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HUMAN RIGHTS COMMITTEE
Eighty-ninth session
12 – 30 March 2007

VIEWS

Communication 1342/2005

Submitted by:	Maksim Gavrilin (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	28 October 2004 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 13 January 2005 (not issued in document form)
Date of adoption of Views:	28 March 2007

* Made public by decision of the Human Rights Committee.

Subject matter: Retroactive application of criminal law establishing a lighter sentence.

Substantive issues: Imprisonment because of inability to fulfil a contractual obligation; equality before the law; unlawful discrimination; arbitrary arrest; entitlement to take proceedings; fair hearing; subsequent provision for the imposition of a lighter penalty.

Procedural issues: Incompatibility *ratione materiae;* non-substantiation of claim

Articles of the Covenant: 2, paragraphs 1 and 2; 9, paragraphs 1 and 4; 11; 14; 15, paragraph 1; 26

Articles of the Optional Protocol: 2 and 3

On 28 March 2007 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. 1342/2005.

[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

Eighty-ninth session

concerning

Communication 1342/2005[**]

Submitted by:	Maksim Gavrilin (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	28 October 2004 (initial submission)

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

Meeting on 28 March 2007,

Having concluded its consideration of communication No. 1342/2005, submitted to the Human Rights Committee by Maksim Gavrilin 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 Maksim Gavrilin, a Belarusian citizen born in 1976, currently imprisoned in Belarus. He claims to be a victim of violations by Belarus[1] of his rights under article 2, paragraphs 1 and 2; article 9, paragraphs 1 and 4; article 11; article 14; article 15, paragraph 1; and article 26 of the International Covenant on Civil and Political Rights. He is not represented.

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

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

The facts as submitted by the author

2.1 Between January 1996 and April 1997, the author illegally acquired other persons' property, by introducing himself as a real-estate agent and taking deposits for future real-estate transactions. On 25 August 1997, the Frunzensky District Court of Minsk found him guilty of fraud and sentenced him to seven years' imprisonment with confiscation of property (hereinafter, 'first judgment' or 'first conviction') under article 90 (3) of the Belarus Criminal Code of 1960 (hereinafter, 'the old Code'), in force at the time when the crime was committed. The sentencing regime which applied to that offence provided for imprisonment of between five and ten years. He appealed against the first judgment to the Judicial College of the Minsk City Court, requesting it to take into account his personal circumstances and to reduce his sentence, because he had not fulfilled his obligations to repay the deposits because of lack of financial resources, which he spent, and not by deliberate intent. On 24 October 1997, the Judicial College of the Minsk City Court upheld the first judgment.

2.2 In 1999, a new Criminal Code (hereinafter, 'the new Code') came into effect; additional changes to this Code were made by the Law 'On amending and supplementing certain laws of the Republic of Belarus' of 4 January 2003 (hereinafter, 'Law of 4 January 2003'). It established a new prison term regime, which ranged from three to ten years' imprisonment.

2.3 On 3 June 2002, the author was convicted by the Rechitsky District Court of Gomel Region under article 413 (1) of the new Code of having escaped from a prison colony (hereinafter, 'second judgment' or 'second conviction') in the Gomel region, where he served the term of imprisonment under the first judgment, on 1 December 2000. The Rechitsky District Court sentenced him to one year's imprisonment for escape, added the unexpired term of two years, four months and twenty days from the first judgment and cumulatively sentenced the author to two and a half years' imprisonment. The final sentence was handed down on the basis of the old Code, as it set out a scheme for calculating cumulative sentences, which was more favourable to the author.

2.4 On an unspecified date, the author appealed against the second judgment to the Judicial College of the Gomel Regional Court, requesting it to change the legal qualification of his actions from article 413 (1) of the new Code to article 184 (1) of the old Code and to reduce what he considered an excessive sentence. The Rechitsky prosecutor objected to the second judgment on the grounds that the sentence was too light, given the circumstances of the author's escape and the length of his being on the run. By ruling of 5 July 2002, the Judicial College of the Gomel Regional Court modified the legal qualification of his actions to article 184 (1) of the old Code, because at the time of his escape, on 1 December 2000, the new Code had not yet come into effect and both Codes set out the same sanction of up to three year's imprisonment. The court did not follow the prosecutor's objection and retained the earlier term of imprisonment of two and a half years'.

