



**International Covenant on
Civil and Political Rights**

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Human Rights Committee

Communication No. 1750/2008

**Views adopted by the Committee at its 104th session,
12–30 March 2012**

<i>Submitted by:</i>	Leonid Sudalenko (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	17 March 2005 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 22 January 2008 (not issued in document form)
<i>Date of adoption of Views:</i>	14 March 2012
<i>Subject matter:</i>	Seizure and partial destruction of electoral print materials in violation of the right to disseminate information without unreasonable restrictions.
<i>Substantive issues:</i>	Equality before the law; right to impart information; permissible restrictions; right to a fair hearing by a competent, independent and impartial tribunal.
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Articles of the Covenant:</i>	14, paragraph 1; 19, paragraph 2
<i>Articles of the Optional Protocol:</i>	5, paragraph 2(b)

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 (104th session)

concerning

Communication No. 1750/2008*

Submitted by: Leonid Sudalenko (not represented by counsel)

Alleged victim: The author

State party: Belarus

Date of communication: 17 March 2005 (initial submission)

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

Meeting on 14 March 2012,

Having concluded its consideration of communication No. 1750/2008, submitted to the Human Rights Committee by Mr. Leonid Sudalenko 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. Leonid Sudalenko, a Belarusian national born in 1966. He claims to be a victim of violations by Belarus of article 14, paragraph 1; and article 19, paragraph 2, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 December 1992.

Factual background

2.1 The author has been a member of the United Civil Party since 2001 and, since 2002, the Chairperson of the Gomel City Section of the public association Civil Initiatives and a member of the Belarusian Association of Journalists. Since 2000, he has been working as a legal adviser in the public corporation Lokon based in Gomel.

* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kaelin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

2.2 On 9 August 2004, the District Electoral Commission of the Khoyniki electoral constituency No. 49 (the District Electoral Commission) registered an initiative group who had agreed to collect signatures of voters in support of the author's nomination as a candidate for the 2004 elections to the House of Representatives of the National Assembly (Parliament). On 16 September 2004, the District Electoral Commission refused to register the author as a candidate. Despite the refusal to register him as a candidate, the author continued his "propaganda and information work" among his supporters in order to inform them about the reasons for the non-registration of his candidacy and his opinion about the upcoming political events in the country.

2.3 On 8 October 2004, on his way to the town of Khoyniki, the author's private vehicle was stopped and searched by traffic police under the pretext that his car had been stolen and was under investigation. The author was taken to the Khoyniki District Department of Internal Affairs, at which point the following print materials were seized from him: (1) a leaflet entitled "Dear Compatriots!" (479 copies); (2) photocopy of an article from the newspaper *People's Will* (479 copies) and (3) a leaflet entitled "Five steps to a Better Life" (479 copies).

2.4 On 10 October 2004, the author, together with the head of his initiative group, Mr. N.I., was detained by police officers in the town of Khoyniki while he was distributing the print materials. This time the author was again taken to the Khoyniki District Department of Internal Affairs where another 310 copies each of the print materials listed in paragraph 2.3 above were seized from the author, together with 310 copies of the newspaper *Week*.

2.5 On an unspecified date, the author filed a complaint with the Prosecutor's Office of the Khoyniki District concerning his arbitrary detention and seizure of the print materials. On 15 October 2004, the author was informed by the Prosecutor of the Khoyniki District that the materials that were seized from him did not comply with article 26 of the Law on Press and Other Mass Media and that the author's actions fell within the scope of article 172-1, part 8 (illegal production and distribution of mass media outputs), of the 1984 Belarus Code on Administrative Offences.¹ He was further informed by the Prosecutor of the Khoyniki District that, on 13 October 2004, the Khoyniki District Department of Internal Affairs forwarded the conclusions of its investigation undertaken pursuant to article 234, part 1, clause 2-2, of the Code on Administrative Offences, to the Khoyniki District Council of Deputies of the Gomel region in order for the latter to draw up an administrative report in relation to the author and Mr. N.I.

2.6 On 9 November 2004, an Executive Officer of the Khoyniki District Executive Committee drew up an administrative report, stating that the author had committed an administrative offence under article 172-1, part 8, of the Code on Administrative Offences, by illegally disseminating print materials produced in violation of article 26 of the Law on Press and Other Mass Media. On an unspecified date, this report was transmitted to the Khoyniki District Court of the Gomel region.

