



International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 1996/2010

Views adopted by the Committee at its 115th session (19 October-6 November 2015)

<i>Submitted by:</i>	Ivan Kruk (not represented by counsel)
<i>Alleged victims:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	23 December 2009 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 1 November 2010 (not issued in document form)
<i>Date of adoption of Views:</i>	29 October 2015
<i>Subject matter:</i>	Right to freedom of expression
<i>Procedural issues:</i>	State party's failure to cooperate; insufficient substantiation of claims; non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Freedom to seek, receive and impart information; protection against unlawful or arbitrary interference with one's privacy
<i>Articles of the Covenant:</i>	17 and 19 (2)
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

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Annex

Views of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights (115th session)

concerning

Communication No. 1996/2010*

Submitted by: Ivan Kruk (not represented by counsel)

Alleged victims: The author

State party: Belarus

Date of communication: 23 December 2009 (initial submission)

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

Meeting on 29 October 2015,

Having concluded its consideration of communication No. 1996/2010, submitted to it by Ivan Kruk 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 (4) of the Optional Protocol

1. The author is Ivan Kruk, a Belarusian national born in 1944. He claims to be a victim of violations by Belarus of his rights under articles 17 and 19 (2) of the Covenant. The Optional Protocol entered into force for the State party on 30 December 1992. The author is not represented.

The facts as submitted by the author

2.1 On 26 April 2009, the author lent his neighbour the newspapers *Astravetsky vesnik* (Bulletin of Astravetsk) Nos. 1 and 2, *Mirny atom* (Peaceful Atom), *Glotok vozdukha* (Breath of Air) and *Novy chas* (New Hour). Later on, the author's neighbour was apprehended by the police, who confiscated the newspapers. The neighbour explained that he had received the newspapers in question from the author.

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Ahmed Amin Fathalla, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

2.2 On 12 June 2009, the author was summoned to the Ministry of Information, and an official of the Ministry issued a report charging him with an administrative offence under article 22.9, paragraph 2 (Violation of the Law on Mass Media), of the Code of Administrative Offences. The author challenged the legality of the report and claimed that he had given the newspapers to his neighbour to check whether intelligence agencies or law enforcement bodies were carrying out any operative investigation measures on him since, on 30 March 2009, in reply to his written request for information, the State Security Committee had informed him that he had never been subject to any operative investigation measures, including telephone tapping, on the part of State security agencies. The author claimed that the drawing up of the administrative report confirmed that politically motivated surveillance was being carried out on him by intelligence agencies and law enforcement bodies of Ostrovetsk District because of his public stand against corruption and other abuses on the part of officials of Ostrovetsk District.

2.3 The case was subsequently referred to the Ostrovetsk District Court, which, on 26 June 2009, convicted the author of “distribution of printed periodical publications without a publisher’s imprint” in violation of article 22.9, paragraph 2, of the Code of Administrative Offences. The court considered that the author’s distribution of newspapers not bearing the publisher’s imprint required under article 22 of the Law on Mass Media (Imprint data on print media) constituted an administrative offence, and sanctioned him with a fine of 700,000 Belarus roubles. The author submits that the court did not address his claim regarding surveillance by intelligence agencies and law enforcement bodies.

2.4 On 2 July 2009, the author filed a cassation complaint to the Grodnensk Regional Court, in which he reiterated his previous explanations and arguments, and maintained that the facts indicated that he was under constant close supervision by intelligence agencies because of his opposition to the construction of a nuclear power plant in Ostrovetsk District and his democratic views regarding the development of civil society.

2.5 On 5 August 2009, the author submitted additional material for his cassation file, in which he claimed, *inter alia*, that the newspapers in question were not printed periodical publications, and therefore the provisions of the Law on Mass Media were not applicable. He also claimed that he was not the publisher, nor could he be regarded as a distributor, within the meaning of the law; that he could not be held responsible for the occasional lending of print materials in his possession to people he knew; and that he could not have known whether or not the said newspapers complied with the requirements set forth in article 22 of the Law on Mass Media. The author further claimed that he was penalized for his opinions and the freedom to express them, more specifically, for lending his neighbour newspapers to read at his request.