2.5 On 17 March 2003, the author was convicted by the Sovietsky District Court of Minsk under article 209 (3) and article 216 (1) of the new Code on numerous counts of frauds and infliction of pecuniary damage committed by him under his own name and a false name between November 2000 and January 2001 (hereinafter, 'third judgment' or 'third conviction'). The

Sovietsky District Court of Minsk applied the principle of 'dangerous recidivism'[2] and sentenced him to seven years' imprisonment with confiscation of property for fraud; and to one year and six months' imprisonment for infliction of pecuniary damage. It applied article 72 (3) of the new Code and cumulatively sentenced the author to seven years and three months' imprisonment. Finally, the Sovietsky District Court of Minsk added an unexpired term under the second judgment on the basis of the old Code (which was more beneficial for the author) and handed down a final sentence of seven years and six months' imprisonment.

2.6 One of the counts in the third judgment was related to a fraud that took place in Minsk on 30 November 2000, i.e. the day before the author's escape from prison according to the second judgment. In court the author testified that at the end of September 2000, he left the colony-settlement where he served the sentence under the first judgment without authorization, came to Minsk and resumed his activities as a real-estate agent. Allegedly, he was *de facto* employed as a manager by the real-estate agency "Tisan", although he did not sign a contract. On an unspecified date, one Zagolko approached this agency for services and the author subsequently visited Zagolko and signed a contract with him with the letterhead of another agency. The author kept these letterheads from the time he planned to register his own real-estate agency under this trade name. On 30 November 2000, he and Zagolko jointly rented a locker in the depository and deposited 1,400 US dollars as a mutual guarantee that the deal would take place. The author stated in court that he withdrew only 100 US dollars, but, when the locker was opened by the depository's personnel on an unspecified date, it was empty. According to the author, he did not intend to commit fraud. The depository's employee testified in court that on 30 November 2000, he registered the locker under Zagolko's name in the presence of Gavrilin, and subsequently saw the latter entering the depository alone a few times, including on 30 November 2000. In a letter to the Committee dated 14 March 2005, the author stated that he admitted in the court of first instance to having visited the depository on that day, hoping that the cassation and review instances would notice the contradictory dates in the second and third judgments and would rescind the latter.

2.7 On an unspecified date, the author appealed the third judgment to the Judicial College of the Minsk City Court, requesting it to reduce the sentence and to exclude the count of alleged fraud committed on 30 November 2000 in Minsk, since he was then serving his sentence in the colony-settlement. Moreover, he should not have been convicted for fraud under article 209 (3) of the new Code because he had not had intended to commit it, and the previous judgments should have been retrospectively reviewed due to the change in the applicable law. On 29 April 2003, the Judicial College of the Minsk City Court upheld the third judgment, stating, *inter alia*, that there were no grounds for review of his previous judgments under the supervisory procedure, because his sentences fell within the sentencing margin allowed under the new Code, as amended by the Law of 4 January 2003.

2.8 On an unspecified date, the author appealed to the Chairperson of the Minsk City Court, with a request to change the legal qualification of his actions from article 90 (3) of the old Code to article 209 (3) of the new Code and to retrospectively review the first judgment and the ruling

[2] Under article 65 (2) of the new Code, an application of the principle of 'dangerous recidivism' means that the sentence should be not less than 2/3 of the maximum term of the heaviest penalty set out in the sanction.

of 2 October 1997 in accordance with the Law of 4 January 2003. On 3 May 2003, the Chairperson of the Minsk City Court explained that the author's complaint was unfounded. The sanction under article 209 (3) of the new Code was the same as that under 90 (3) of the old Code (a prison term of between five and ten years' imprisonment) and the author's sentence of seven years' imprisonment fell within the sentencing margin allowed under the new Code, as amended by the Law of 4 January 2003 (a prison term of between three and ten years' imprisonment). As a result, the first judgment was not subject to the mandatory review under the supervisory procedure.

