

## HUMAN RIGHTS COMMITTEE

Aliev v. Ukraine

Communication No. 781/1997

7 August 2003

CCPR/C/78/D/781/1997

### VIEWS

*Submitted by: Mr. Azer Garyverdy ogly Aliev*

*Alleged victim: The author*

*State party: Ukraine*

*Date of communication: 21 September 1997 (initial submission)*

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

Meeting on 7 August 2003,

Having concluded its consideration of communication No. 781/1997, submitted by Mr. Azer Garyverdy ogly Aliev 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**

1.1 The author of the communication is Mr. Azer Garyverdy ogly Aliev, an Azerbaijani national, born on 30 August 1971. At the time of submission, the author was being held in the Donetsk remand centre (SIZO) in Ukraine, awaiting execution. He claims to be a victim of violations by Ukraine (1) of the International Covenant on Civil and Political Rights. Although the author does

not invoke specific provisions of the Covenant, the communication appears to raise issues under articles 6, 7 and 10, article 14, paragraph 1, paragraph 3 (d), (e) and (g), and paragraph 5, and article 15 of the Covenant. He is not represented by counsel.

1.2 On 24 November 1997, in accordance with rule 86 of its rules of procedure, the Committee requested the State party to stay the execution of the author while his communication was under consideration. On 30 September 2002, the State party informed the Committee that, on 26 June 2000, the author's death sentence had been commuted to life imprisonment.

#### The facts as submitted by the author

2.1 On 8 June 1996, in the town of Makeevka, Ukraine, having consumed a large quantity of alcohol, the author, Mr. Kroutovtsev and Mr. Kot had an altercation in an apartment. The altercation degenerated into a fight. A fourth person, Mr. Goncharenko, witnessed the incident. According to the author, Mr. Kot and Mr. Kroutovtsev beat him severely. Mr. Kroutovtsev also struck him with an empty bottle. While defending himself, the author seriously wounded Mr. Kot and Mr. Kroutovtsev with a knife, whereupon he fled.

2.2 The author states that he contacted Mr. Kroutovtsev's wife shortly afterwards in order to inform her of the incident and to ask her to call for assistance. On hearing this news, Mrs. Kroutovtseva began to hit him. The author states that he then slashed Mrs. Kroutovtseva's face with a knife and returned to his apartment, where his wife and some neighbours treated his wounds.

2.3 On 8 June 1996, the author reported the incident to a criminal investigation officer, Mr. Volkov, who ordered him to bring \$15,000 to bribe the police and the prosecutors. The author collected only \$5,600. The author gave official evidence in writing in Mr. Volkov's car. On hearing that one of the victims had died, the police officer told the author that, if he did not come up with the required sum by 2 p.m., he would be in trouble.

2.4 On the afternoon of 8 June 1996, the author and his wife left town and went into hiding in his mother-in-law's village, while his father tried to raise the sum of money that had been demanded. When they returned, they were arrested by the police on 27 August 1996 and taken to a police station, where they were interrogated for four days. According to the author, they were not given anything to eat during their detention. Mr. Volkov and other officers subjected the author to physical pressure, which included depriving him of oxygen by forcing him to wear a gas mask, in order to force him to confess to a number of unsolved crimes. The author's wife, who was pregnant at the time, was also beaten and a cellophane bag was placed over her head, which caused her to lose consciousness. In order to obtain his wife's release, the author signed all the documents that were placed before him, without reading them.

2.5 The police officers released his wife after having obtained her promise not to divulge what had taken place during the detention, failing which her husband would be killed and she would be reincarcerated. After her miscarriage, the author's wife decided to collect medical evidence in order to lodge a complaint, whereupon she was again threatened by Mr. Volkov and another officer.

The author states that he complained to a procurator on 31 January 1997, but that the procurator had advised him to make his allegations during the trial.

2.6 The author was held for five months without access to a lawyer; he states that he was not examined either by a forensic psychiatrist, in spite of his medical history, or by a physician. During the reconstruction of the crime, the author was unable to participate, except when Mr. Kroutovtsev and Mr. Kot were also concerned.

2.7 The case was tried by the Donetsk regional court. According to the author, the court heard only witnesses produced by Mrs. Kroutovtseva, who were all her neighbours and friends.

2.8 The author states that, although the public prosecutor had demanded that the author be sentenced to 15 years' imprisonment, on 11 April 1997 the court found him guilty of the murder of Mr. Kroutovtsev and Mr. Kot and of the attempted murder of Mrs. Kroutovtseva, and sentenced him to death. On 28 April 1997, the author filed an appeal with the Supreme Court. He claims that his appeal was not transmitted by the Donetsk regional court and was illegally annulled. In this regard, the author notes that the public prosecutor had requested the annulment of the judgement and the transfer of the case for non-compliance with certain provisions of article 334 of the Code of Criminal Procedure.