2.7 On 18 November 2004, a judge of the Khoyniki District Court of the Gomel region examined the administrative report of 9 November 2004 in relation to the author and found him guilty of having committed an administrative offence under article 172-1, part 8, of the Code on Administrative Offences. The author was ordered to pay 144,000 roubles (6 base amounts)² as fine. The court also ordered the confiscation and destruction of "one copy" of the seized print materials each. The court concluded that, by distributing photocopies of an

¹ The 1984 Belarus Code on Administrative Offences was replaced by the new Code on Administrative Offences as of 1 March 2007.

² Approximately 66.2 USD or 51.1 EUR.

article from the newspaper *People's Will* issued on 28 September 2004 in the absence of a contractual agreement with the editorial board or the publisher, as well in the absence of other legal grounds, the author had engaged in illegal distribution of mass media outputs. This decision is final and executory.³

2.8 On unspecified dates, the ruling of the Khoyniki District Court of the Gomel region of 18 November 2004 was appealed by the author to the Gomel Regional Court and the Supreme Court under the supervisory review procedure. The author notes that he submitted to the higher courts a copy of the letter from the chief editor of *People's Will* dated 3 December 2004, stating that the editorial board did not object to the copying of the articles published in the newspaper by the author. The author's appeals, however, were dismissed by the Chair of the Gomel Regional Court on 10 February and by the Deputy Chair of the Supreme Court on 31 March 2005, respectively. Both courts found that the ruling of the Khoyniki District Court of the Gomel region of 18 November 2004 was lawful and well-founded.

The complaint

3.1 The author claims that, contrary to the guarantees of article 14, paragraph 1, of the Covenant, his rights to equality before the courts and to a fair hearing by competent, independent and impartial court were violated. In particular, he submits that:

(a) Article 172-1, part 8, of the Code on Administrative Offences under which he was found guilty established liability for the "*illegal production and distribution of mass media outputs*".⁴ Under article 1, part 10, of the Law on Press and Other Mass Media, the term „mass media output“ is interpreted as full or partial circulation of the *periodical printed publication*,⁵ an issue of the radio, TV, newsreel; full or partial circulation of the audio or video recording of the programme. Article 43, part 2, of the same Law stipulates that in case of conflict between the Law and the international treaty to which Belarus is a State party, the latter should prevail. Therefore, the author claims that in evaluating his actions of 8 and 10 October 2004, the court should have assessed, as required by article 19 of the Covenant, whether the sanctions applied to him were necessary *for respect of the rights or reputations of others, for the protection of national security or of public order, or of public health or morals*;⁶

(b) The Khoyniki District Court of the Gomel region did not take any measures to establish why it was necessary for the author to sign a contract with the editor or publisher of the publicly available newspaper *People's Will* in order to make copies of a given article published in one of its issues. The court failed to establish how the author's failure to sign such a contract negatively affected respect of the rights or reputations of others, for the protection of national security or of public order, or of public health or morals;

(c) The confiscation and destruction of one copy of the seized print materials each is not provided in the vindicatory part of article 172-1, part 8, of the Code on Administrative Offences;

³ Under article 266 of the Code on Administrative Offences, the court's decision in administrative case is final and it cannot be appealed through administrative proceedings. This decision, however, can be revoked by the chair of a court of superior jurisdiction through the supervisory procedure.

⁴ Emphasis is added by the author of the communication.

⁵ *Idem*.

⁶ *Idem*.

(d) The court did not evaluate the author's actions in relation to the distribution of print materials other than the copies of the newspaper *People's Will*. It ordered, however, the confiscation and destruction of one copy of the seized print materials each. The court did not evaluate the author's actions that took place on 8 October 2004 when, according to the administrative report of the Khoyniki District Executive Committee, he was also allegedly illegally distributing the mass media outputs.

3.2 The author further claims a violation of his rights under article 19, paragraph 2, of the Covenant, because of the arbitrary seizure of elections related print materials, in particular, in violation of his right to impart information, and the State party has failed to justify the necessity of the restriction of this right.

The State party's observations on admissibility and merits

4.1 By note verbale of 2 May 2008, the State party submitted its observations on admissibility and merits. It confirms that, on 18 November 2004, the Khoyniki District Court of the Gomel region found the author guilty of having committed an administrative offence under article 172-1, part 8, of the Code on Administrative Offences and ordered him to pay 144,000 roubles (6 base amounts) as a fine. The administrative report of 9 November 2004 also documents that in violation of the Law on Press and Other Mass Media, the author was distributing illegally produced copies of the newspapers and leaflets. Furthermore, the author did not deny that he was engaged in the production and distribution of the print materials in question. Therefore, on the basis of the evidence before him, the judge's decision in finding the author guilty of having committed an administrative offence was well-founded.