2.6 On 13 August 2009, the Grodnensk Regional Court rejected the author’s cassation request and upheld the decision of the Ostrovetsk District Court of 26 June 2009. The author states that it is beyond his understanding how the loan of newspapers that did not comply with the requirements set out in article 22 of the Law on Mass Media would violate the rights or reputation of other citizens, nor how it would affect national security or public order, public health or morals. He submits that the Grodnensk Regional Court also failed to address his claim regarding arbitrary interference with his privacy by intelligence agencies and law enforcement bodies.

2.7 The author states that, while the Procedural-Executive Code of Administrative Offences provides for an appeal to the Supreme Court against court decisions in cases concerning administrative offences that have entered into force, that is, the supervisory review procedure, he did not avail himself of that remedy. He argues that the supervisory review is dependent on the discretionary power of an official and therefore does not constitute an effective remedy because: (a) it does not result in the re-examination of a case; (b) the application is considered by only one official; (c) requesting case file materials is at

the discretion of the official; and (d) the review procedure takes place in the absence of the interested parties. The author also notes that, according to the Committee's jurisprudence, domestic remedies should not only be available, but also effective. He states that the review of court decisions under the supervisory procedure is at the discretion of a limited category of officials, such as the Prosecutor General or the President of the Supreme Court, and that it is sufficient to avail oneself of the remedy provided by the cassation court to demonstrate the exhaustion of domestic remedies. He submits that that action is confirmed by European Court of Human Rights case law.¹ The author therefore contends that he has exhausted all available and effective domestic remedies.

The complaint

3.1 The author submits that the unwillingness of the courts to consider his claims regarding interference with his private and family life by intelligence agencies and law enforcement bodies constitutes a violation of his rights under article 17 of the Covenant.

3.2 He also claims a violation of his right to freedom of opinion under article 19 (2) of the Covenant, arguing that he was fined for lending his neighbour newspapers that did not bear the publisher's imprint required under article 22 of the Law on Mass Media. The author requests as a remedy compensation for material damages in the amount of 770,000 Belarus roubles, that is, the value of the imposed fine plus court fees.

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, its concern about, inter alia, the unjustified registration of communications submitted by individuals under its jurisdiction who, it considered, had not exhausted all available domestic remedies in the State party, including filing an appeal with the Prosecutor's Office for supervisory review of a judgement having the force of *res judicata*, in violation of article 2 of the Optional Protocol. It submitted that, although it was a party to the Optional Protocol and recognized the Committee's competence under article 1 thereof, it did not consent to the extension of the Committee's mandate; that the present communication was registered by the Committee in violation of the provisions of the Optional Protocol; that there were no legal grounds for the State party to consider it; and that any decision taken by the Committee on this communication would be considered legally invalid. It also stated that any references to the Committee's long-standing practice regarding the registration of communications were not legally binding on it.

4.2 In a letter dated 19 April 2011, the Chair of the Committee informed the State party that, further to article 4 (2) of the Optional Protocol to the Covenant, it was implicit that the State party must provide the Committee with all the information at its disposal. The State party was requested to submit additional observations regarding the admissibility and the merits of the communication. The State party was also informed that, in the absence of observations, the Committee would proceed with the examination of the communication based on the information available to it.

4.3 On 1 November 2011, the State party was again invited to submit its observations on the admissibility and the merits of the communication.

