



International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 2103/2011

Views adopted by the Committee at its 111th session (7–25 July 2014)

<i>Submitted by:</i>	Vasily Poliakov (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	10 September 2011 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 26 September 2011 (not issued in document form);
<i>Date of adoption of Views:</i>	17 July 2014
<i>Subject matter:</i>	The author was convicted of an administrative offence for distributing "greeting cards"
<i>Substantive issues:</i>	Freedom to impart information, fair trial, effective remedy
<i>Procedural issues:</i>	Non-exhaustion
<i>Articles of the Covenant:</i>	14 (para. 1); 19 (para. 2); 2 (para. 2)
<i>Articles of the Optional Protocol:</i>	2; 5 (para. 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 (111th session)

concerning

Communication No. 2103/2011*

Submitted by: Vasily Poliakov (not represented by counsel)
Alleged victim: The author
State party: Belarus
Date of communication: 10 September 2011 (initial submission)

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

Meeting on 17 July 2014,

Having concluded its consideration of communication No. 2103/2011, submitted to the Human Rights Committee by Vasily Poliakov 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 pursuant to article 5, paragraph 4 of the Optional Protocol

1. The author of the communication is Vasily Poliakov, a Belarusian national born in 1969. He claims to be a victim of violations by Belarus of his rights under article 14, paragraph 1, article 19, paragraph 2, and article 2, paragraph 2, in conjunction with articles 14 and 19 of the International Covenant on Civil and Political Rights.¹ The author is unrepresented.

The facts as presented by the author

2.1 On 26 July 2010, the author was distributing among residents of the town of Gomel Independence Day greeting cards, printed by the United Democratic Forces political party. He was detained by the police, who issued a protocol (official report), charging him with an

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Christine Chanet, Cornelis Flinterman, Yuji Iwasawa, Walter Kälin, Zonke Zanele Majodina, Gerald L. Neuman, Sir Nigel Rodley, Víctor Manuel Rodríguez Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili, Margo Waterval and Andrei Paul Zlătescu.
The text of an individual opinion by Committee member Fabián Omar Salvioli (concurring) is appended to the present Views.

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

administrative offence under article 22.9, paragraph 2, of the Administrative Offences Code of Belarus, namely, illegally distributing “mass media production” in violation of article 1, paragraph 20, and article 17 of the Law on Mass Media.² Subsequently the case was brought before the Central Regional Court in Gomel, which, on 24 September 2010, convicted the author for the above-mentioned offence³ and sentenced him to pay a fine of 1,050,000 Belarusian roubles.

2.2 On 29 September 2010, the author appealed the verdict before the District Court of Gomel, which on 27 October 2010 rejected his appeal. On 28 December 2010, a subsequent supervisory review by the Supreme Court confirmed the verdict. The author submits that he did not attempt to apply to the General Prosecutor’s Office for supervisory review since he does not consider it to be an effective remedy, and refers to the Human Rights Committee’s jurisprudence on the matter. He also submits that the domestic legislation currently does not allow private citizens to file complaints with the Constitutional Court. The author contends that he has exhausted all available and effective domestic remedies.

The complaint

3.1 The author submits that article 22.9, paragraph 2, of the Administrative Offences Code refers to the Law on Mass Media, which defines mass media as a type of periodic distribution of information in printed form, through television or radio transmissions or via the Internet. He maintains that the printed cards that he was distributing constituted a one-off, not periodic, publication and that he was therefore convicted in violation of domestic legislation. He submits that by failing to follow the law, the courts of Belarus violated his rights under article 14, paragraph 1, of the Covenant.

3.2 The author further maintains that the authorities failed to justify the limitation of his freedom to distribute information as required by article 19, paragraph 3, of the Covenant. He makes reference to the Committee’s views in *Laptsevich v. Belarus*, where the Committee stated that “even if the sanctions imposed on the author were permitted under domestic law, the State party must show that they were necessary for one of the legitimate aims set out in article 19, paragraph 3”.⁴

3.3 The author refers to articles 26 and 27 of the Vienna Convention on the Law of Treaties, in which it is established that a State party may not invoke the provisions of its internal law as a justification for its failure to fulfil treaty obligations, and to article 15 of the Law on International Treaties of the Republic of Belarus, which according to the author states that the provisions of international treaties that have entered into force in Belarus constitute part of the applicable law of the land. The author further refers to article 19 of the Covenant and maintains that his detention and subsequent conviction for distributing the greeting cards violated his rights under that article, and that the authorities failed to give precedence to the norms of the international treaty over the domestic law. He concludes that, by not giving precedence to the Covenant rules, the authorities of the State party violated their obligation under article 2, paragraph 2, in conjunction with articles 14 and 19, of the Covenant.