4.2 The State party submits that article 238 of the Code on Administrative Offences provides for a possibility of taking an offender to the police station with the purpose of drawing up an administrative report. Pursuant to articles 28 and 244 of the same Code, items constituting a direct object of the administrative offence can be seized and then confiscated. Thus, the author's delivery to the police station with the purpose of drawing up an administrative report, as well as the seizure and subsequent confiscation of the print materials constituting a direct object of the administrative offence were lawful and grounded. The State party adds that the decisions of the Gomel Regional Court and the Supreme Court to dismiss the author's appeals were justified and that he did not complain to the General Prosecutor's Office about the institution of administrative proceedings against him.

4.3 According to the State party, article 19, paragraph 3, of the Covenant provides for a possibility to subject the exercise of the rights provided for in paragraph 2 of this article to certain restrictions. Therefore, the Law on Press and Other Mass Media establishes a procedure for the production and distribution of mass media outputs. At the time when the author's actions in question took place, article 172-1 of the Code on Administrative Offences provided for administrative liability for the breach of the said procedure. The State party concludes that the institution of administrative proceedings against the author for illegal production and distribution of mass media outputs does not contravene the requirements of the Covenant and that, consequently, the author's rights guaranteed under the Covenant have not been violated.

Author's comments on the State party's observations

5.1 On 22 February 2009, the author commented on the State party's observations. He notes that the State party justifies the restriction of his right to impart information by the alleged breach of the Law on Press and Other Mass Media. With reference to article 8, paragraph 1, of the Belarusian Constitution, which confirms the supremacy of the universally recognized principles of international law and prescribes a requirement of

compliance of the laws of Belarus with such principles, the author submits that the State party's invocation of the provisions of its internal law as justification for its failure to comply with the requirements of the Covenant is groundless. He further refers to article 27 of the Law on International Treaties that incorporates into the domestic law the principles of *pacta sunt servanda* and correlation between internal law and observance of treaties established under articles 26 and 27 of the 1969 Vienna Convention on the Law of Treaties.

5.2 The author submits that the restriction of his right to impart information was not based on one of the legitimate grounds provided for under article 19, paragraph 3, of the Covenant and that, therefore, there was a violation of article 19, paragraph 2, read together with article 2 of the Covenant in his case.

5.3 The author reiterates his claims in relation to the alleged violation of article 14, paragraph 1, of the Covenant, and adds that, in its concluding observations on the fourth periodic report of Belarus (CCPR/C/79/Add.86), the Committee noted with concern that the procedures relating to tenure, disciplining and dismissal of judges at all levels did not comply with the principle of independence and impartiality of the judiciary (para. 13).⁷

5.4 Finally, the author submits that he did not avail himself of the right to submit a complaint to the General Prosecutor's Office, since such a complaint does not constitute an effective domestic remedy, as it does not entail a review of the case by the court. He recalls that, according to the Committee's jurisprudence, one is required to exhaust domestic remedies that are not only available but also effective.

Further submissions from the State party

6.1 By note verbale of 4 September 2009, the State party submits that, pursuant to article 12.11 of the Executive Code on Administrative Offences, a prosecutor can lodge an objection against the court ruling on finding a person guilty of having committed an administrative offence. An objection can also be lodged in relation to a ruling that has already become executory. The State party adds that in 2008 a total of 2,739 complaints have been received by the prosecutorial authorities within the framework of administrative proceedings and 422 of them have been decided in favour of the submitting party. In particular, 146 court rulings have been revoked or revised by the Chairman of the Supreme Court in the framework of the administrative proceedings on the basis of the objections lodged by the General Prosecutor's Office in 2008. The State party further submits that 427 rulings have been revoked and 51 have been revised through the supervisory review procedure in civil cases in 2006. In 2007, the numbers were 507 and 30, respectively, and, in 2008, 410 and 36. The State party concludes, therefore, that the author's assertion in relation to the ineffectiveness of the complaint mechanism established within the General Prosecutor's Office is baseless.

