



**International covenant
on civil and
political rights**

Distr.
RESTRICTED*

CCPR/C/96/D/1311/2004
21 August 2009

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Ninety-sixth session
13 – 31 July 2009

VIEWS

Communication No. 1311/2004

<u>Submitted by:</u>	Mr. Ivan Osiyuk (not represented by counsel)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Belarus
<u>Date of communication:</u>	11 June 2004 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 21 September 2004 (not issued in document form)
<u>Date of adoption of Views:</u>	30 July 2009

* Made public by decision of the Human Rights Committee.

Subject matter: Administrative proceedings falling within the ambit of “any criminal charge” within the meaning of the Covenant.

Substantive issue: Minimum procedural guarantees of defence in criminal trial.

Procedural issue: Admissibility *ratione materiae*.

Article of the Covenant: 14, paragraphs 3 (b), (d), (e).

Article of the Optional Protocol: 3

On 30 July 2009, the Human Rights Committee adopted the annexed text as the Committee’s Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1311/2004.

[ANNEX]

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

Ninety-sixth session

concerning

Communication No. 1311/2004*

<u>Submitted by:</u>	Mr. Ivan Osiyuk (not represented by counsel)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Belarus
<u>Date of communication:</u>	11 June 2004 (initial submission)

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

Meeting on 30 July 2009,

Having concluded its consideration of communication No. 1311/2004, submitted to the Human Rights Committee by Ivan Osiyuk 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, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Ivan Osiyuk, a Belarusian national born in 1932. He claims to be a victim of a violation by Belarus of article 14 of the International Covenant on Civil and Political Rights. The author is unrepresented. The Optional Protocol entered into force for Belarus on 30 December 1992.

* The following members of the Committee participated in the examination of the present communication: Mr. Mohammed Ayat, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

The facts as presented by the author

2.1 The author is a pensioner who lives in his native settlement of Borisovka (Belarus), which is approximately one kilometre away from the settlement of Godyn (Ukraine). At around 12 p.m. on 26 June 2003, he crossed, by his privately-owned car registered in Belarus, the customs and national frontier between Belarus and Ukraine through, respectively, the Mokransy and Domanovo frontier posts. The purpose of this trip was to visit the relatives of his aunt, who passed away on 7 May 2003. On the way back, allegedly unconsciously and in order to save fuel – the main road where the frontier posts are located takes longer – the author took the road through the forest. The national frontier between Belarus and Ukraine runs through this forest, but no one knows where exactly, because there are no demarcation lines, signs, inscriptions or boundary posts to identify it in any way. The forest road is regularly used by local residents from both sides of the frontier, who go to the forest to collect berries and mushrooms, to graze cattle and to mow grass.

2.2 At around 2 p.m., the author's car was ambushed in the forest by a group of young men with submachine guns, who later introduced themselves as frontier guards from Belarus. They rummaged the car from top to bottom, searching for money and goods, but found nothing. They told him that he had unlawfully crossed the national frontier and asked him to provide written explanations. He was dictated what to write, as he was frightened, confused and suffered from a heart pain. The author claims that he had to be given heartache drugs by guards at the Mokransy frontier post, because he was held at gunpoint under the baking sun for six hours, without even being allowed to relieve himself.

2.3 On the same day, an administrative and customs report in relation to the author was drawn up by a customs inspector of the Mokransy frontier post. He was accused of having committed an administrative and customs offence, envisaged by article 193-6 (movement of goods and means of transport across the customs frontier of the Republic of Belarus in evasion of customs control), of the 1984 Belarus Code on Administrative Offences (Code on Administrative Offences).¹ On an unspecified date, he was also accused of having committed administrative offences, envisaged by articles 184-3 (unlawful crossing of the national frontier of the Republic of Belarus) of the Code on Administrative Offences.

2.4 On 9 July 2003, a judge on administrative cases and enforcement proceedings of the Kobrin District Court found the author guilty of having committed an administrative offence under article 184-3 of the Code on Administrative Offences for unlawfully crossing the national frontier and ordered him to pay 14,000 roubles as fine.² This decision is final and executory.

2.5 On 30 July 2003, a judge of the Moskovsky District Court of Brest found that the author had committed an administrative offence under article 193-6 of the Code on Administrative

¹ The 1984 Belarus Code on Administrative Offences was replaced by the new Code on Administrative Offences as of 1 March 2007.

² The sanction envisaged under article 184-3 of the Code on Administrative Offences is a fine of up to 300 minimal salaries or correctional labour of between two and four months, with up to 20% salary deduction.