2.9 On an unspecified date, the Chairperson of the Minsk City Court objected to the third judgment and requested the Presidium of the Minsk City Court to review it, in the light of the adoption of another new Law, amending and supplementing the Criminal and Criminal Procedure Codes of 22 July 2003 (hereinafter, 'Law of 22 July 2003'). The latter set out a new penalty for fraud, which ranged from 2 to 7 years' imprisonment. On 24 September 2003, the Presidium of the Minsk City Court reduced the author's sentence under the third judgment for fraud (article 209 (3) of the new Code) to six years and nine months' imprisonment. It applied article 72 (2) of the new Code and cumulatively sentenced the author to seven years' imprisonment under both article 209 (3) and 216 (1) of the new Code. Finally, the Presidium of the Minsk City Court added an unexpired term of three months' imprisonment under the second judgment and imposed a final sentence of seven years' imprisonment. It decided that the new Code, as amended by the second Law, classified the crime under article 209 (3) as 'grave' and under article 216 (1) as 'less grave'. On this basis, the court applied article 72 (2) of the same Code,[3] requiring it to apply only one sentence – the highest among the sentences handed down under individual articles - as a cumulative sentence. The Presidium of the Minsk City Court replaced the principle of 'dangerous recidivism' invoked by the Sovietsky District Court of Minsk in the author's case with the principle of 'simple recidivism', thus excluding the requirement of sentencing him to not less than 2/3 of the maximum term of the heaviest penalty set out in the sanction of article 209 (3) of the new Code. It took into account that the cumulative sentence under the second judgment was handed down on the basis of the old Code, more beneficial for the author.

2.10 On an unspecified date, the author requested the Supreme Court to review the first and the third judgments. On 15 December 2003, the Deputy Chairperson of the Supreme Court explained that the first judgment was not subject to the mandatory review procedure, because his sentence fell within the sentencing margin allowed under the new Code.

2.11 By ruling of the Presidium of the Minsk City Court of 2 June 2004, the legal qualification of the author's actions under the first judgment was changed from article 90 (3) of the old Code to article 209 (3) of the new Code, as amended by the Law 22 July 2003. The court took into account the public danger of the author's actions, his personal qualities and decided to sentence him to the maximum term of imprisonment, i.e. seven years, because he committed the crimes with self-interest.

[3] The Sovietsky District Court of Minsk applied article 72 (3) of the new Code while calculating the cumulative sentences.

2.12 On 23 June 2004, the author wrote to the Presidential Administration requesting the President, *inter alia*, to initiate a review procedure of the Law of 22 July 2003 in the Constitutional Court.[4] On 16 July 2004, he requested the Supreme Court to review the second and third judgments in the light of Presidium's ruling of 2 June 2004. On 4 March 2005, the Deputy Chairperson of the Supreme Court informed him that there were no grounds to initiate a review of any of his judgments under the supervisory procedure.

2.13 On 15 March 2005, the author requested the Supreme Court to review the third judgment in the light of, *inter alia*, article 15, paragraph 1, of the Covenant. He challenged the finding of the Sovetsky District Court of Minsk that on 30 November 2000, he had committed a fraud in Minsk, since on that day he was still in prison in the Gomel region. His request was rejected on 6 May 2005. The decision stated that he was in the punishment cell from 27 October to 11 November 2000. In the letter dated 14 March 2005 to the Committee, the author explains that he was permitted to leave the prison colony for a family visit on 22 and 23 November 2000, but overstayed and was brought back on 25 November 2000 and placed into a punishment cell.