6.2 The State party further submits that the Belarusian Constitution guarantees the independence of the judges when administering justice, their irrevocability and immunity, and prohibits any interference in the administration of justice. The Code "On Judicial System and Status of Judges" also provides legal guarantees for the administration of independent justice. Pursuant to article 110 of the Constitution, judges are independent and are only subject to the law; any interference in the administration of justice is impermissible and is liable to punishment.⁸ The State party concludes, therefore, that the author's claims

⁷ The author also refers to the report on the mission to Belarus of the Special Rapporteur on the independence of judges and lawyers, Dato^o Param Cumaraswamy, submitted in accordance with resolution 2000/42 of the Commission on Human Rights, E/CN.4/2001/65/Add.1.

⁸ The State party further lists a number of specific guarantees on the independence of the judiciary contained in the Code on Judicial System and Status of Judges.

about the lack of independence and partiality of the judges in Belarus are his own inferences that do not correspond to the State party's law and practice.

Further submissions from the author

7.1 On 16 February 2011, the author reiterates his earlier arguments in relation to the ineffectiveness of the supervisory review procedure which allows a prosecutor to lodge an objection against the court ruling on finding a person guilty of having committed an administrative offence that has already become executory. He further adds that the State party failed to specify whether the statistical data provided by it included any revoked or revised rulings with regard to administrative offences related to the exercise of one's civil and political rights or administrative persecution of socially and politically active individuals. The author states that he is unaware of any case over the last 10 years when the General Prosecutor's Office would lodge an objection, requesting revocation of administrative proceedings related to the exercise of citizens' civil and political rights. He submits that the supervisory review procedure is at the discretion of a limited number of high-level public officials, such as the Prosecutor General and Chair of the Supreme Court. Such review, if granted, takes place without a hearing and is allowed on questions of law only. Furthermore, the State party's law does not allow an individual to submit an appeal to the Constitutional Court. The author asserts, therefore, that all domestic remedies have been exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.

7.2 The author further submits that the State party failed to address any of his specific claims in relation to article 14, paragraph 1, of the Covenant. Furthermore, although the Khoyniki District Court of the Gomel region did not take any decision on what needed to be done with the remaining print materials that had been seized from the author on 8 and 10 October 2004,⁹ their fate remains unknown to him. The author adds that the judge of the Khoyniki District Court of the Gomel region issued the ruling of 18 November 2004 exclusively on the basis of the domestic law and did not take into account the State party's obligations under the Covenant. The author refers to the Committee jurisprudence in *Park v. Republic of Korea*¹⁰ in support of his argument about the supremacy of the State party's obligations under the Covenant over its domestic law.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 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 case is admissible under the Optional Protocol to the Covenant.

8.2 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.

8.3 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party's argument that the author did not complain to the General Prosecutor's Office about the institution of administrative proceedings against him, specifically noting that an objection by a prosecutor can also be

⁹ The author refers to the following print materials: (1) the leaflet entitled "Dear Compatriots!" (789 copies); (2) photocopy of an article from the newspaper *People's Will* (789 copies); and (3) the leaflet entitled "Five steps to a Better Life" (789 copies).

¹⁰ Communication No. 628/1995, *Park v. Republic of Korea*, Views adopted on 20 October 1998, para. 10.4.

lodged in relation to a ruling that has already become executory. The Committee further notes the author's explanation that he had exhausted all available domestic remedies and that he has not lodged any complaint with the General Prosecutor's Office, since the supervisory review procedure does not constitute an effective domestic remedy. The Committee also notes that the author submitted an appeal to the Supreme Court, which upheld the ruling of the Khoyniki District Court of the Gomel region. In this regard, the Committee recalls its jurisprudence, according to which the supervisory review procedure against court decisions which have entered into force constitutes an extraordinary means of appeal which is dependent on the discretionary power of a judge or prosecutor and is limited to issues of law only.¹¹ In the circumstances, the Committee considers that it is not precluded, for purposes of admissibility, by article 5, paragraph 2 (b) of the Optional Protocol, from examining the communication.