Offences for moving the car across the customs frontier of the Republic of Belarus³ in evasion of customs control and ordered him to pay 700,000 roubles as fine, together with the seizure of the author's car (in the value of 6,177,000 roubles). This decision is final and executory.

2.6 On an unspecified date, the author filed a request for supervisory review of the decision of 30 July 2003 with the Brest Regional Court. On 21 August 2003, the acting Chairperson of the Brest Regional Court revoked the decision of the Moskovsky District Court of Brest, because of the misspelling of the author's family name in the decision, and ordered a new hearing of the case by the same court of first instance but by a different judge.

2.7 On an unspecified date, the author received a summons to appear in court on 15 September 2003 for a new hearing of his case, which he duly signed. On an unspecified date, the author filed a written challenge, claiming that the judge who was scheduled to hear his case on 15 September 2003 was not impartial. On an unspecified date, the author's challenge was granted and his case was assigned to a new judge. On at least three occasions the author made telephone inquiries with the registry of the Brest Regional Court as to when the hearing with the newly assigned judge would take place. On each occasion he was told "to wait for a summons to appear in court". However, he never received one, and when he called the registry of the Brest Regional Court yet again, he was told that the new hearing of his case had taken place a week earlier, on 15 September 2003, in his absence.

2.8 On that date, a judge of the Moskovsky District Court of Brest found that the author had committed an administrative offence under article 193-6 of the Code on Administrative Offences for moving the car across the customs frontier of the Republic of Belarus in evasion of customs control and ordered him to pay 700,000 roubles as fine, together with the seizure of his car. The decision states that the author failed to appear in court, despite being duly notified, as transpires from his own signature on the summons. This decision is final and executory.

2.9 The author submits that he had arranged for numerous witnesses from the settlement of Borisovka to testify on his behalf, particularly in relation to the fact that no one had any knowledge of where the national frontier between Belarus and Ukraine ran and of any rules about crossing the frontier; however these witnesses, like the author, were never heard at the new trial by the Moskovsky District Court of Brest.⁴

2.10 On an unspecified date, the author filed a request for supervisory review of the decision of 15 September 2003 with the Brest Regional Court. In support of this request, he submitted an affidavit from a deputy of the House of Representatives of the National Assembly from the Kobrin electoral constituency, attesting that there were no demarcation and road signs to identify the national frontier between Belarus and Ukraine at the area in question. The author's request was rejected by the acting Chairperson of the Brest Regional Court on 10 October 2003.

³ Decision of the Moskovsky District Court of Brest of 30 July 2003 states that the author was arrested by the frontier troops of the Republic of Belarus 40 metres away from the national frontier of the Republic of Belarus.

⁴ There is no information in the case file on whether these witnesses gave evidence at the first hearing by the Moskovsky District Court of Brest on 30 July 2003.

2.11 On an unspecified date, the author filed a complaint with the State Customs Committee of the Republic of Belarus. In the reply of 21 October 2003, the Deputy Chairperson of the State Customs Committee informed the author that under article 202 of the Code on Administrative Offences, consideration of cases concerning administrative and customs offences under article 193-6 of the Code on Administrative Offences was within the court's jurisdiction. For this reason, the State Customs Committee did not have a right to revoke or change the court decision. It could be done only on the basis of an objection lodged by either a prosecutor or a higher court upon the author's request.

2.12 On an unspecified date, the author filed a request for supervisory review of the decision of 15 September 2003 with the Supreme Court. This request was rejected by the Deputy Chairperson of the Supreme Court on 15 December 2003. A repeated request from the author to the Supreme Court for supervisory review of the decision of 15 September 2003 was rejected by the First Deputy Chairperson of the Supreme Court on 18 March 2004.

The complaint

3. The author claims a violation by Belarus of his rights under article 14 of the Covenant, because the State party's courts have disregarded (1) that he lives in the frontier area between Belarus and Ukraine; (2) his age and state of health; (3) that he did not do any harm or damage to the state's interests; and (4) that there are no demarcation lines, signs, inscriptions or boundary posts to identify the customs and national frontier between Belarus and Ukraine in the forest in question, which is regularly used by local residents from both sides of the frontier. He further submits that the punishment imposed on him by the decision of the Moskovsky District Court of Brest on 15 September 2003 is too harsh, unjust and inadequate, given that his monthly pension, half of which has to be spent on medicines, is only 103,000 roubles.

