



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 1989/2010

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

<i>Submitted by:</i>	E.V. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	29 June 2010 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 27 September 2010 (not issued in a document form)
<i>Date of adoption of decision:</i>	30 October 2014
<i>Subject matter:</i>	Right not to be subjected to inhuman or degrading treatment; right to a fair trial
<i>Substantive issues:</i>	Inhuman or degrading treatment; fair trial
<i>Procedural issues:</i>	State party's failure to cooperate; exhaustion of domestic remedies; substantiation of claims
<i>Articles of the Covenant:</i>	10, para. 1, and 14, para. 1
<i>Articles of the Optional Protocol:</i>	2 and 5, para. 2 (b)



## 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. 1989/2010\* \*\***

*Submitted by:* E.V. (not represented by counsel)  
*Alleged victim:* The author  
*State party:* Belarus  
*Date of communication:* 29 June 2010 (initial submission)

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

*Meeting on 30 October 2014,*

*Adopts the following:*

#### **Decision on admissibility**

1. The author of the communication is E.V., a Belarusian national born in 1987. He claims to be a victim of a violation by Belarus of his rights under articles 10, paragraph 1, and 14, paragraph 1, of the International Covenant on Civil and Political Rights.<sup>1</sup>

#### **The facts as submitted by the author**

2.1 On 25 March 2008, at around 6 p.m., the author passed by a peaceful demonstration in the centre of Minsk. The police formed a chain around the participants of the demonstration and arrested a number of them. The author was also arrested. At 7 p.m., he was brought to the Department of Internal Affairs of Sovetsky District and issued with an official record for having committed an administrative offence (participation in an unauthorized meeting). On 26 March 2008, at around 5 a.m., he was transferred to a pretrial detention centre. Thereafter, at noon, he was taken to the Zavodskoy District Court. The court hearing was held on the same day between 1.45 p.m. and 2.10 p.m. From the moment of his detention on 25 March 2008 until his release the next day after the hearing at around 2 p.m., the author was deprived of water and food.

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\* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Christine Chanet, Ahmad Amin Fathalla, Cornelis Flinterman, Yuji Iwasawa, Walter Kälin, Gerald L. Neuman, Sir Nigel Rodley, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Varzelashvili, Margo Waterval and Andrei Paul Zlătescu.

\*\* A joint opinion by Committee members Yuval Shany, Dheerujlall B. Seetulsingh and Fabián Omar Salvioli is appended to the present decision.

<sup>1</sup> The Optional Protocol entered into force for the State party on 30 December 1992.

2.2 During the trial before the Zavodskoy District Court, the two police officers who had arrested the author on 25 March 2008 testified to having detained him during the demonstration. According to the author, neither of them could testify that they actually saw him participating in the demonstration, but only that he had been “handed over” to them by other police officers to be brought to the police station. Nevertheless, on 26 March 2008, the District Court found him guilty of having committed an administrative offence under article 23.34, paragraph 1, of the Code of Administrative Offences for participating in an unsanctioned mass event and fined him in the amount of 700,000 Belarusian roubles.<sup>2</sup>

2.3 The author claims that he had requested the district court to ensure the participation of a representative, as he was a student and could not afford one. The court declined his request, invoking article 4.3 of the Procedural-Executive Code of Administrative Offences, as the author did not fall within the category of persons who, under the law, were to be represented by a “lawful representative”.<sup>3</sup> The author also requested the court to question a particular witness, but his request was rejected with the explanation that the witness in question was detained on the basis of the same offence.

2.4 On 3 April 2008, the author appealed the judgment of 26 March 2008 of the District Court to the Minsk City Court, claiming that the judgement of the District Court was unlawful, noting, *inter alia*, that the presence of his representative had not been assured during the hearing. His appeal was dismissed on 15 April 2008. The Minsk City Court ruled that the author’s guilt was established on the basis of the corroborating evidence gathered and on the witnesses’ testimonies. It also concluded that under article 4.3 of the Procedural-Executive Code of Administrative Offences, the author did not fall under those categories of persons who, under the law, were to be provided with a lawful representative, and noted that he had not requested the participation of his legal representative, *i.e.* a lawyer, in line with the requirements as set out in article 4.5 of the Code.<sup>4</sup> The author explains that he did not avail himself of the possibility to appeal that decision within the supervisory review procedure, as in Belarus such a review is conducted by a single official, who does not even examine the case file, and therefore the procedure is not an effective remedy.