8.4 As to the author's claim under article 14, paragraph 1, the Committee notes that it relates primarily to issues directly linked to those falling under article 19, of the Covenant, that is, the author's right to impart information. It also notes that there are no obstacles to the admissibility of the claims under article 19, paragraph 2, of the Covenant, and declares them admissible. Having come to this conclusion, the Committee decides not to separately consider the claims arising under article 14, paragraph 1, of the Covenant.¹²

Consideration of the merits

9.1 The Human Rights Committee has considered the 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.

9.2 The first issue before the Committee is whether or not the application of article 172-1, part 8, of the Code on Administrative Offences to the author's case, resulting in the seizure and partial destruction of the following elections related print materials: (1) the leaflet entitled "Dear Compatriots!" (789 copies); (2) photocopy of an article from the newspaper *People's Will* (789 copies) and (3) the leaflet entitled "Five steps to a Better Life" (789 copies) and the subsequent fine, constituted a restriction within the meaning of article 19, paragraph 3, on the author's right to impart information. The Committee notes that article 172-1, part 8, of the Code on Administrative Offences establishes administrative liability for illegal production and distribution of mass media outputs. It also notes that since the State party imposed a "procedure for the production and distribution of mass media outputs", it effectively established obstacles regarding the exercise of the freedom to impart information, guaranteed by article 19, paragraph 2, of the Covenant.¹³

9.3 The second issue is, therefore, whether in the present case such obstacles are justified under article 19, paragraph 3, of the Covenant, which allows certain restrictions but only as provided by law and necessary: (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. The Committee recalls its general comment No. 34 (2011) on freedoms of opinion and expression, according to which freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, that they are essential for any society, and that they constitute the foundation stone for every free and

¹¹ See, for example, *Gerashchenko v. Belarus*, communication No. 1537/2006, inadmissibility decision adopted on 23 October 2009, para. 6.3; *P.L. v. Belarus*, communication No. 1814/2008, inadmissibility decision adopted on 26 July 2011, para. 6.2; *Tulzhenkova v. Belarus*, communication No. 1838/2008, Views adopted on 26 October 2011, para. 8.3.

¹² See communication No. 1377/2005, *Katsora v. Belarus*, Views adopted on 19 July 2010, para. 6.4.

¹³ Communication No.780/1997, *Laptsevich v. Belarus*, Views adopted on 20 March 2000, para. 8.1.

democratic society.¹⁴ Any restrictions to their exercise must conform to the strict tests of necessity and proportionality and “must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.”¹⁵

9.4 The Committee notes that the author has argued that article 172-1, part 8, of the Code on Administrative Offences does not apply to him, since the print materials that he was distributing on 8 and 10 October 2004 did not constitute a “mass media output” within the meaning of article 1, part 10, of the Law on Press and Other Mass Media, and that the sanctions thus were unlawful and constituted a violation of article 19 of the Covenant. In this regard, the Committee notes, firstly, that the author and the State party disagree on whether the elections related print materials that were seized from the author constituted a “mass media output” that was subject to the “procedure for the production and distribution of mass media outputs” established by the Law on Press and Other Mass Media. In particular, the author contests the applicability of a requirement of having a contractual agreement with the editorial board or the publisher of a newspaper in order to distribute photocopies of an article published in one of its issues. Secondly, the Committee notes that from the material on file, it transpires that the Khoyniki District Court of the Gomel region based its findings only on the absence of the said contractual agreement with the editor or publisher of the newspaper *People’s Will*.

9.5 The Committee considers that, even if the sanctions imposed on the author were permitted under national law, the State party has not advanced any argument as to why they were necessary for one of the legitimate purposes set out in article 19, paragraph 3, of the Covenant. It further notes that the State party has not explained why the breach of the requirement to have a contractual agreement with the editorial board or the publisher of a newspaper in order to distribute photocopies of an article published in one of its issues involved pecuniary sanctions, and the seizure and partial destruction of the leaflets in question. It finally notes that the author has submitted to the Gomel Regional Court and the Supreme Court a copy of the letter from the chief editor of *People’s Will* dated 3 December 2004, stating that the editorial board did not object to the copying of the articles published in the newspaper by the author. The Committee concludes that in the absence of any pertinent explanations from the State party, the restrictions of the exercise of the author’s right to impart information, cannot be deemed necessary for the protection of national security or of public order (*ordre public*) or for respect of the rights or reputations of others. The Committee therefore finds that the author’s rights under article 19, paragraph 2, of the Covenant have been violated in the present case.

10. 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 by Belarus of article 19, paragraph 2, of the Covenant.

11. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including reimbursement of the value of the fine as at the situation of November 2004 and any legal costs incurred by the author, as well as compensation. The State party is also under an obligation to take steps to prevent similar violations in the future.

12. 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

¹⁴ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40, vol. I (A/66/40 (Vol. I)), annex V, para. 2.*

¹⁵ *Ibid.*, para. 22.

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 effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[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.]
