



**International covenant
on civil and political
rights**

Distr.
RESTRICTED*

CCPR/C/91/D/1161/2003
15 November 2007

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Ninety-first session
15 October - 2 November 2007

DECISION

Communication No. 1161/2003

<u>Submitted by:</u>	Mr. Dimitry Kharkhal (represented by the Belarusian Helsinki Committee)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Belarus
<u>Date of communication:</u>	6 February 2003 (initial submission)
<u>Document references:</u>	Special Rapporteur's rules 92/97 decisions transmitted to the State party on 10 February 2003 and 2 April 2003 respectively, not issued in document form.
<u>Date of adoption of decision:</u>	31 October 2007

* Made public by decision of the Human Rights Committee.

Subject matter: Death sentence pronounced after allegedly unfair trial.

Substantive issue: Arbitrary deprivation of life; right to have one's conviction reviewed by a higher tribunal.

Procedural issues: Evaluation of facts and evidence; substantiation of claim

Articles of the Covenant: 6; paragraph 1; 14; paragraph 5

Article of the Optional Protocol: 2

[ANNEX]

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

Ninety-first session

concerning

Communication No. 1161/2003*

<u>Submitted by:</u>	Mr. Dimitry Kharkhal (represented by the Belarusian Helsinki Committee)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Belarus
<u>Date of communication:</u>	6 February 2003 (initial submission)

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

Meeting on 31 October 2007,

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The author of the communication is Mr. Dimitry Kharkhal, a Belarusian national born in 1970, who, at the time of submission of the communication, was awaiting execution in Minsk, pursuant to a death sentence pronounced by the Minsk City Court on 20 March 2002. He claims to be a victim of violations by Belarus of his rights under article 6, paragraph 1; and article 14, paragraph 5, of the Covenant. The author is represented by the Belarusian Helsinki Committee.

1.2 Pursuant to Rule 92 of its Rules of Procedure, while registering the communication on 10 February 2003, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party not to carry out the author's death sentence, pending consideration of his case. On 2 July 2003, the State party informed the Committee that,

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanut, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez - Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

on 24 March 2003, the Belarus Supreme Court had commuted the author's death sentence to 15 years' imprisonment, with confiscation of his property.

The facts as presented by the author

2.1 The author was arrested on 17 September 1997, in St. Petersburg (Russian Federation), at the demand of Belarusian authorities, as a suspect for thefts and other crimes committed in Belarus. He was transferred to Minsk on 18 September 1997. On 21 April 1999, the Minsk City Court sentenced him to 13 years' imprisonment for theft and attempted murder. On 20 March 2002, the same court found him guilty of murdering one Mrs. Puchkovskaya and her acquaintance Grebenkin, on 3 November 1994 in Minsk, and unlawfully taking possession of Puchkovskaya's car, jewellery, and other items. On 30 August 2002, the Supreme Court of Belarus upheld the Minsk City Court's judgment of 20 March 2002 and confirmed the author's death sentence. In March 2003, the author's death sentence was commuted to 15 years' imprisonment by the Supreme Court.

2.2 The author claims that he is innocent, and that although he had planned to unlawfully take possession of Puchkovskaya's car in order to sell it, it was his cousin, Tatarinovich, who actually killed the victims when the author tested the car before taking it, and the victims and his cousin were his passengers.

2.3 According to the author, the Russian authorities handed him over to their Belarus counterparts under the terms of the Commonwealth of Independent States' (CIS) Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal cases (hereafter LAC). Under the LAC's provisions, an individual can only be prosecuted in the receiving country in relation to crimes that are specifically mentioned in the extradition request. To prosecute an individual for crimes others than those listed in the extradition request, the receiving State requires the express agreement of the extraditing State. In the author's case, the extradition request addressed to the Russian authorities did not mention the two murders for which he was convicted in 2002. Thus, he allegedly was unlawfully prosecuted and sentenced to death in this respect.

2.4 The author asserts that his right to have his sentence reviewed by a higher tribunal was violated, as some of the arguments contained in his appeal remained unanswered by the Supreme Court. In particular, he challenges the conclusion of the initial expert report (No. 2667), by which a forensic medical expert affirmed that Grebenkin had died as a result of a single shot gun injury to the head and the neck, which had damaged his brain. The author told the Supreme Court of the existence of another bullet in Grebenkin's body that was not revealed and examined by the expert, and that as a result, the first instance court had been misled when establishing his guilt. The first instance court did not examine this argument because the author raised it only on appeal, as he only then recollected the exact sequence of the events. The Supreme Court, however, did not examine this argument in its decision but instead noted that in his appeal, the author contended that the subsequent experts' conclusions in a complementary expert report contradicted the initial forensic medical expert's conclusions and therefore could not be used for his conviction. According to the author, his appeal was not "examined". Similarly, on the issue of the applicability of the LAC in his case, he contends that the Supreme Court has merely rejected the claim, without providing an argumentation on its merits.

2.5 In light of the above, the author contends that in the event of his execution, Belarus would violate article 6 of the Covenant, by arbitrarily depriving him of his life.