### **The complaint**

3.1 The author claims to be a victim of a violation by the State party of his rights under article 10, paragraph 1, of the Covenant, on account of the fact that he was apprehended and detained without food and water for 19 hours.

3.2 He also claims to be a victim of a violation of his rights under article 14, paragraph 1, of the Covenant, since the first instance court dismissed his request to ensure the participation of a “representative” and to question a particular witness who could testify in the author’s defence.

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<sup>2</sup> Pursuant to article 23.34 of the Code of Administrative Offences, a person may be issued a warning, fined in an amount of up to 50 minimum monthly wages or an administrative arrest (*i.e.* detention) may be imposed.

<sup>3</sup> Art. 4.3 provides for, among others, that lawful representation within administrative proceedings must be ensured to special category of persons such as to minors and persons with restricted legal capacity. Article 4.5 of the same Code regulates access to a defence lawyer, to be differentiated from the “lawful representative” as mentioned above.

<sup>4</sup> Art. 4.5 states that a counsel or a representative of a natural person within administrative proceedings may be, *inter alia*, a legal counsel, who is a citizen of Belarus, or a close relative and s/he is authorized to act on behalf of that person by a power of attorney written in a free form and, in the case of a counsel, also has a legal counsel’s certificate.

**State party's observations on admissibility**

4.1 In a note verbale dated 6 January 2011, the State party conveyed, with regard to the present communication and several other communications before the Committee, *inter alia*, its concern about unjustified registration of communications submitted by individuals under its jurisdiction who, it considers, have not exhausted all available domestic remedies in the State party, including appealing to the Prosecutor's Office for a supervisory review of a judgement having the force of *res judicata*, in violation of article 2 of the Optional Protocol to the Covenant. It submits that the present communication and several other communications were registered in violation of the provisions of the Optional Protocol; that there are no legal grounds for the State party to consider those communications; and that any decision taken by the Committee on such communications will be considered legally invalid. It further states that any references in that connection to the Committee's long-standing practice are not legally binding on it.

4.2 By a letter of 19 April 2011, the Chair of the Committee informed the State party that, in particular, it is implicit in article 4, paragraph 2, of the Optional Protocol to the Covenant that a State party must provide the Committee with all the information at its disposal. Therefore, the State party was requested to submit further observations as to the admissibility and the merits of the case. The State party was also informed that, in the absence of observations from the State party, the Committee would proceed with the examination of the communication based on the information available to it.

4.3 By note verbale of 5 October 2011, the State party submitted, *inter alia*, with regard to the present communication, that it believed that there were no legal grounds for its consideration, insofar as it was registered in violation of article 1 of the Optional Protocol to the Covenant. It maintains that the author has failed to exhaust all available domestic remedies and has failed to appeal to the Prosecutor's Office under the supervisory review procedure.

4.4 In a note verbale dated 25 January 2012, the State party submitted that upon becoming a party to the Optional Protocol, it had agreed under article 1 thereof to recognize the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction, who claim to be victims of a violation by the State party of any rights protected by the Covenant. It notes, however, that that recognition was undertaken in conjunction with other provisions of the Optional Protocol, including those establishing the criteria regarding petitioners and the admissibility of their communications, in particular articles 2 and 5. The State party maintains that, under the Optional Protocol, States parties have no obligation to recognize the Committee's rules of procedure, nor its interpretation of the provisions of the Optional Protocol, which could only be effective when done in accordance with the Vienna Convention on the Law of Treaties. It submits that, in relation to the complaint procedure, States parties should be guided first and foremost by the provisions of the Optional Protocol and that references to the Committee's long-standing practice, methods of work and case law are not subjects of the Optional Protocol. It also submits that any communication registered in violation of the provisions of the Optional Protocol will be viewed by the State party as incompatible with the Optional Protocol and will be rejected without comments on the admissibility or merits, and any decision taken by the Committee on such rejected communications will be considered by its authorities as "invalid". The State party considers that the present communication, as well as several other communications before the Committee, were registered in violation of the Optional Protocol.