² Law on Mass Media of the Republic of Belarus, No. 427-Z of July 17, 2008. Available from <http://law.by/main.aspx?guid=3871&p0=H10800427e>.

³ According to the decisions, enclosed with the communication, of the Central Regional Court and of the Supreme Court, dated, respectively, 24 September 2010 and 28 December 2010, it appears that essentially the author was convicted for distributing “greeting cards” printed by a political party that had not been registered in accordance with the domestic legislation. The Central Regional Court decision against the author refers to article 38, paragraph 1, of the Law on Mass Media. The text of the law is available from <http://law.by/main.aspx?guid=3871&p0=H10800427e>.

⁴ Communication No. 780/1997, *Laptsevich v. Belarus*, Views adopted on 20 March 2000, para. 8.3.

State party's observations on admissibility

4. On 28 November 2011, the State party submitted that there were no legal grounds for the consideration of the communication, either on admissibility or on the merits, since it had been registered in violation of article 1 of the Optional Protocol. It also maintained that the author had not exhausted all the available domestic remedies as required by article 2 of the Optional Protocol in that he did not file requests with the prosecutor's offices for supervisory review of the 28 December 2010 decision of the Supreme Court.

Author's comments on admissibility

5. On 5 January 2012, the author commented on the State party's submission. He reiterates that he did not address a request to the prosecution because he does not consider that such a request constitutes an effective legal remedy. He further submits that such remedies should be available and effective and that, according to the Committee's practice, an effective remedy is one that can provide the author with compensation and offer him a reasonable prospect of redress. The author refers to the Committee's consistent jurisprudence that supervisory review is a discretionary review process, limited to issues of legality, which the Committee considers not to constitute an effective remedy for the purposes of exhaustion of domestic remedies. He refers specifically to the Committee's jurisprudence in *Tulzhenkova v. Belarus*,⁵ and further reiterates that private citizens are not allowed to file complaints with the Constitutional Court.

State party's further observations

6. On 25 January 2012, the State party submitted that upon becoming a State party to the Optional Protocol, it had agreed to recognize the competence of the Committee under article 1, but that recognition of competence had been undertaken in conjunction with other provisions of the Optional Protocol, including those that established criteria regarding petitioners and the admissibility of their communications, in particular articles 2 and 5. 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 of the Law on 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 further submitted that any communication registered in violation of the provisions of the Optional Protocol to the Covenant on Civil and Political Rights would be viewed by the State Party as incompatible with the Protocol and would be rejected without comments on the admissibility or the merits. The State party maintained that decisions taken by the Committee on such rejected communications would be considered by its authorities as "invalid".

Further submissions from the author

7.1 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 the 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 as stemming from the competency of the Committee. Furthermore, without internal regulations bodies would not be able to function.

⁵ The author refers to communication 1838/2008, *Tulzhenkova v. Belarus*, Views adopted on 26 October 2011, para. 8.3.

7.2 The author further submits that, by becoming a State 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 in accordance with article 40, paragraph 4, of the Covenant, also recognized the Committee's competence to transmit to the States parties its reports, and such general comments as it may consider 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 also undertook to take into consideration the Committee's general comments. The role of the Committee ultimately includes interpretation of the provisions of the Covenant and development of jurisprudence. By refusing to recognize the standard practices, methods of work and precedents of the Committee, Belarus in effect refuses to recognize its competence to interpret the Covenant, which contradicts the Committee's objective and goals.

7.3 The author submits that, having voluntarily accepted the jurisdiction of the Committee, the State party has no right to infringe on its competence and ignore its opinion.⁶ 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.

7.4 Regarding the argument that he failed to exhaust 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 common in former Soviet republics that does not constitute an effective remedy for the purposes of exhaustion of domestic remedies. He further maintains that the European Court of Human Rights employs a similar standard.⁷ He also maintains that the ineffectiveness of the above-mentioned remedy was confirmed by the recent case of Vladislav Kovalev, who was executed while the Supreme Court was conducting a supervisory review of his case.