The complaint

3. The author claims that the above facts amount to a violation by Belarus of his rights under article 6, paragraph 1; and article 14, paragraph 5, of the Covenant.

State party's observations

4.1 On 2 July 2003, the State party informed the Committee that on 24 March 2003, the Presidium of the Supreme Court of Belarus had commuted the author's death sentence to 15 years' imprisonment.

4.2 On 1 October 2003, the State party noted that the General Prosecutor's Office had verified the file and established that Mr. Kharkhal was subject to an arrest warrant in 1997, as a suspect for different crimes, including the murders of Ms. Puchkovskaya and Mr. Grebenkin. He was located in St. Petersburg by an official of the Belarus Criminal Search Department (Ministry of Internal Affairs, Minsk City Executive Committee). He agreed to return to Minsk voluntarily.

4.3 Pursuant to part 1 of article 80, of the CIS Legal Assistance Convention, all communications in relation to extradition requests are handled by the General Prosecutors' Offices concerned. In the present case, no such request was ever addressed from the Belarus General Prosecutor's Office to its Russian counterpart, and no extradition proceedings were in fact initiated. Accordingly, the author was lawfully prosecuted in Belarus in relation to the murders he was accused of.

Author's comments

5.1 The author presented comments on 1 August 2006. He maintains that he is innocent and affirms that he was arrested in St. Petersburg by the Russian police at the demand of Belarus authorities, as a theft suspect. According to him, immediately upon his arrest, the Belarus authorities sent an extradition request to the Russian authorities, and this request did not mention any murder charges. He drew the Supreme Court's attention to this issue during the appeal, but the Court rejected the claim. He quotes from the court's decision to the effect that no violation of the law occurred in bringing him to account for the murders after his extradition by the Russian authorities.

5.2 The author invokes the Supreme Court's decision of 11 June 2003, where the court noted that the circumstances of the disappearance of Puchinskaya and Grebenkin only became known after the author's confessions. He reiterates that the CIS Legal Assistance Convention should have been applied in his case, and adds that article 301 of the Criminal Procedure Code delimits the scope of criminal pursuit and provides that the content of the extradition order is also to be taken into account when deciding an individual's criminal liability.

5.3 The author quotes from a judgment of the Supreme Court in relation to one "Sh.", where the court observed that in order to define the scope of criminal jurisdiction, it must not only take into account the charges, but also the content and terms of the extradition order which had been

addressed to the extraditing country. After his extradition, Sh. had been convicted in Belarus of murder committed with particular violence, in a group. The Supreme Court quashed the first instance judgment and excluded the murder with particular violence count, as it had not been listed in the extradition request¹. According to the author, this judgment is wholly pertinent to his own case.

Issues and proceedings before the Committee

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 communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes, as required by article 5, paragraph 2 (a) and (b), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement, and notes that it is uncontested that domestic remedies have been exhausted.

6.3 The Committee has noted the author's claim under article 6 of the Covenant, that after his return from the Russian Federation to Belarus, he was unlawfully charged with murder in Belarus and subsequently sentenced to death, in violation of the CIS Legal Assistance Convention (1993), and that in the event of his execution, the State party would arbitrarily deprive him of his life. The Committee notes however, that the State party's Supreme Court commuted the author's death sentence on 24 March 2003. In these circumstances, it considers that the author's claim has become moot. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.4 As to whether the CIS Legal Assistance Convention should have been applied to the author's case, the Committee notes the apparent contradiction between the author's claim and the information submitted by the State party. In the absence of any other pertinent information or documents in the case file that would allow the Committee properly to evaluate the circumstances of the case, it considers that this part of the communication is insufficiently substantiated, for purposes of admissibility, and therefore inadmissible under article 2, of the Optional Protocol.

6.5 The author claims that the way in which the Supreme Court handled his appeal constituted a violation of article 14, paragraph 5, of the Covenant. The Committee observes that the right to a review of a criminal conviction by a higher tribunal, as secured by article 14, paragraph 5, implies that the tribunal of review adequately addresses those issues that are pertinent, having regard to such reasonable conditions as are applicable to appeals under the State party's laws. Where, as in the present case, the review allows for a re-examination of facts and evidence, the same principle guides the Committee as in other proceedings, namely that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a

¹ It appears from the extracts submitted by the author, that the Belarusian request on Sh.'s extradition mentioned only article 139 part 2, al. 15, of the Criminal Code (murder, committed in a group).

particular case, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was clearly arbitrary or amounted to a denial of justice². In the absence of any other pertinent information indicating that the evaluation of evidence in the case indeed suffered from such deficiencies, the Committee considers that the requirements of article 14, paragraph 5, have been fulfilled and therefore this part of the communication is inadmissible under article 2 of the Optional Protocol.

7. Accordingly, the Committee decides:

- (a) that the communication is inadmissible under article 2 of the Optional Protocol;
- (b) that this decision be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

² See, inter alia, Communication No 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, paragraph 6.2.