4.4 In a note verbale dated 25 January 2012, the State party reiterated its position on the admissibility of individual communications registered by the Committee and its

¹ The author refers, in this respect, to the decision of the European Court of Human Rights in *Tumilovich v. Russia* (application No. 47033/99), decision of 22 June 1999.

observations of 6 January 2011. It submitted that, upon becoming a party to the Optional Protocol, it had agreed to recognize the Committee's competence, under article 1 thereof, 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 set forth in the Covenant. It noted, however, that that recognition was undertaken in conjunction with other provisions of the Optional Protocol, including those establishing criteria regarding petitioners and the admissibility of their communications, in particular articles 2 and 5 of the Optional Protocol. The State party maintained that, under the Optional Protocol, States parties had 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 submitted 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 were not subjects of the Optional Protocol. It also submitted that any communication registered in violation of the provisions of the Optional Protocol would be viewed by it as being incompatible with the Optional Protocol and would be rejected without comments on the admissibility or the merits, and that any decision taken by the Committee on such rejected communications would be considered by its authorities as "invalid". The State party also reiterated its view that the present communication as well as several other communications before the Committee have been registered in violation of the Optional Protocol.

4.5 On 7 February 2012, the State party was again invited to submit its observations on the admissibility and the merits of the communication, and was informed that, in the absence of additional information, the Committee would examine the communication based on the information available on file.

4.6 In a note verbale dated 14 February 2012, the State party reiterated its position and observations in the note verbale of 25 January 2012.

Author's comments on the State party's observations

5.1 On 21 March 2012, the author submitted that the State party was challenging the Committee's right to develop its rules of procedure, as well as the usual practice of international bodies to develop internal regulations for their functioning. He maintains that the rules of procedure do not contradict the Covenant and are accepted by States parties as stemming from the competency of the Committee. Furthermore, without internal regulations, international bodies would not be able to function.

5.2 The author also submits that, by becoming a party to the Optional Protocol, Belarus recognized not only the Committee's competence to issue decisions regarding the existence or absence of violations of the Covenant, but also recognized, in accordance with article 40 (4) of the Covenant, the Committee's competence to transmit to States parties reports and general comments that it considers appropriate. Under article 2 of the Covenant, the State party is also obliged to ensure that any person within its territory and subject to its jurisdiction has an effective remedy if his or her rights under the Covenant are violated. By accepting the competence of the Committee to determine, in concrete cases, the effectiveness of a particular domestic remedy, the State party has also undertaken to take into consideration the Committee's general comments. The role of the Committee ultimately includes interpreting the provisions of the Covenant and developing jurisprudence. Accordingly, by refusing to recognize the standards, practices, methods of work and precedents of the Committee, Belarus is in effect refusing to recognize the Committee's competence to interpret the Covenant, which contradicts the object and purpose of the Covenant.

5.3 The author submits that, having voluntarily accepted the jurisdiction of the Committee when it became a party to the Covenant and its Optional Protocol, the State party has no right to infringe on the Committee's competence and ignore its authoritative opinions.² The State party is not only obliged to implement the decisions of the Committee, but it is also obliged to recognize its standards, practices, methods of work and precedents. The above argument is based on the most important principle of international law — *pacta sunt servanda* —, according to which every treaty in force is binding upon the parties to it and must be performed by them in good faith.

5.4 Regarding the argument that he has not exhausted all domestic remedies, the author submits that such remedies should be available and effective and that, according to the Committee's practice, an effective remedy is one that provides compensation and offers a reasonable prospect of redress. The author refers to the Committee's consistent jurisprudence that supervisory review is a discretionary review process in former Soviet republics, which does not constitute an effective remedy for the purposes of exhaustion of domestic remedies.³ The author submits that the European Court of Human Rights employs a similar standard⁴ and states that the ineffectiveness of the above-mentioned remedy was confirmed in the recent case of Vladislav Kovalev, who was executed while his application for supervisory review was pending before the Supreme Court.⁵

5.5 The author informs the Committee that, after submitting his complaint to the Committee, he applied to the Supreme Court for a supervisory review of his case and that his appeal was rejected by the Deputy President of the Supreme Court on 24 February 2010. He submits that, one day earlier, on 23 February 2010, Law No. 98-Z of 28 December 2009 on Amendments and Additions to some Codes of the Republic of Belarus Concerning Criminal and Administrative Responsibility entered into force, and the words "distribution of printed periodical publications without a publisher's imprint" in article 22.9, paragraph 2, of the Code of Administrative Offences had been amended to read "illegal production and/or distribution of media products". On that ground, on 23 July 2010 the author filed another appeal with the Supreme Court, requesting it to quash the decision of the Ostrovetsk District Court of 26 June 2009 and to terminate the administrative proceedings against him for lack of corpus delicti in his actions. The Supreme Court rejected that appeal on 30 August 2010.