Issues and proceedings before the Committee

State party's lack of cooperation

8.1 The Committee notes the State party's assertion that there are no legal grounds for considering the author's communication insofar as it was registered in violation of article 1 of the Optional Protocol and because the author failed to exhaust domestic remedies; that it has no obligation to recognize the Committee's rules of procedure nor its interpretation of the provisions of the Optional Protocol; and that decisions taken by the Committee on the present communication will be considered as "invalid".

8.2 The Committee recalls that under article 39, paragraph 2, of the International Covenant on Civil and Political Rights it has the authority to establish its own rules of

⁶ 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.

⁷ See European Court of Human Rights, *Tumilovich v. Russia*, Application No. 47033/99, decision on admissibility of 22 June 1999.

procedure, which the States parties have agreed to recognize. The Committee further observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights 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). 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 concerned and to the individual (art. 5, paras. 1 and 4). It is incompatible with these 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.⁸ It is up to the Committee to determine whether a communication should be registered. By failing to accept the competence of the Committee to determine whether a communication should be registered and by declaring outright that it will not accept the Committee's determination on the admissibility or the merits of the communications, the State party is violating its obligations under article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights.⁹

Consideration of admissibility

9.1 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.

9.2 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.

9.3 The Committee notes the State party's challenge to the admissibility of the communication on the grounds of non-exhaustion of domestic remedies, namely, the author's failure to petition the prosecutor's offices for supervisory review of the decision handed down by the Supreme Court on 28 December 2010. The Committee recalls its jurisprudence, according to which a petition for supervisory review to a prosecutor's office allowing the review of court decisions that have taken effect does not constitute a remedy which must be exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.¹⁰ Accordingly, it considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining this part of the communication.

9.4 The Committee notes the author's submission that the State party's courts violated his rights under article 14, paragraph 1, of the Covenant since they misinterpreted the definition of mass media provided by the Law on Mass Media and convicted him wrongly. The Committee recalls its jurisprudence in this respect and reiterates that, generally speaking, it is for the relevant domestic courts to review or evaluate facts and evidence in a particular case and to interpret the relevant provisions of domestic laws. The Committee will exercise its powers of review only if it has been ascertained that the evaluation or interpretation was clearly arbitrary or amounted to a denial of justice.¹¹ Based on the

⁸ See communication No. 869/1999, *Piandiong et al. v. Philippines*, Views adopted on 19 October 2000, para. 5.1, and communication Nos. 1867/2009, 1936/2010, 1975/2010, 1977/2010, 1978/2010, 1979/2010, 1980/2010, 1981/2010 and 2010/2010, *Levinov v. Belarus*, Views adopted on 19 July 2012, para. 8.2.

⁹ See *Levinov v. Belarus*, para. 8.2.

¹⁰ Communication No. 1873/2009, *Alekseev v. Russian Federation*, Views adopted on 25 October 2013, para. 8.4.

¹¹ See, inter alia, communications No. 541/1993, *Simms v. Jamaica*, decision of inadmissibility adopted on 3 April 1995, para. 6.2; No. 1212/2003, *Lanzarote Sánchez v. Spain*, decision of inadmissibility

material before it, the Committee considers that the author has not shown sufficient grounds to support his argument that there was such arbitrariness or denial of justice. The Committee, therefore, concludes that this claim is unsubstantiated and thus inadmissible pursuant to article 2 of the Optional Protocol.

9.5 The Committee takes note of the author's submission that the State party violated its obligations under article 2, paragraph 2, of the Covenant, in conjunction with articles 14 and 19, since it had failed to give precedence to the norms of the international treaty over domestic law when evaluating his conviction for distributing greeting cards. The Committee recalls, however, in this connection its general comment No. 31, according to which a State party is allowed, under article 2, to give effect to the Covenant rights in accordance with its own domestic constitutional structure and that it does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law.¹² The Committee therefore considers that the author's claims that the State party must afford the Covenant precedence over domestic law to be incompatible with article 2 of the Covenant and inadmissible under article 3 of the Optional Protocol.

9.6 The Committee considers that the author has sufficiently substantiated his claim under article 19 of the Covenant for purposes of admissibility. Accordingly, it declares this part of the claim admissible and proceeds to its examination on the merits.

Consideration of the merits

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

10.2 The Committee notes the author's allegations that the authorities violated his rights under article 19 of the Covenant. From the material before the Committee, it transpires that the author had been arrested and subsequently convicted and fined for distributing greeting cards printed by a political party that had not been registered in accordance with the domestic legislation. In the Committee's opinion, the above-mentioned actions of the authorities interfere with the author's right to impart information and ideas of all kinds, which is protected under article 19, paragraph 2, of the Covenant.