### The complaint

3.1 The author claims that he was sentenced to death without account being taken of the fact that, pursuant to articles 3 and 28 of the Constitution of Ukraine, capital punishment had been legally abolished, which rendered the sentence unconstitutional and inapplicable, contrary to the provisions of article 6 of the Covenant.

3.2 The author's allegations that he and his wife had been victims of torture and ill-treatment by the police for the purpose of extorting confessions during their detention, may violate article 14, paragraph 3 (g), article 7 and article 10, in combination with article 6 of the Covenant.

3.3 The author maintains that he was deprived of a fair trial for the following reasons. After his arrest, he was interrogated for four days by police officers at the police station where the chief was the brother of one of the deceased. He maintains that the charges against him were inconsistent, the presentation of the facts by the police and the public prosecutor was biased, and the court called only witnesses for the prosecution and the victims. The author states that, in examining his case record, he had discovered that the pages were not bound, numbered or attached, which made it possible to remove evidence in order to conceal illegal acts and procedural errors, and that his appeal to the Supreme Court had not been transmitted by the regional court. All this may constitute a violation of article 14, paragraph 1, paragraph 3 (e) and paragraph 5 of the Covenant.

3.4 The author claims that he did not have access to counsel during the five months following his arrest, from 27 August 1996 to 18 December 1996; on 17 July 1997, the Supreme Court took its decision in his absence and the absence of his counsel, in violation of article 14, paragraph 3 (d), of the Covenant.

3.5 According to the author, the Supreme Court confirmed an illegal decision, since the death sentence was incompatible with the Ukrainian Constitution of 1996. On 29 December 1999, the Constitutional Court had declared capital punishment unconstitutional; since that date, the penalty contained in article 93 of the Criminal Code was between 8 and 15 years' imprisonment. Rather than seeing his sentence modified and reduced "by a prompt review" of his conviction, the author was sentenced to life imprisonment, pursuant to the amendments to the Criminal Code of 22 February 2000. In his opinion, this constitutes a violation of his right to a lighter sentence because the penalty provided for under the "provisional law", following the decision of the Constitutional Court (of December 1999), was between 8 and 15 years' imprisonment while, following the reforms introduced in 2000, the author was imprisoned for life.

3.6 The author also claims that, in spite of his medical history, he was not examined by an expert psychiatrist, nor had the wounds that he had sustained during the events of 8 June 1996 been examined.

#### The State party's observations on admissibility and merits

4.1 In its *notes verbales* dated 26 May 1998 and 20 September 2002, the State party submitted its observations, claiming that the case did not entail any violation of the rights recognized under the Covenant, since the author had had a fair trial and had been sentenced in accordance with the law.

4.2 A criminal case for the murder of Mr. Kroutovtsev and Mr. Kot and the attack on Mrs. Kroutovtseva was opened on 9 June 1996 by the prosecution of the town of Makeevka. On 13 June 1996, a warrant for the arrest of Mr. Aliev and his wife was issued and those two persons were arrested on 28 August 1996. On 11 April 1997, the Donetsk regional court sentenced the author to death for intentional homicide with aggravating circumstances and for aggravated theft of personal effects. On 17 July 1997, the decision was confirmed by the Supreme Court. Pursuant to legislative amendments, on 26 June 2000 the Donetsk regional court commuted Mr. Aliev's death sentence to life imprisonment.

4.3 According to the State party, the court found the author guilty of having deliberately and vengefully murdered the victims with a knife during an altercation. The author later attempted to murder Mr. Kroutovtsev's wife out of greed, attacking and seriously wounding her, before stealing her jewellery. He returned to the scene of the crime the same day in order to remove a gold chain from Mr. Kroutovtsev's corpse.

4.4 The evidence concerning the crime was corroborated by the conclusions of the preliminary investigation and the forensic examination, and was confirmed by several witnesses, as well as by the inspection of the scene of the crime, physical evidence and the conclusions of experts.

4.5 The State party maintains that the courts correctly characterized the author's acts as constituting offences under the relevant articles of the Criminal Code. It considers that the author's allegations that he had wounded Mr. Kroutovtsev and Mr. Kot in self-defence were refuted by the procedural documents and the courts. In the light of the particular dangerousness of the crimes, the court was

of the view that the author constituted an exceptional danger to society and imposed an exceptional sentence on him.