Issues and proceedings before the Committee

The State party's lack of cooperation

6.1 The Committee notes the State party's assertion that there are no legal grounds for the 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 the decision taken by the Committee on the present communication will be considered by its authorities as "invalid."

² The author refers to the Committee's general comment No. 33 (2008) on the obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, paras. 11-13.

³ The author refers, in this respect, to communication No. 1418/2005, *Iskiyaev v. Uzbekistan*, Views adopted on 20 March 2009.

⁴ The author refers, in this respect, to *Tumilovich v. Russia*.

⁵ See also in this respect, communication No. CCPR/C/106/D/2120/2011, *Kovaleva et al. v. Belarus*, Views adopted on 29 October 2012.

6.2 The Committee recalls that, under article 39 (2) of the Covenant, it is empowered to establish its own rules of procedure, which States parties have agreed to recognize. It 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 to the individual (art. 5 (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 a communication, and in the expression of its Views.⁶ It is up to the Committee to determine whether a communication should be registered. The Committee observes that, by failing to accept the competence of the Committee to determine whether a communication should be registered and by declaring beforehand that it will not accept the Committee's determination on the admissibility or the merits of the communication, the State party is violating its obligations under article 1 of the Optional Protocol.⁷

Consideration of admissibility

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

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

7.3 With regard to the requirement set out in article 5 (2) (b) of the Optional Protocol, the Committee notes that, in its submission of 6 January 2011, the State party challenged the admissibility of the present communication on the grounds of non-exhaustion of domestic remedies, stating that the author had not filed a request for supervisory review with the prosecutor's office. In that regard, the Committee recalls its jurisprudence, according to which petition to a prosecutor's office to initiate the supervisory review of a judgement having the force of *res judicata* does not constitute an effective remedy that has to be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol. The Committee notes that the author states that, before submitting his complaint to the Committee, he did not avail himself of the possibility to appeal to the Supreme Court for a review of the decision of the Grodnensk Regional Court because he considered that such review of a decision that had entered into force did not constitute an effective remedy. The Committee also notes that the State party has not demonstrated that there was a reasonable prospect that such an appeal would have provided an effective remedy in the circumstances of the author's case. It further notes that the appeal that the author subsequently submitted to the Supreme Court for a review of his case was rejected by the Deputy President of the Supreme Court on 24 February 2010. In those circumstances, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from considering the present communication.

⁶ See, inter alia, communications No. 869/1999, *Piandiong et al. v. the Philippines*, Views adopted on 19 October 2000, para. 5.1; and No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, para. 5.2.

⁷ See also communications No. 1949/2010, *Kozlov et al. v. Belarus*, Views adopted on 25 March 2015, paras. 5.1-5.2; No. 1226/2003, *Korneenko v. Belarus*, Views adopted on 20 July 2012, paras. 8.1-8.2; and *Turchenyak et al. v. Belarus*, paras. 5.1-5.2.

7.4 The Committee notes the author's claim that he was under constant close supervision by intelligence agencies and law enforcement bodies because of his civic activism and that such interference with his private and family life constitutes a violation of his rights under article 17 of the Covenant. It also notes that, according to the author, the State Security Committee informed him on 30 March 2009 that he had never been subject to any operative investigation measures, including telephone tapping, on the part of State security agencies. The Committee further notes that, apart from the author's claim, there is no detailed and documented information on file to support those allegations. Accordingly, and in the absence of any other pertinent information in that respect, the Committee considers that the author has failed to sufficiently substantiate this particular claim for the purposes of admissibility and declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.5 The Committee considers that the author has sufficiently substantiated his claim under article 19 (2) of the Covenant for purposes of admissibility. It therefore declares the respective claim admissible and proceeds to its consideration of the merits.