10.3 The Committee has next to consider whether the restrictions imposed on the author's freedom to impart information are justified under any of the criteria set out in article 19, paragraph 3, of the Covenant. The Committee recalls in that respect its general comment No. 34 (2011), in which it stated, inter alia, that the freedom of expression is essential for any society and a foundation stone for every free and democratic society (para. 2). It notes that article 19, paragraph 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 reputation 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 overbroad in nature,

adopted on 25 July 2006, para. 6.3; and No. 1537/2006, *Gerashchenko v. Belarus*, decision of inadmissibility adopted on 23 October 2009, para. 6.5.

¹² General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 13. The Committee did indicate, however, that: "[It] takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. [It] invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2" (ibid., para. 13).

i.e., it must be the least intrusive among the measures which might achieve the relevant protective function and proportionate to the interest to be protected.¹³

10.4 The Committee observes that in the present case, the prohibition of the distribution of printed materials because they had been printed by a political party which did not have a licence to distribute such materials, the detention of the author for violating the prohibition and the imposition of a significant fine on the author all raise serious doubts as to the necessity and proportionality of the restrictions on the author's rights under article 19 of the Covenant. The Committee further observes that the State party has failed to invoke any specific grounds to support the necessity of the restrictions imposed on the author as required under article 19, paragraph 3, of the Covenant.¹⁴ Nor did the State party demonstrate that the measures selected were the least intrusive in nature or proportionate to the interest that it sought to protect. The Committee considers that, in the circumstances of the case, the limitations imposed on the author, although based on domestic law, were not justified pursuant to the conditions set out in article 19, paragraph 3, of the Covenant. It therefore concludes that the author's rights under article 19, paragraph 2, of the Covenant have been violated.¹⁵

11. 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 the author's rights under article 19 of the Covenant. The State party also breached its obligations under article 1 of the Optional Protocol to the Covenant.

12. In accordance with 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 current value of the fine and any legal costs incurred by the author, as well as compensation. The State party should also ensure that no similar violations occur in the future.

13. 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 or not 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 where 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.

¹³ Ibid., para. 34.

¹⁴ See communication No. 1604/2007, *Zalesskaya v. Belarus*, Views adopted on 28 March 2011, para. 10.5.

¹⁵ See communications No. 927/2000, *Svetik v. Belarus*, Views adopted on 8 July 2004, para. 7.3, and No. 1009/2001, *Shchetko v. Belarus*, Views adopted on 11 July 2006, para. 7.5.

Appendix

Individual opinion of Fabián Omar Salvioli (concurring)

1. I concur with the decision of the Committee in *Poliakov v. Belarus* (communication No. 2103/2011). However, I cannot agree with the reasoning outlined by the Committee in paragraph 9.5, in which it cites general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant as the basis for declaring the claim under article 2, paragraph 2, inadmissible.
2. Paragraph 13 of general comment No. 31 is unfortunate and fails to reflect article 2, paragraph 2, of the Covenant satisfactorily. In that paragraph, the Committee states: “Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law.”
3. Article 2, paragraph 2, of the Covenant states: “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”
4. The clear purpose of article 2, paragraph 2, is to ensure that the rights set forth in the Covenant are safeguarded effectively at the national level. If those rights are not duly protected by legislation at the time of ratification, there is an immediate obligation to adopt national legislation in accordance with the established constitutional processes.
5. Implementation of the Covenant at the national level is fundamental in order to guarantee the rights set forth therein. It is for this reason that, when considering State party reports, the Committee requests examples of the application of the Covenant by the State party’s courts and also draws attention in its concluding observations to the need for the Covenant to be applied by the courts.^a The Committee should not set forth interpretations — either in its general comments or in its Views — that undermine the system of protection provided for under the Covenant.
6. Be that as it may, I understand why, in the present case, the Committee felt it necessary to declare the claim of a violation of article 2, paragraph 2, inadmissible on grounds of the author’s failure to substantiate his allegation.

^a During the same session at which the Views in the present case were adopted, the Committee adopted concluding observations concerning Ireland (CCPR/C/IRL/CO/4, see para. 5 thereof), Japan (CCPR/C/JPN/CO/6, see para. 6 thereof) and Malawi (CCPR/C/MWI/CO/1/Add.1, see para. 5 thereof).