4.6 According to the State party, the author's allegation that he was subjected to unauthorized investigation methods was examined by the Supreme Court, which consider the allegation unsubstantiated. The State party affirms that the case record does not contain any element that would lead to the conclusion that illegal methods were used during the preliminary investigation; the author did not file any complaint with the Donetsk regional court in this regard. The court records do not contain any complaint by Mr. Aliev concerning the use of illegal methods of investigation or other unlawful acts by the investigators. It was only after the regional court took its decision that the author, in his application for judicial review, maintained that the investigators had forced his wife and him to make false statements. The State party points out that the application for judicial review submitted by the author's lawyer did not contain such allegations.

4.7 In conclusion, the State party notes that there is no reason to challenge the judicial decisions against the author and that the author did not file any complaint with the Procurator-General concerning the alleged unlawfulness of his sentence.

#### The author's comments

5.1 The author submitted his comments on the State party's observations on 21 April 2003. He reiterates his previous allegations and disputes the characterization of his acts by the prosecution and the courts. He maintains that, on the night of 7 to 8 June 1996, he wounded, but did not kill, Mr. Kot and Mr. Kroutovtsev. He challenges the witnesses' statements, which he claims were "attached to the case record by police officers" and used by the court.

5.2 The author reiterates that the investigation and the courts were biased against him because, at the time of the crime, the brother of one of the victims was the chief of the Makeevka district police station, while the sister of the other victim was the chief of the central police station's identity card department and she was, moreover, married to a judge. The author claims that, in order to aggravate his sentence, the police officers described a different sequence of events.

5.3 With regard to the allegations of ill-treatment of which he claims to be a victim, the author explains that part of his criminal file was covered with his blood. He reiterates that the investigators had put a gas mask over his head and had blocked the flow of air in order to force him to testify against himself. His wife was also beaten and strangled. He maintains that he complained, without success, "to several authorities" of having been subjected to physical violence. A number of his co-detainees could attest that he had bruises and haematomas as a result of ill-treatment.

5.4 As proof of the investigators' bias, the author cites the fact that a criminal investigation into the murder of Mr. Kot and Mr. Kroutovtsev was opened on 9 June 1996, whereas Mr. Kot died of his wounds on 13 June 1996.

#### Issues and proceedings before the Committee

### *Decision on admissibility*

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 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 that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee notes that the author filed an appeal with the Supreme Court of Ukraine, which confirmed the decision of the inferior court, and that the State party has not argued that the author has not exhausted domestic remedies. The Committee therefore considers that the author has met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With regard to the author's allegation that during their detention he and his wife were subjected to inhuman treatment by police officers in order to force them to testify against themselves, the Committee notes that the author submitted the communication on his own behalf, without indicating that he had been authorized to act on his wife's behalf and without explaining whether or not his wife was able to submit her own complaint. Pursuant to paragraph 1 of the Optional Protocol and rule 90 (b) of its rules of procedure, the Committee decides that it will consider only the author's complaint.

6.5 With regard to the author's allegation that the court sentenced him to death without taking account of the fact that articles 3 and 28 of the Ukrainian Constitution of 1996 had abolished capital punishment, the Committee notes that it was only as a consequence of the Constitutional Court's decision of 29 December 1999 and the Parliament's amendment of the Criminal Code and the Code of Criminal Procedure on 22 February 2000 that the State party abolished capital punishment, that is, after a final decision had been taken in the case. The Committee therefore considers that, for the purposes of admissibility, the author has not substantiated his allegation that the imposition of the death sentence in 1997 took place after the State party had abolished capital punishment. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.6 The Committee notes that the author states, concerning his allegations of ill-treatment and torture, that on 31 January 1997 he complained to a procurator who advised him to make his allegations during the trial. The State party claims that this allegation was not raised before the Donetsk regional court and that the author made the allegation only when he filed his application for judicial review. The Committee notes that, in its judgement, the Supreme Court considered the allegation and decided that it was unfounded. The Committee recalls that it is generally for the courts of State parties to the Covenant, and not for the Committee, to evaluate facts and evidence in a particular case, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice. However, nothing in the information brought to the attention of the Committee concerning this matter shows that the decisions of the Ukrainian courts or the

behaviour of the competent authorities were arbitrary or amounted to a denial of justice. This part of the communication is therefore inadmissible under article 3 of the Optional Protocol.