Consideration of the merits

8.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as provided under article 5 (1) of the Optional Protocol.

8.2 The Committee notes the author's claim that, by penalizing him under article 22.9, paragraph 2, of the Code of Administrative Offences, the State party's authorities violated his freedom of expression, as protected under article 19 (2) of the Covenant.

8.3 The first issue before the Committee is whether the administrative fine imposed on the author on 26 June 2009 for lending his neighbour newspapers that did not bear the publisher's imprint, as required under article 22 of the Law on Mass Media, constituted a restriction by the authorities on the author's freedom of expression, in particular, his right to impart information, within the meaning of article 19 (3) of the Covenant.

8.4 The Committee recalls that article 19 (2) of the Covenant requires States parties to guarantee the right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print. The Committee also refers to 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. They are essential for any society and constitute the foundation stone for every free and democratic society (para. 2).

8.5 The Committee notes that article 22 of the Law on Mass Media prescribes the type of information to be reflected in a publisher's imprint. It also notes the author's claim that the newspapers *Astravetsky vesnik* (Bulletin of Astravetsk), Nos. 1 and 2, *Mirny atom* (Peaceful Atom) and *Glotok vozdukha* (Breath of Air) that he lent his neighbour were not periodical publications that fall within the scope of the Law on Mass Media. Without assessing the manner in which the domestic courts have interpreted and applied the said legislation and evaluated the facts and evidence in the author's case, the Committee is of the view that, by imposing on a person who is not a publisher or distributor, the obligation to ensure that newspapers and any other printed periodical publications they possess, read or lend to other persons comply with the requirements set out in article 22 of the Law on Mass Media, the State party restricts their freedom of expression, including their freedom to impart information, as protected under article 19 (2) of the Covenant.

8.6 The second issue before the Committee is whether the restrictions imposed on the author's freedom of expression were justified under any of the criteria set out in article 19

(3) of the Covenant. The Committee observes that article 19 provides for certain restrictions, but only as provided by law and necessary: (a) for respect of the rights and reputations of others; and (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. It recalls that any restrictions on the exercise of such freedoms must conform to the strict tests of necessity and proportionality and 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.⁸ The Committee recalls that, if the State party imposes a restriction, it is up to the State party to show that it is necessary for the purposes set out in article 19 (2) of the Covenant.

8.7 The Committee notes that the State party has not submitted any observations on the merits of the present communication nor any justification or reasons as to why it was necessary, under domestic law and for any of the legitimate purposes set out in article 19 (3) of the Covenant, to require that the author ensure that the newspapers he transmitted to his neighbour comply with the requirements for a publisher's imprint as set out in article 22 of the Law on Mass Media.

8.8 In the circumstances, and in the absence of any information in that regard from the State party justifying the restriction for the purposes of article 19 (3) of the Covenant, the Committee concludes that the author's rights under article 19 (2) of the Covenant, have been violated.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by Belarus of the author's rights under article 19 (2) of the Covenant.

10. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to reimburse any legal costs incurred by the author and the present value of the fine that he was required to pay, together with adequate compensation.⁹ The State party is also under an obligation to take steps to prevent similar violations in the future.

11. 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 and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy where it has been determined that a violation has occurred, the Committee requests the State party to provide, within 180 days, information about the measures taken to give effect to the present 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.

⁸ See the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, para. 22.

⁹ See, for example, communications No. 1830/2008, *Pivonos v. Belarus*, Views adopted on 29 October 2012, para. 11; and No. 1785/2008, *Olechkevitch v. Belarus*, Views adopted on 18 March 2013, para. 10; No. 2103/2011, *Poljakov v. Belarus*, Views adopted on 17 July 2014, para. 12; and No. 1991/2010, *Volchek v. Belarus*, Views adopted on 24 July 2014, para. 9.