



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2955/2017*, **

<i>Communication submitted by:</i>	Konstantin Zhukovsky (represented by counsel, Leonid Sudalenko)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	26 February 2016 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 15 February 2017 (not issued in document form)
<i>Date of adoption of Views:</i>	8 November 2019
<i>Subject matter:</i>	Freedom to impart information; imposition of a fine for unlawful production and distribution of mass media products
<i>Procedural issues:</i>	Exhaustion of domestic remedies; State party's failure to cooperate
<i>Substantive issue:</i>	Freedom of expression
<i>Articles of the Covenant:</i>	2 (2) and (3) (b) and 19
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1. The author of the communication is Konstantin Zhukovsky, a national of Belarus born in 1975. He claims that the State party violated his rights under article 19, read in conjunction with article 2 (2) and (3) (b), of the Covenant. The Optional Protocol entered into force for Belarus on 30 December 1992. The author is represented by counsel.¹

* Adopted by the Committee at its 127th session (14 October–8 November 2019).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Héléne Tigroudja, Andreas Zimmermann and Gentian Zyberi.

¹ The author was not represented during the submission of communication. The authorization was signed on 14 May 2018, when the author submitted his comments to the State party's observations.



The facts as submitted by the author

2.1 The author is a freelance journalist² and a member of the Association of Journalists in Belarus. He collects information in Belarus and disseminates it on the Internet. He submits that in the course of 2015 he was systematically brought before courts and charged with significant administrative fines because of his journalistic activities. He was convicted for the illegal production and distribution of mass media products under article 22.9 of the Code of Administrative Offences³ in relation to the following six separate incidents.

2.2 The first incident occurred on 5 February 2015. The author was interviewing and filming teachers from secondary school No. 12 in the city of Gomel, regarding a murdered child. His video product was disseminated via the Internet and aired on the Polish satellite channel Belsat. Subsequently, a police report was filed against the author, charging him with a violation of article 22.9 (2) of the Belarus Code on Administrative Offences.⁴ On 2 April 2015, the Zheleznodorozhny District Court of the city of Gomel found that the author had violated article 17 of the law on mass media of 2008 and fined him 5,400,000 Belarus roubles.⁵ On 20 May 2015, the Gomel Regional Court rejected the author's appeal, upholding the lower court's decision.

2.3 The second incident occurred on 12 March 2015. The author was interviewing and filming local residents of the village Buda-Golovchitskaya of the Gomel region regarding housing and communal services. The video product was disseminated via the Internet and aired on the Polish satellite channel Belsat. On 24 April 2015, the Central District Court of the city of Gomel found the author guilty of a violation of the law on mass media and fined him 5,400,000 Belarus roubles.⁶ On 29 May 2015, the author's appeal was rejected by the Gomel Regional Court.

2.4 The third incident occurred on 24 March 2015, when the author was interviewing and filming local residents of the village Cheretyanka on issues faced by Christians. The video product was disseminated via the Internet and aired on the Polish satellite channel Belsat. Subsequently, an administrative record was filed against the author and he was charged with a violation of article 22.9 of the Belarus Code on Administrative Offences based on the law on mass media. On 22 May 2015, the Gomel District Court fined him 4,500,000 Belarus roubles.⁷ On 17 June 2015, the Gomel Regional Court rejected the author's appeal and upheld the decision of the court of first instance. The author appealed through the supervisory review procedure to the Chair of the Gomel Regional Court and the Chair of the Supreme Court, but his appeals were dismissed on 7 September and 26 October 2015, respectively. On 12 November 2015, the author filed an appeal with the Prosecutor-General of Belarus under the supervisory review procedure, but the appeal was dismissed on 10 December 2015 and 15 February 2016.⁸

2.5 The fourth incident occurred on 4 April 2015. The author was interviewing and filming local residents on the housing and communal services in the village Zabolote, Buda-Koshelevsky district of the Gomel region. The video product was disseminated via the Internet and aired on the Polish satellite channel Belsat. An administrative record was filed against the author, charging him with a violation of article 22.9 of the Belarus Code on Administrative Offences. On 5 June 2015, the Buda-Koshelevsky District Court of the city of Gomel fined him 3,600,000 Belarus roubles.⁹ On 12 June 2015, the author appealed to the Gomel Regional Court, but his appeal was rejected on 1 July 2015. On unspecified dates, the author appealed under the supervisory review procedure to the Chair of the Gomel Regional Court and to the Chair of the Supreme Court of Belarus. His appeals were

² Freelancers are not acknowledged as foreign mass media journalists and, as a result, they cannot get accreditation from the Ministry of Foreign Affairs. Article 35 (4) of the law on mass media prohibits the carrying out of journalistic activities for foreign mass media without accreditation.

