not take into account the mitigating circumstances.

3.3 He claims that his right to re-examination of his sentence in his presence was not respected and that the imposition of the new penalty meant that he was convicted twice for the same crime.

3.4 He claims that he was subjected to ill-treatment during the interrogations by the police.

3.5 As stated, the author does not invoke any articles of the Covenant. However, as noted, the communication may raise issues under articles 7, 14, and 15, paragraph 1, of the Covenant.

State party's observations on admissibility and merits

4.1 On 28 April 2005, the State party submitted that the author and his accomplice were found guilty of premeditated murder and sentenced to death on 10 April 1998. The author's guilt was proven by witness statements, forensic and medical expertise.

4.2 During the pre-trial investigation, the author confessed his guilt and gave full description of the circumstances of the crime, including those that could only be known by the person who committed the crime. He did not complain of any unlawful methods applied during the investigation. His confession served as a basis for his conviction. The court assessed the evidence, qualified his actions and issued the sentence correctly. The cassation appeals by the author and his lawyer were rejected by the Supreme Court on 2 July 1998.

4.3 On 23 August 2000, the author's death sentence was commuted to life imprisonment under the law "on amendments to the Criminal Code, the Criminal Procedure Code and the Correctional Labor Code of Ukraine". This law removed section 24 of the Criminal Code on death penalty and replaced it by section 25, which establishes life imprisonment. Under chapter 2 of this law, death sentences which had not been executed at the time of its entry into force, should be brought in compliance with it. Therefore, the author's death sentence was commuted to life imprisonment.

4.4 The State party refers to the author's claim that he was sentenced twice for the same crime and argues that the claim is unfounded, as there was no violation of the criminal procedure law.

Author's comments on the State party's observations

5.1 On 11 July 2005, the author argued that the State party's comments are unfounded and false, provide only general information and fail to address the violations occurred during the investigation process.

5.2 The author adds that he was not provided with legal assistance for ten days after his arrest. The lawyer appointed after this period did not defend his interests and his participation was a mere formality. On the first day after his arrest he was subjected to ill treatment and was forced to testify against his accomplice in the crime. His lawyer also convinced him to do that in order to receive a lighter punishment. He later found out that his lawyer was also defending his accomplice, despite the conflicting interests. His requests to change his lawyer were denied by the court. He adds that his lawyer did not plead to change the charges or to obtain any expertise.

5.3 The author contends that the indictment and judgment do not contain important evidence, such as the number of wounds inflicted to the victim by each individual, as it is not clear who caused the wounds and who finally killed them. He adds that the judgment does not mention the intention of each accused persons, instead, the sentence generalized their actions and made a general conclusion.

5.4 The author adds that after his death sentence his lawyer refused to defend his interests at the cassation level, thus he had to ask another lawyer's help with the cassation appeal. However, later he found out that his initial lawyer has in fact submitted a cassation appeal on his behalf again for mere formality. Therefore, he explains that his case file contains two cassation appeals. He claims that this means that he did not have any legal assistance either during investigation or during court proceedings.

5.5 The author adds that the court proceedings were not impartial. His request to invite his witness, whose testimonies would have been important, was rejected. This witness was not examined also during the pre-trial investigation, despite his requests. He claims that his request was not recorded in the court transcript therefore he has no evidence to prove other than a note written by this witness. He argues that the court transcript is not complete and contains false information in relation to testimonies given by witnesses. He adds that the court also ignored the extenuating circumstance under section 40 of the Criminal Code such as his confession and assistance to the investigation.

5.6 The author argues that all his case materials are in Ukrainian language which he does not understand. He claims he was not provided with the assistance of a translator. The court transcript states that he chose the documents to be in Ukrainian language which he claims is a false statement.

Further comments by the parties

6 On 28 November 2005, the State party reiterated the facts from its previous submission and added that the author's claims of unlawful methods of investigation involving physical pressure have not been confirmed. The author has been serving his sentence in Vinnits prison since 2001. During this time, he has not complained of detention conditions to either prison administration or other state agencies.