The State party's observations on admissibility and merits

4.1 On 26 November 2004, the State party reiterates the facts summarised in paragraphs 2.8 and 2.11 above and adds that under article 11 of the Law "On the national frontier of the Republic of Belarus", movement across the national frontier of persons, means of transport and goods is effectuated in the designated frontier posts. The procedure of movement across the frontier of persons, means of transport and goods includes going through the frontier and customs controls, and, whenever necessary, through the sanitary and quarantine, veterinary and other types of control.

4.2 The State party submits that the author's guilt in having committed an offence is established. While being arrested, he stated that he had crossed the frontier between Belarus and Ukraine through the "Mokrany-Domanovo" customs and national frontier post. On the way back from Ukraine to Belarus, he took a detour road without going through the frontier and customs controls. The author did not deny that he took that detour road in order to "save fuel". The fact that the author had moved the means of transport across the frontier without the customs control is corroborated by the plan of the locality where he was arrested, which bears the author's signature, by the reports of frontiers guards that have arrested the author and by other evidence.

4.3 The State party argues that, since the author had crossed the frontier into Ukraine through the customs and national frontier post, he knew where this post was and must have realised the

necessity to register the car on the way back to Belarus. For this reason, the court had correctly concluded that he had committed an offence under article 193-6 of the Code on Administrative Offences. The primary and additional penalties were imposed in full compliance with law. The court took extenuating circumstances into account before imposing a minimal fine. Given, however, the value of the car (6,177,000 roubles), which is a direct object of the offence, it can not be qualified as a minor one.

Author's comments on the State party's observations

5. On 24 December 2004, the author reiterates his claim that the decisions of the State party's courts are too harsh and unjust. In addition to the earlier advanced arguments, which according to the author were disregarded by the courts, he submits (1) that as a resident of the frontier area between Belarus and Ukraine, he should be entitled to a simplified frontier crossing procedure; (2) an affidavit from 35 inhabitants of the settlement of Borisovka, attesting that no one knew where exactly was the national frontier between Belarus and Ukraine, and that they were unaware that one could be fined with 50 to 500 minimal salaries and the seizure of the means of transport for crossing the border; (3) the State party's frontier guards, instead of hiding in the forest and ambushing his car, should have informed him that he was about to cross the national frontier and instructed him to go through the customs post.

Supplementary submissions by the State party

6.1 On 26 July 2005, the State party adds that the sanction established under article 193-6 of the Code on Administrative Offences for this offence consists of a fine of between 50 and 300 minimal salaries and **a mandatory seizure of goods and means of transport which are the direct objects of the offence in question.**⁵ Under article 191 of the Customs Code, all goods and means of transport which are moved across the customs frontier of the Republic of Belarus, are subject to the customs control. In his communication to the Committee, the author claimed that he lived in the frontier area, where the national frontier between Belarus and Ukraine was not marked in any way, and that he was unaware about the consequences of crossing it. He argued that the State party's courts did not take into account his age, state of health and the purpose of his visit to Ukraine.

6.2 The State party argues that, when the author's case was considered by the Kobrin District Court, he admitted to have intentionally crossed the national frontier of the Republic of Belarus unlawfully. The legal qualification of the author's actions under article 193-6 of the Code on Administrative Offences was correct, and the primary penalty (a minimal fine) was imposed taking into account the extenuating circumstances referred to by the author. The imposition of the additional penalty, that is the seizure of the means of transport, is mandatory by virtue of article 193-6 of the Code on Administrative Offences. The State party concluded that the author's argument of being ignorant of law does not exempt him from the responsibility.

⁵ Emphasis added by the State party.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 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.

7.2 The Committee notes that the same matter is not being examined under any other international procedure, in line with the requirements of article 5, paragraph 2(a), of the Optional Protocol. In the absence of any objection by the State party, the Committee considers that the requirements of article 5, paragraph 2(b), of the Optional Protocol have been met.

7.3 With regard to the author's claim that his rights under article 14 of the Covenant were violated, the Committee recalls that the right to a fair and public hearing by a competent, independent and impartial tribunal is guaranteed in cases regarding the determination of criminal charges against individuals or of their rights and obligations in a suit at law. It recalls⁶ that criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion, however, may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.⁷ In this respect, the Committee notes that the concept of a "criminal charge" bears an autonomous meaning, independent of the categorisations employed by the national legal system of the States parties, and has to be understood within the meaning of the Covenant. Leaving State parties the discretion to transfer the decision over a criminal offence, including imposition of punishment, to administrative authorities and, thus, to avoid the application of the fair trial guarantees under article 14, might lead to results incompatible with the object and purpose of the Covenant.