## Issues and proceedings before the Committee

### *The State party's lack of cooperation*

5.1 The Committee notes the State party's assertion that there are no legal grounds for consideration of the author's communication, insofar as it was registered in violation of the provisions of the Optional Protocol; that it has no obligation to recognize the Committee's rules of procedure, nor the Committee's interpretation of the provisions of the Optional Protocol; and that any decision taken by the Committee on the present communication will be considered "invalid" by its authorities.

5.2 The Committee recalls that under article 39, paragraph 2, of the Covenant, it is empowered to establish its own rules of procedure, which States parties have agreed to recognize. It further observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and art. 1 of the Optional Protocol). Implicit in a State's adherence to the Optional Protocol is the undertaking to cooperate with the Committee in good faith, so as to permit and enable it to consider such communications and, after examination thereof, to forward its Views to the State party and the individual (art. 5, paras. 1 and 4). It is incompatible with those obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.<sup>5</sup> It is up to the Committee to determine whether a communication should be registered.

### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

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

6.3 In the context of the author's claim under article 10, paragraph 1, of the Covenant, the Committee notes that the State party has challenged the admissibility of the communication on grounds of non-exhaustion of domestic remedies, as the author has not appealed to the Prosecutor's Office under the supervisory review procedure. In that regard, the Committee recalls its jurisprudence, according to which a petition for supervisory review to a Prosecutor's Office, allowing court decisions that have taken effect to be reviewed, does not constitute a remedy which has to be exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.<sup>6</sup> In the meantime, however, the Committee notes that in the present case the author has not submitted any information or documents to demonstrate that he has ever complained at the domestic level about the alleged inhuman or degrading conditions during his detention on 25 and 26 March 2008, and with what result. In those circumstances, and in the absence of any further information on file, the Committee declares that part of the communication inadmissible pursuant to article 5, paragraph 2 (b), of the Optional Protocol to the Covenant.

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<sup>5</sup> See, for example, communication No. 869/1999, *Piandiong et al. v. the Philippines*, Views adopted on 19 October 2000, para. 5.1.

<sup>6</sup> See communication No. 1873/2009, *Alekseev v. the Russian Federation*, Views adopted on 25 October 2013, para. 8.4.

6.4 As to the author's claims under article 14, paragraph 1, of the Covenant that he was found guilty of having committed an administrative offence and fined in the absence of a representative, and that his request to question a particular witness was dismissed by the court, the Committee recalls that the right to a fair and public hearing by a competent, independent and impartial tribunal is guaranteed in cases regarding the determination of criminal charges against individuals or of their rights and obligations in a suit at law. It further recalls that criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion, however, may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity. In that respect, the Committee notes that the concept of a "criminal charge" bears an autonomous meaning, independent of the categorizations employed by the national legal system of States parties, and has to be understood within the meaning of the Covenant. Leaving States parties the discretion to transfer the decision over a criminal offence, including the imposition of punishment, to the administrative authorities and thus avoid the application of the fair trial guarantees under article 14, might lead to results incompatible with the object and purpose of the Covenant.<sup>7</sup>

6.5 The issue before the Committee is, therefore, whether article 14 of the Covenant is applicable in the present communication, that is, whether the sanctions in the author's case related to his participation in the unsanctioned mass event on 25 March 2008 concerned "any criminal charge" within the meaning of the Covenant. As to the conditions of "purpose and character" of the sanctions, the Committee notes that, although administrative according to the law of the State party, the sanctions imposed on the author under article 23.34 of the Code of Administrative Offences had the aim of repressing, through penalties, the offences alleged against him and of serving as a deterrent to others – objectives analogous to the general goal of the criminal law. In that regard, the Committee notes that article 23.34 of the Code includes as a sanction "administrative arrest" (i.e. detention). It further notes that the rules of law infringed by the author are directed, not towards a given group possessing a special status – in the manner, for example, of disciplinary law – but towards everyone in his or her capacity as individuals participating in unsanctioned mass events. They prescribe conduct of a certain kind and make the resultant requirement subject to a sanction that is punitive. Therefore, the general character of the rules and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of article 14 of the Covenant, criminal in nature.<sup>8</sup>

6.6 Consequently, the Committee concludes that the proceedings finding the author guilty of an administrative offence on account of his participation in the unsanctioned mass event on 25 March 2008, fall within the ambit of "the determination" of a "criminal charge" under article 14, paragraph 1, of the Covenant.<sup>9</sup>