7.1 On 1 March 2006, the author referred to the research study of a post-graduate student according to which a moratorium to the execution of the death penalty was adopted in 1996, when the Commission to abolish death penalty was created, but no legislative acts were adopted. The decision of the Constitutional Court of 1999 found section 24 and other sections of the Criminal Code regarding death penalty unconstitutional. It also obliged the Supreme Court to bring the Criminal Code in compliance with its decision. The decision of the Constitutional Court in itself introduces changes to the criminal law. Under section 152 of the Constitution, the provisions of laws that are declared unconstitutional are void from the moment of the adoption of the decision by the court. Accordingly, the changes in the Criminal Code were introduced already on 30 December 1999. In particular, section 24 and 23 other sections regarding death penalty became null. The law in Ukraine does not require Parliament's confirmation for the amendments to enter into force. The Parliament only duplicates the decision of the Constitutional Court. He considers that the Parliament is responsible to introduce changes that have not yet been introduced by the Constitutional Court, but that are the natural consequence of changes made by the court.

7.2 The author refers to the above mentioned study and suggests that life imprisonment contradicts current section 23, part 1 of the Criminal Code, which establishes that the most severe punishment is imprisonment for a definite period of time and suggests that the nature of life imprisonment violates several provisions of the Constitution and the Universal Declaration on Human Rights.

7.3 The author claims that the amendments to the Criminal Code made by the Parliament set a heavier penalty than the one resulting from the decision of the Constitutional Court. The latter should be the one applicable to his case, as under section 6 of the Criminal Code, the law which provides a lighter penalty is retroactive. He suggests that, inter alia, the persons who were sentenced to death before 29 December 1999

(Constitutional Court decision), but whose death sentence has not yet been executed, should benefit from the same procedure as established under section 405 of the Criminal Procedure Code. He suggests that the provision of the above "transition law" should be based on section 58, part 2 of the Constitution which stipulates that the law with lighter penalty should be retroactive, despite the fact that it was not yet in force when the penalty was established.

7.4 On 16 July 2007, 4 June 2008, 2 December 2008 and 26 December 2008 the author submitted copies of his appeals to courts and to the Ombudsperson, all of which were refused. He also attached copies of newspaper articles and a legal analysis prepared by the institute of state and law on the subject of abolition of death penalty and its effect on convicts.

8.1 On 7 February 2008 and 21 November 2009, the State party submitted that the General Prosecutor's office has not found any basis to react on judicial decisions regarding the author. It refers to section 6 of the Criminal Code of 1960 which states that the crime and punishment is determined by the law which is in force at the time of commitment of a crime. The law that annuls punishment for an act of crime or that extenuates the punishment is retroactive and applies from the moment of its enactment even to those acts that were committed prior to its adoption. The law which establishes the punishment for an act of crime or establishes a heavier penalty cannot be applied retroactively. It submits that the decision by the Kiev City Court fully complies with this provision of the code. The penalty for the author's acts established under section 93 (a) of the Criminal Code of 1960 which was in force at the time of commitment of the crime was 8 to 15 years imprisonment or death penalty with confiscation of property. With the adoption of the above mentioned decision of the Constitutional Court all provisions of the Criminal Code that were considered unconstitutional became void from the date of its adoption. In part 3 of the decision the Constitutional Court recommended the Parliament to bring the Criminal Code in compliance with its decision. The law on amendments to the Criminal Code including to the section 93 was adopted by the Parliament on 22 February 2000. However after the decision of the Constitutional Court and prior to the amendments to the Criminal Code by the Parliament there was no law which would annul the penalty or extenuate the punishment for the acts of crime under section 93 of the Criminal Code of 1960.

8.2 The State party further stated that according to the Ministry of Justice, the provision of section 24 of the Criminal Code of 1960 establishing death penalty was temporary and exceptional. It was applied only when the crime was exceptionally severe and when the circumstances did not allow applying lighter punishment. Chapter 2 of the law on amendments to the Criminal Code adopted by the Parliament establishes that review of sentences in relation to persons sentenced to death penalty but whose sentence was not yet executed should be done by the same court that issued the sentence in the first place.

8.3 On 27 May 2009, the State party submitted that under section 85 of the Constitution, only Parliament has a right to adopt laws and introduce amendments to laws. Under sections 6 and 54, paragraph 3 of the Criminal Code of 1960 and section 405 of the Criminal Procedure Code which were in force when the decision of the Constitutional Court was adopted, the punishment for an act of crime which exceeds the punishment for the same act of crime under new law, should be decreased to the maximum extent provided under the new law. The same provisions also exist in section 5 and section 74 of the Criminal Code.