³ The author contributed as a journalist to Polish Belsat, a foreign mass media company, thus violating the law as he was working without accreditation.

⁴ Article 22.9 (2) of the Belarus Code of Administrative Offences establishes liability for illegal production and distribution of mass media products.

⁵ The equivalent of approximately \$367 on the day of the court ruling.

⁶ The equivalent of approximately \$377 on the day of the court ruling.

⁷ The equivalent of approximately \$314 on the day of the court ruling.

⁸ The second dismissal was signed by the Prosecutor-General.

⁹ The equivalent of approximately \$236 on the day of the court ruling.

dismissed on 7 September and 22 October 2015, respectively. On 27 October 2015, the author filed a complaint under the supervisory review procedure against the decision of the Buda-Koshelevsky District Court to the General Prosecutor, but his appeal was dismissed on 1 December 2015.¹⁰

2.6 The fifth incident occurred on 15 April 2015. The author was interviewing and filming the local residents regarding a university teacher who committed suicide. The video product on this subject was disseminated via the Internet and aired on the Polish satellite channel Belsat. An administrative record was filed by the police against the author, charging him with a violation of article 22.9 of the Belarus Code on Administrative Offences. On 9 June 2015, the Central District Court of the city of Gomel fined the author 5,400,000 Belarus roubles.¹¹ On 12 June 2015, the author appealed to the Gomel Regional Court, which rejected the appeal on 10 July 2015, upholding the lower court's decision. On an unspecified date, the author filed a complaint against the decision of the Central District Court to the General Prosecutor, who dismissed the complaint on 18 January 2016.¹²

2.7 The sixth incident occurred on 12 May 2015. The author was interviewing and filming local residents of Rogachev city of the Gomel region on difficulties faced by the local milk producers in distributing their products. His video product was disseminated via the Internet and aired on the Polish satellite channel Belsat. Subsequently, an administrative record was filed against the author by the police, charging him with a violation of article 22.9 (2) of the Belarus Code on Administrative Offences. On 2 July 2015, the Buda-Koshelevsky District Court of the city of Gomel found that the author had violated article 17 of the law on mass media and fined him 6,300,000 Belarus roubles.¹³ On an unspecified date, the author appealed under the supervisory review procedure to the Chair of the Gomel Regional Court and the Chair of the Supreme Court of Belarus. Those appeals were dismissed on 7 September and 23 October 2015, respectively.¹⁴ On 12 November 2015, the author, under the supervisory review procedure, filed a complaint against the decision of the Gomel District Court to the General Prosecutor, which was dismissed on 21 December 2015 and 15 February 2016.

2.8 The author submits that the police and courts failed to assess his actions within the scope of article 34 of the Constitution of Belarus, which guarantees the right to receive and disseminate information. In this context, the author argues that the authorities failed to justify whether the limitation of his rights were necessary to ensure respect for the rights or reputations of others, as well as for the protection of national security, public order, public health or morals.

2.9 The author claims that the authorities disregarded article 2 of the law on mass media, which implies that when the rules of a treaty to which Belarus is party are not in line with the rules provided for by this law, the rules of the treaty shall apply.

2.10 The author moreover submits that court decisions in his case were contrary to the provisions contained in the Constitution of Belarus, the law on mass media, article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant.

The complaint

3.1 The author claims that Belarus violated his rights under article 19 read in conjunction with article 2 (2) and (3) (b) of the Covenant. He claims that by filming videos and disseminating them, he was exercising his right to obtain and impart information without undermining public order, public interest, health, or the rights and freedoms of others.