The complaint

3.1 The author alleges that he is a victim of violations by Belarus of his rights under article 15, paragraph 1, of the Covenant. He claims that the provisions of the new Code, as amended by the Laws of 4 January and 22 July 2003, establishing a lighter penalty for fraud, should have been applied retrospectively in his case. Under the new Code, a sentence of seven years is the maximum possible, reserved for the most serious cases, whereas his sentence under the old Code was at the lower end of the scale. Thus, he should have benefited from a shorter term of imprisonment under the new Code. He refers to the decisions of the Belarus Constitutional Court of 9 July 1997 and of 21 October 2003. On the basis of article 104 of the Belarus Constitution and article 15, paragraph 1, of the Covenant, the Constitutional Court had found that the principle of retrospective application of criminal law establishing a lighter penalty should apply, *inter alia*, in cases where a maximum and a minimum of the sentencing margin were reduced by a subsequent law, even if the sentence handed down under the previous law falls within the new margin. Moreover, a law establishing a lesser penalty was defined by the Belarus Supreme Court[5] as a law reducing the maximum or the minimum of the sentencing margin.

3.2 The author further claims that his rights under article 2, paragraph 1, and article 26 of the Covenant were violated, as persons committing the same offence in the same circumstances, but under the new Code, have received more favourable treatment.

3.3 Article 2, paragraph 2, is said to have been violated, because the State party failed to adopt measures for clear and uniform interpretation of the principle of retrospective application of criminal law, guaranteed by article 104 of the Belarus Constitution.

3.4 Article 9, paragraph 4, allegedly was violated, as the state and judicial bodies which are authorized to initiate a review of the author's sentences under the supervisory procedure failed to do so.

[4] Under the State party's law, a right to initiate a review in the Constitutional Court belongs to the highest officials within the hierarchy of state and judicial authorities.
[5] Reference is made to the Judicial Bulletin No.2 of 2001, pp.30-31 and No.3 of 2003, pp.2-3.

3.5 The author raises a complaint about his conviction under the third judgment. First, he says that this conviction is incompatible with the second judgment in which he was convicted of escaping, because the latter judgment recognized that he escaped only on 1 December 2000. He submits that he should not have been convicted on the count of fraud committed on 30 November 2000, and claims that his right to a fair trial under article 14 of the Covenant was violated.

3.6 Finally, the author claims a violation of article 11 of the Covenant, insofar as he was sentenced to deprivation of liberty for a debt which he had failed to repay solely because of lack of financial resources and not by deliberate intent. He claims that his actions should have been qualified under article 151 of the old Criminal Code, i.e. carrying out activities in violation of the registration requirements punishable by up to three year's imprisonment. He concludes, without further substantiation, that his rights under article 9, paragraph 1, were also violated.

The State party's observations on admissibility and the merits

4. On 20 July 2005, the State party reiterated the facts of the case and added that the author's argument that he was detained on 30 November 2000 and thus could not commit fraud on the same day in Minsk is unfounded and not borne out by the case file. He did not challenge this fact in the court of first instance. The State party submits that his guilt was proven beyond doubt by the evidence presented in court, that the courts correctly qualified his actions under the law then in force and imposed appropriate sentences by taking into account the author's actions and personal characteristics.

The author's comments on the State party's observations

5. On 22 and 30 September 2005, and 22 February 2006, the author commented on the State party's observations. He reiterates earlier claims. He also challenges the State party's statement that his actions were correctly qualified under the law then in force. He claims that although a new Criminal Code came into force on 1 January 2001, the events described in some of the counts in the third judgment took place in 2000, whereas the damage caused by those events that took place in 2001 did not amount to 'large' damage. Therefore, his actions should have been qualified as a 'less grave' crime, thus excluding the principle of "dangerous recidivism".[6]

Further submissions from the State party, and the author's comments

6. Both parties[7] filed additional submissions in which they reiterate their earlier claims.

[6] See paragraph 2.5 above.
[7] The State party's submission is dated 29 May 2006, and the author's – 27 April and 29 May 2006.

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 case is admissible under the Optional Protocol to the Covenant.

7.2 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. Concerning the exhaustion of domestic remedies, the Committee has noted that according to the information submitted by the author, all available domestic remedies, up to and including the Supreme Court, have been exhausted. In the absence of any State party objection, 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 alleged violation of article 11 of the Covenant, the Committee notes that the prohibition of detention for debt does not apply to criminal offences related to civil law debts. When a person commits fraud, negligent or fraudulent bankruptcy, etc., he or she may be punished with imprisonment even when he or she no longer is able to pay the debts. Consequently, the Committee finds this claim incompatible *ratione materiae* with article 11 of the Covenant and thus inadmissible under article 3 of the Optional Protocol. So far as the claim under article 9, paragraph 1, is also linked to the claim under article 11, the Committee equally finds it inadmissible on the same ground.