9.1 On 3 August 2009, the author submitted that the State party's observations are unfounded and that it omitted to address the period between 29 December 1999 and 22 February 2000. He reiterates that, during this time, the death penalty was abolished and the maximum penalty was 15 years imprisonment. The State party's reference to the Law on amendments to the Criminal Code which was adopted on 22 February 2000 and entered

into force on 4 April 2000 is not relevant to his case as it was adopted after the Constitutional Court's decision. He claims that section 6 and 54, paragraph 3 of the Criminal Code of 1960 and section 405 of the Criminal Procedure should be applied in his case, as he is asking for the maximum penalty for the crime he committed under the Criminal Code of 1960 which is 15 years imprisonment and not life imprisonment, a penalty that was established much later.

9.2 On 28 October 2009, the author submitted a letter from the Supreme Court in relation to another convicted person and stated that the person who committed a crime between 29 December 1999 and 4 April 2000, for which the previous Code established the death penalty could be given the punishment of 15 years of imprisonment as it was the maximum punishment under the old code during that time. He also submitted a letter from the center on law research which stated that the decision of the Constitutional Court recommended changes in the legislation but did not postpone its own implementation as well as the letter from a law professor stating that persons whose death sentence was commuted to life imprisonment could ask for a pardon.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 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.

10.2 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.

10.3 The Committee notes the author's claims, that there were factual mistakes in his indictment and sentence, which allegedly also lacked evidence, that the trial was not impartial and the sentence was based only on his confession and did not take into account the mitigating circumstances; his request to invite a witness was also denied. The State party, on the other hand, argues that the court assessed the evidence, qualified his actions and issued the sentence correctly. The Committee observes that the author's claims relate to the evaluation of facts and evidence by the State party's courts. It recalls that it is generally for the courts of States parties to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice[1]. The material before the Committee does not contain enough elements to demonstrate that the court proceedings suffered from such defects. Accordingly, the Committee considers that the author has failed to substantiate the claims under article 14, paragraphs 1 and 3 (e) and declares them inadmissible under article 2 of the Optional Protocol.

10.4 Furthermore, the Committee notes the author's claims, that his right to re-examination of his sentence in his presence was violated, that with the establishment of the new penalty he was convicted twice for the same crime, that he was subjected to ill-treatment during the interrogations by the police, that his right to an effective legal assistance were violated and that he was not provided with the assistance of a translator. However, the Committee considers that the author did not provide sufficient details or documentation on any of these claims. Accordingly, the Committee concludes that the

[1] See, inter alia, Communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, paragraph 6.2.

claims under articles 7 and 14, paragraphs 3 (b and d) and 7, are insufficiently substantiated for purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

10.5 Finally, the Committee finds that, the author's claim that his right to retroactive application of the law with lighter penalty was violated, is sufficiently substantiated as raising issues under article 15, paragraph 1, of the Covenant. It therefore considers this part of the communication admissible and proceeds to the examination thereof on its merits.

Consideration of the merits

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

11.2 The Committee notes the author's claim under article 15, paragraph 1, that he should have benefited from the "transitional law", i.e. the old Code as it read with the unconstitutional capital punishment provisions removed, which was in force between 29 December 1999, when the decision of the Constitutional Court was adopted, and 4 April 2000, when the law on amendments to the codes entered into force. The State party argues that, after the decision of the Constitutional Court and prior to the amendments to the Criminal Code by the Parliament, there was no law which would annul the penalty or extenuate the punishment for the acts of crime under section 93 of the Criminal Code of 1960. It argues that under section 85 of the Constitution, only Parliament has a right to adopt laws and introduce amendments to laws and that chapter 2 of the law on amendments to the Criminal Code adopted by the Parliament establishes that review of sentences in relation to persons sentenced to death penalty but whose sentence was not yet executed should be done by the same court that issued the sentence in the first place.

11.3 According to article 15, paragraph 1, last sentence, of the Covenant, if, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. In the current case, the Committee notes that the penalty of life imprisonment established by the law "on amendments to the Criminal Code, the Criminal Procedure Code and the Correctional Labor Code of Ukraine" fully respects the purpose of the Constitutional Court's decision, which was to abolish the death penalty, a penalty which is more severe than life imprisonment. The Court's decision in itself does not imply commutation of the sentence imposed on the author nor does it establish a new penalty which would replace the death sentence. Furthermore, there were no subsequent provisions made by law for the imposition of any lighter penalty from which the author could benefit, other than the above-mentioned amendment on life imprisonment. In such circumstances, the Committee cannot conclude that the State party, by substituting life imprisonment for capital punishment for the crimes committed by the author, has violated the author's rights under article 15, paragraph 1, of the Covenant.

12. 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 do not reveal a breach of any provision of the Covenant in connection with the author.

[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.]