¹⁰ At the time of initial submission, the author had not received a reply from the General Prosecutor's Office. The State party's observation confirmed the rejected appeal.

¹¹ The equivalent of approximately \$351 on the day of the court ruling.

¹² The State party, in its observations, noted that the author's appeal to the Supreme Court was also dismissed on 22 October 2015.

¹³ The equivalent of approximately \$411 on the day of the court ruling.

¹⁴ The State party observed that earlier, on 31 July 2015, the author's appeal was also dismissed by the Gomel Regional Court.

3.2 The author requests the Committee to recommend that the State party bring the provisions of the law on mass media into line with its international obligations under the Covenant.

State party's observations on admissibility

4.1 On 20 February 2017, the State party submitted its observations and commented on each of the six incidents presented by the author. In this context, the State party reiterates the dates for dismissal of the author's court appeals, including those reviewed under the supervisory procedures. The State party submits that the author was convicted for unlawful production and dissemination of mass media products, in violation of article 22.9 of the Code of Administrative Offences, and he was subjected to a fine for each incident.

4.2 The State party notes that the author has failed to exhaust all domestic remedies, particularly with regard to two incidents when he did not complain under the supervisory review procedure to the Supreme Court and Prosecutor-General.¹⁵

4.3 The State party concludes that the author's claims of violation of article 19, in conjunction with article 2 (2) and (3), of the Covenant are groundless. According to the State party, the provisions of the law on mass media that relate to regulating the dissemination of foreign media products shall not be considered as a limitation of the rights within the scope of article 19 of the Covenant.

Authors' comments on the State party's observations

5.1 In a letter dated 14 May 2018, the author commented on the State party's observations. He submits that he appealed the decisions under the supervisory review proceedings to the Chair of the Supreme Court of Belarus. The appeal, however, was rejected by one of his deputies. In this context, the author argues that the State party failed to explain which of the five deputies should have been addressed in order for the appeal to be reviewed by the Chair of the Court. The author submits that he does not consider the supervisory review procedures to be an effective remedy and adds that no individual complaints to the Constitutional Court are provided under domestic law.

5.2 As to the State party's argument regarding the compatibility of the limitation contained in the national legislation on the freedom of expression with those under article 19 of the Covenant, the author refers to the case law of the Committee and submits that any restriction must conform to the strict tests of necessity and proportionality, and applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.

5.3 The author refers to the jurisprudence where the Committee finds it incompatible with the Covenant that the State party has given priority to the application of its national law over its obligations under the Covenant.¹⁶

5.4 The author finally submits that the courts failed to establish how the restrictions on his right to freedom of expression, although based on the national legislation, were necessary and fall within one of the justifications as prescribed by articles 19 (3) and 21 of the Covenant.¹⁷

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

¹⁵ The reference is made to the first and second incidents, when the author could have submitted his appeal within six months after the court decision took effect.

¹⁶ *Tae Hoon Park v. Republic of Korea* (CCPR/C/64/D/628/1995), para. 10.4.

¹⁷ Although here the author refers specifically to article 21 of the Covenant, this provision was not invoked in his initial communication or in his claims therein.

6.2 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.

6.3 The Committee notes the State party's objection that the author has failed to seek a supervisory review by the Chair of the Supreme Court of the decisions of the domestic courts relating to two of the incidents he was convicted for. The Committee recalls its jurisprudence, according to which a petition to a Prosecutor's Office requesting a review of court decisions that have taken effect does not constitute a remedy that has to be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.¹⁸ It also considers that filing a request for supervisory review to the Chair of a court with regard to court decisions that have entered into force and depend on the discretionary power of a judge constitutes an extraordinary remedy and that the State party must show that there is a reasonable prospect that such requests would provide an effective remedy in the circumstances of the case.¹⁹ In the absence of any information regarding the eventual effectiveness of supervisory review proceedings to the Supreme Court regarding cases of freedom of expression, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

6.4 The Committee further notes the author's claim that his rights under article 19, read in conjunction with article 2 (2), of the Covenant were violated. The Committee recalls its jurisprudence, which indicates that the provisions of article 2 of the Covenant set forth a general obligation for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol.²⁰ The Committee also considers that the provisions of article 2 cannot be invoked as a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim. The Committee notes, however, that the author has already alleged a violation of his rights under article 19, resulting from the interpretation and application of the existing laws of the State party, and the Committee does not consider that an examination of whether the State party also violated its general obligations under article 2 (2) of the Covenant, read in conjunction with article 19, to be distinct from the examination of the violation of the author's rights under article 19. The Committee therefore considers that the author's claims in this regard are incompatible with article 2 of the Covenant, and inadmissible under article 3 of the Optional Protocol.