6.7 With regard to the author's allegations that he was denied a fair trial because the brother of one of the deceased was chief of the police station where he underwent his first interrogations, the Committee notes, first, that nothing in the documents before it leads it to conclude that these allegations were brought before the competent national authorities. Secondly, with regard to the author's claim that the charges against him were inconsistent, that the presentation of the facts by the police and the public prosecutor were biased, that the court only heard witnesses for the prosecution, and that the judges were obviously biased, the Committee considers that these allegations have not been sufficiently substantiated for the purposes of admissibility. Consequently, the Committee declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.8 The author has also alleged that his case record was tampered with in order to conceal procedural errors; the Committee notes that the author has not indicated whether or not he presented these allegations to the competent national authorities. Moreover, he has not maintained that his case record was falsified. The Committee is therefore of the view that this allegation has not been substantiated for the purposes of admissibility and is inadmissible under article 2 of the Optional Protocol.

6.9 With regard to the author's allegation that his application for judicial review had been illegally rejected by the regional court, the Committee notes that the Supreme Court of Ukraine considered his appeal and confirmed the decision of the regional court on 17 July 1997, and that a copy of the decision has been furnished by the State party. Without any other relevant information concerning the examination of the author's application for judicial review, the Committee is of the view that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.10 The Committee has taken note of the author's claim that he was sentenced to a penalty heavier than the one provided by law. The State party refutes this allegation, considering that the courts correctly characterized the author's acts under the Criminal Code and sentenced him in conformity with the law. In the light of the copies of the relevant judicial decisions furnished by the State party and, in the absence of any information indicating that these judicial decisions violate in any way the author's rights under article 15 of the Covenant, the Committee is of the view that the facts before it have not been sufficiently substantiated to meet the criteria for admissibility under article 2 of the Optional Protocol.

6.11 As for the author's complaint that he was deprived of counsel for the first five months of the investigation and that, on 17 July 1997, the Supreme Court gave its ruling in his absence and the absence of his counsel, the Committee notes that the State party has not made any objection as to admissibility and therefore proceeds to an examination of the merits of this allegation, which may raise issues under article 14, paragraphs 1 and 3 (d) and article 6, of the Covenant.

6.12 The Committee therefore proceeds to the consideration of the complaints that were declared admissible under article 14, paragraphs 1 and 3 (d) and article 6, of the Covenant.

### *Examination of the merits*

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

7.2 First, the author alleges that he did not have the services of a counsel during his first five months of detention. The Committee notes that the State party is silent in this regard; it also notes that the copies of the relevant judicial decisions do not address the author's allegation that he was not represented for five months, even though the author had mentioned this allegation in his complaint to the Supreme Court dated 29 April 1997. Considering the nature of the case and questions dealt with during this period, particularly the author's interrogation by police officers and the reconstruction of the crime, in which the author was not invited to participate, the Committee is of the view that the author should have had the possibility of consulting and being represented by a lawyer. Consequently, and in the absence of any relevant information from the State party, the Committee is of the view that the facts before it constitute a violation of article 14, paragraph 1, of the Covenant.

7.3 Secondly, the author alleges that, subsequently, on 17 July 1997, the Supreme Court heard his case in his absence and in the absence of his counsel. The Committee notes that the State party has not challenged this allegation and has not provided any reason for this absence. The Committee finds that the decision of 17 July 1997 does not mention that the author or his counsel was present, but mentions the presence of a procurator. Moreover it is uncontested that the author had no legal representation in the early stages of the investigations. Bearing in mind the facts before it, and in the absence of any relevant observation by the State party, the Committee considers that due weight must be given to the author's allegations. The Committee recalls its jurisprudence that legal representation must be available at all stages of criminal proceedings, particularly in cases in which the accused incurs capital punishment **(2)**. Consequently, the Committee is of the view that the facts before it disclose a violation of article 14, paragraph 1, as well as a separate violation of article 14, paragraph 3 (d), of the Covenant.

7.4 The Committee is of the view **(3)** that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant if no further appeal against the death sentence is possible. In the author's case, the final sentence of death was passed without having met the requirements for a fair trial as set out in article 14 of the Covenant and thus in breach of article 6. However, this breach was remedied by the commutation of the death sentence by the Donetsk regional court's decision of 26 June 2000.

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 14, paragraphs 1 and 3 (d) of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy.

The Committee is of the view that, since the author was not duly represented by a lawyer during the first months of his arrest and during part of his trial, even though he risked being sentenced to death, consideration should be given to his early release. The State party is under an obligation to take measures 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 90 days, information about the measures taken to give effect to these Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the French 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.]

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

### Notes

1. The Covenant entered into force for the State party on 23 March 1976, and the Optional Protocol on 25 October 1991.
2. See for example *Robinson v. Jamaica*, Communication No. 223/1987 and *Brown v. Jamaica*, Communication No. 775/1997.
3. See *Levy v. Jamaica*, *op. cit.*; *Marshall v. Jamaica*, *op. cit.*