6.7 As to the author's claim that, during the administrative proceedings before the Zavodskoy District Court he was not provided with a representative, in spite of his request, the Committee observes that the trial court examined his request for a representation, but concluded that, under article 4.3 of the Procedural-Executive Code of Administrative Offences, the author did not belong to one of the categories of persons whose interests were to be represented by a "lawful representative" and notes that he had not requested the participation of his representative in line with the procedure set out in article 4.5 of the Code. Accordingly, and in the absence of any other pertinent information on file, the

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<sup>7</sup> See for example communication No. 1311/2004, *Osiyuk v. Belarus*, Views adopted on 30 July 2009, para. 7.3.

<sup>8</sup> *Ibid.*, para. 7.4.

<sup>9</sup> *Ibid.*, para. 7.5.

Committee considers that this part of the communication is inadmissible for lack of substantiation under article 2 of the Optional Protocol to the Covenant.

6.8 As to the author's remaining claim concerning the allegedly unjustified refusal to question a particular witness, the Committee notes that the author has not provided any further explanation regarding the relevance of the witness to his case. In particular, the author has not provided any information as to how and what exactly this witness could have affirmed in his defence, as well as how the questioning of that witness in court could have affected the final finding of the court concerning the author's guilt. In those circumstances, the Committee considers that the author has failed to sufficiently substantiate his claim under article 14 of the Covenant and declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7. Therefore, the Human Rights Committee decides that:

- (a) The communication is inadmissible, pursuant to articles 2 and 5, paragraph 2 (b), of the Optional Protocol;
- (b) The present decision shall be communicated to the author and to the State party.

## Appendix

[Original: English]

### **Joint opinion of Committee members Yuval Shany, Dheerujlall B. Seetulsingh and Fabian Salvioli (dissenting)**

1. We believe that the majority on the Committee erred in finding the communication inadmissible with respect to the author's claim that he was denied the right to summon a defence witness for the following reasons.

2. The author was arrested on 25 March 2008 and convicted on the following day for committing an administrative offence (participation in an unauthorized demonstration), which falls within the ambit of the determination of a criminal charge under article 4, paragraph 1, of the Covenant. He claimed in his defence that he did not participate in the demonstration, but merely passed by it. He was precluded from summoning a witness that could have testified in his defence. The first instance court explained the decision not to allow the author to summon his defence witness by noting that the witness was detained on the same offence. The second instance court explained that summoning the witness was not necessary, since the author's guilt was established by the testimonies of the two police officers who had detained him (who did not actually see him participating in the demonstration) and by corroborating evidence.

3. Under article 14, paragraph 3 (e), of the Covenant, everyone has the right to "obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". Although this right is not absolute and is restricted to witnesses whose testimony is "relevant for the defence",<sup>a</sup> nothing in the case file suggests that the courts in the State party have denied the author's request to summon witnesses for lack of relevance. Instead, the two courts invoked other reasons for their decisions – namely, the detention of the witness on the same offence and the strong evidence against the author – reasons that cannot be justified under the Covenant.

4. The majority based its decision to dismiss the communication on the inability of the author to substantiate his claim of a violation of article 14, paragraph 3 (e), of the Covenant, because he "has not provided any further explanations regarding the relevance of the witness to his case. In particular, the author has not provided any information as to how and what exactly this witness could have affirmed in his defence, as well as how the questioning of that witness in court could have affected the final finding of the court concerning the author's guilt." We disagree with that approach, since we are of the view that, except where a defendant seeks to summon a clearly irrelevant witness, it is for the State party to invoke valid reasons for preventing the summoning of defence witnesses. That latter burden was not met in the present case. Instead, the aforementioned reasons cited by the reviewing courts for denying the author's request, strongly suggest that the decision was not based on lack of relevance, but on other considerations.

5. Even if one were to accept the majority approach that the author carries an initial burden of showing the relevance of the requested witness to his defence, the Committee could have resorted to its power under rule 86, paragraph 1 (e), of its rules of procedure, to seek from the author a clarification of the facts of the claim (whatever the punishment meted out for the offence might be). We believe such a procedural move would have been particularly justified, since the author was not represented by counsel in the present proceedings.

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<sup>a</sup> See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 39.