6.5 The Committee also considers that the author has failed to substantiate his claims under article 19 read in conjunction with article 2 (3) of the Covenant and therefore declares this part of the communication inadmissible.

6.6 The Committee considers that the author has sufficiently substantiated the remaining claims under article 19 of the Covenant for the purpose of admissibility, and therefore proceeds with the consideration of the merits.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information submitted by the parties, in accordance with article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's claim that the courts failed to establish how the restriction on his right to freedom of expression fell within one of the permissible restrictions as prescribed under article 19 (3) of the Covenant. The Committee also notes the author's claim that, in the absence of such justifications, his rights under article 19 (2) of the Covenant were violated.

7.3 The Committee recalls in that respect its general comment No. 34 on the freedoms of opinion and expression, in which it points out, inter alia, that the freedom of expression

¹⁸ *Zhuravlev v. Belarus* (CCPR/C/126/D/2495/2014), para. 7.3; *Alekseev v. Russian Federation* (CCPR/C/109/D/1873/2009), para. 8.4; and *Lazenko v. Belarus* (CCPR/C/112/D/1929/2010), para. 6.3.

¹⁹ *Gelazauskas v. Lithuania* (CCPR/C/77/D/836/1998), para. 7.4; and *Sekerko v. Belarus* (CCPR/C/109/D/1851/2008), para. 8.3.

²⁰ *Poliakov v. Belarus* (CCPR/C/111/D/2030/2011), para. 7.4.

is essential for any society and a foundation stone for every free and democratic society.²¹ It notes that article 19 (3) allows restrictions on the freedom of expression, including the freedom to impart information and ideas, only to the extent that they are provided by law and only if they are necessary (a) for respect of the rights and reputations of others, or (b) for the protection of national security or public order (*ordre public*), or of public health or morals. Finally, any restriction on freedom of expression must not be overly broad in nature – that is, it must be the least intrusive among the measures that might achieve the relevant protective function and must be proportionate to the interest to be protected.²² The Committee recalls that it is for the State party to demonstrate that the restrictions on the author's rights under article 19 of the Covenant were necessary and proportionate.²³

7.4 The Committee notes that the author was sanctioned for filming local residents and distributing video materials via the Internet and through a foreign satellite channel on six separate incidents without a valid accreditation. In all these instances, the author was heavily fined by district courts for illegal production and distribution of mass media products in violation of the law on mass media. The Committee further notes that neither the State party nor the domestic courts have provided any explanations as to how such restrictions were justified pursuant to the conditions of necessity and proportionality as set out in article 19 (3) of the Covenant, and whether the penalties imposed (i.e. the administrative fines), even if based on law, were necessary, proportionate and in compliance with any of the legitimate purposes listed in the mentioned provisions. In these circumstances and in the absence of any explanations by the State party, the Committee concludes that the rights of the author under article 19 (2) have been violated.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of article 19 (2) of the Covenant.

9. Pursuant to 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 take appropriate steps to reimburse any expenses incurred by the author and to provide him with adequate compensation. The State party is also under an obligation to take all steps necessary to prevent similar violations in the future, in particular by reviewing its national legislation and the implementation thereof in order to make it compatible with its obligations to adopt measures able to give effect to the rights recognized by article 19.²⁴

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 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 when it has been determined that a violation has occurred, 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 disseminate them widely in the official languages of the State party.

²¹ General comment No. 34 (2011) on the freedoms of opinion and expression, para. 2.

²² *Ibid.*, para. 34.

²³ *Androsenko v. Belarus* (CCPR/C/116/D/2092/2011), para. 7.3.

²⁴ *Mikhalchenko v. Belarus* (CCPR/C/114/D/1982/2010), para. 10.