7.4 With regard to the author's claim that state and judicial bodies authorized to initiate a review of his sentences under the supervisory procedure failed to do so, contrary to article 9, paragraph 4, of the Covenant, the Committee notes that the principle of *habeas corpus* enshrined in this provision does not apply to the supervisory procedure existing under the State party's law. The latter procedure concerns a review of the final judgment, whereby the legality of a person's detention is *a priori* reviewed and confirmed by the prior judicial instance(s). Therefore, the Committee finds this part of the communication incompatible *ratione materiae* with article 9, paragraph 4 of the Covenant, and thus inadmissible under article 3 of the Optional Protocol.

7.5 The Committee notes the author's claim that his right under article 14 of the Covenant was violated in relation to his conviction by the Sovetsky District Court of Minsk of, *inter alia*, committing a fraud in Minsk on 30 November 2000. The Committee notes that the author's claim under article 14 relates, in its essence, to the evaluation of facts and evidence and to the interpretation of domestic legislation. It recalls its jurisprudence that the evaluation of facts and evidence and interpretation of domestic legislation is in principle for the courts of States parties, unless the evaluation of facts and evidence was clearly arbitrary or amounted to a denial of justice.[8] As the author has provided no evidence to show that the domestic courts' decisions suffered from such defects, the Committee considers that this part of the communication is inadmissible under article 2 of the Optional Protocol.

[8] See, inter alia, Errol Simms v. Jamaica, Communication No. 541/1993, Inadmissibility decision of 3 April 1995.

7.6 The Committee considers that the author has not sufficiently substantiated his claim under articles 2 and 26 of the Covenant, for purposes of admissibility. This part of the communication is therefore inadmissible under article 2, of the Optional protocol.

7.7 The Committee considers that the author's remaining claims have been sufficiently substantiated for purposes of admissibility, and declares them admissible, as raising issues under article 15, paragraph 1, of the Covenant.

Consideration of the merits

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

8.2 The Committee notes that, in view of the retroactive application of a new Code, as amended by the Law of 22 July 2003, to the author's first and third convictions by the Presidium of the Minsk City Court on 2 June 2004 and 24 September 2003, respectively, the main point raised in the communication is not whether the provision on the retroactivity of a 'lighter penalty' in article 15, paragraph 1, of the Covenant applies in the circumstances of the author's case. Rather, the issue is whether, in a case in which the sentence handed down under a previous law falls within the sentencing margin introduced under the later law, the provision of article 15, paragraph 1, of the Covenant requires the State party proportionally to reduce the original sentence, so that the accused may benefit from the imposition of a lighter penalty under the later law.

8.3 In this regard, the Committee refers to its jurisprudence in Filipovich v. Lithuania,[9] where it concluded there was no violation of article 15, paragraph 1, because the author's sentence was well within the margin provided by the earlier law and that the State party had referred to the existence of certain aggravating circumstances. The Committee notes that in the present case, the author's sentence under the first conviction was well within the margins provided by both the old Code and the new Code, as amended by the Law of 22 July 2003, and that in determining the sentence, the court took into account the public danger of the author's actions and his personal circumstances. It further notes that when reviewing the author's sentence under the third conviction, the Presidium of the Minsk City Court reduced his sentence for fraud to six years and nine months' imprisonment. In applying the reasoning in Filipovich *mutatis mutandis* to the present case, the Committee cannot, on the basis of the material made available to it, conclude that the author's sentence was handed down in a way incompatible with article 2, paragraph 2, and article 15, paragraph 1, 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 do not disclose a violation of any of the provisions of the International Covenant on Civil and Political Rights.

[9] See Filipovich v. Lithuania, Communication No.875/1999, Views adopted on 4 August 2003.

[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.]