7.4 The issue before the Committee is, therefore, whether article 14 of the Covenant is applicable in the present communication, that is, whether the sanctions in the author's case related to the unlawful crossing of the national frontier and to the movement of means of transport across the customs frontier concerned "any criminal charge" within the meaning of the Covenant. As to the conditions of "purpose and character" of the sanctions, the Committee notes that, although administrative according to the State party's law, the sanctions imposed on the author had the aims of repressing, through penalties, offences alleged against him and of serving as a deterrent for the others, the objectives analogous to the general goal of the criminal law. It further notes that the rules of law infringed by the author are directed, not towards a given group possessing a special status - in the manner, for example, of disciplinary law, - but towards everyone in his or her capacity as individuals crossing the national frontier of Belarus; they prescribe conduct of a certain kind and make the resultant requirement subject to a sanction that is punitive. Therefore, the general character of the rules and the purpose of the penalty, being

⁶ Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007, paragraph 15.

⁷ Communication No.1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, paragraph 9.2.

both deterrent and punitive, suffice to show that the offences in question were, in terms of article 14 of the Covenant, criminal in nature.

7.5 Consequently, the Committee declares the communication admissible *ratione materiae*, insofar as the proceedings related to the movement of means of transport across the customs frontier, fall within the ambit of “the determination” of a “criminal charge” under article 14, paragraph 1, of the Covenant. It therefore follows that the provisions of article 14, paragraphs 2 to 7, also apply in the present communication.

7.6 The Committee notes that, although the author refers to article 14 of the Covenant only generally, without invoking a violation by the State party of any specific fair trial guarantees, his allegations and the facts as submitted to the Committee appear to raise issues under article 14, paragraphs 3(b), (d) and (e), of the Covenant, with regard to the proceedings related to the movement of means of transport across the customs frontier. The Committee considers that the author has sufficiently substantiated these claims, for purposes of admissibility, and declares them admissible.

Consideration of the merits

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

8.2 The Committee must examine whether the proceedings on the basis of which the Moskovsky District Court of Brest found, on 15 September 2003, that the author had committed an administrative offence under article 193-6 of the Code on Administrative Offences for moving the car across the customs frontier of the Republic of Belarus in evasion of customs control and ordered him to pay 700,000 roubles as fine, together with the seizure of the car, disclose any breach of rights protected under the Covenant. Under article 14, paragraph 3, everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. This provision and other requirements of due process enshrined in article 14 cannot be construed as invariably rendering proceedings *in absentia* impermissible, irrespective of the reasons for the accused person’s absence.⁸ The Committee recalls its jurisprudence, according to which the effective exercise of the rights under article 14 presupposes that the necessary steps should be taken to inform the accused of the charges against him and notify him of the proceedings.⁹ Judgment *in absentia* requires that, notwithstanding the absence of the accused, all due notifications have been made to inform him or the family of the date and place of his trial and to request his attendance.

8.3 The Committee acknowledges that there must be certain limits to the efforts that can reasonably be expected of the competent authorities with a view to establishing contact with the accused. In the present communication, the Committee notes that, according to the decision of the Moskovsky District Court of Brest of 15 September 2003, the author failed to appear in court, despite being duly notified, as transpired from his own signature on the summons. It also notes

⁸ Communication No. 16/1977, *Mbenge v. Zaire*, Views adopted on 25 March 1983, paragraph 14.1.

⁹ General Comment No. 32, *supra* n.6, paragraph 31.

the author's statement that he had received and signed the summons to appear in court for a hearing of his case. However, according to the author, the judge initially assigned to the case was subsequently replaced, and the author was not informed of the date of the hearing of his case by the newly appointed judge, despite his regular contact with the registry of the Brest Regional Court (see, paragraph 2.7). These allegations have not been challenged by the State party. The Committee further notes that, as a result of not being informed of the date of the hearing, neither the author himself nor any witnesses on his behalf, were ever heard at the 15 September 2003 trial by the Moskovsky District Court of Brest. In these circumstances, the Committee concludes that the State party failed to make sufficient efforts with a view to informing the author about the impending court proceedings, thus preventing him from preparing his defence or otherwise participating in the proceedings. In the view of the Committee, therefore, the State party has violated the author's rights under article 14, paragraphs 3 (b), (d) and (e), of the Covenant.

9. 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 violations of the author's rights under article 14, paragraph 3(b), (d) and (e), of the Covenant.

10. 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 adequate compensation. The State party is also under an obligation 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 or not 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 in case 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 Committee's Views.

[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.]
