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International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 1991/2010

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

Submitted by:	Oleg Volchek (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	24 April 2007 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 18 October 2010 (not issued in a document form)
Date of adoption of Views:	24 July 2014
Subject matter:	Right to freedom of expression
Substantive issues:	Right to freedom to seek, receive and impart information
Procedural issue:	Exhaustion of domestic remedies
Articles of the Covenant:	14 and 19
Articles of the Optional Protocol:	2 and 5, paragraph 2 (b)

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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. 1991/2010*

Submitted by:	Oleg Volchek (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	24 April 2007 (initial submission)

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

Meeting on 24 July 2014,

Having concluded its consideration of communication No. 1991/2010, submitted to the Human Rights Committee by Oleg Volchek 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 Oleg Volchek, a Belarusian national, born in 1967. He claims to be a victim of violations by Belarus of his rights under article 14 and article 19 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Belarus on 30 December 1992. The author is unrepresented.

The facts as submitted by the author

2.1 The author submits that, on 20 August 2006, while on his way to Poland in his private car, by customs officers; his car was searched and he was charged with violating article 193-9, paragraph 1, of the Code of Administrative Offences of Belarus because he was allegedly transporting forbidden books across the State border.

2.2 The author submits that on 17 October 2006, the Oktyabrsky District Court convicted him for violating the Code of Administrative Offences and sentenced him to pay

* The following members of the Committee participated in the consideration of the present communication: Yadh Ben Achour, Lazhari Bouzid, 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.

a fine of 1,550,000.00 Belarusian roubles.[1] The court found that the author had violated provisions of the Belarus Customs Committee Regulation No. 7, dated 20 February 2002, and the Order of Council of Minister of the Republic of Belarus No. 218, dated 18 March 1997. In its decision, the court relied, inter alia, on a letter dated 21 September 2006, which the State Security Committee had sent to the State Customs Committee. In that letter, the State Security Committee provided its analysis of the two books seized from the author at the border, and confirmed that they were indeed "prohibited from moving them across the State border", and that they were subject to seizure and had to be destroyed.

2.3 The author submits that the books in his possession were: one book entitled, "The Chronicles of the Government's Turpitude: What really happened to General Yury Zakharenko, How and Why?"; and three copies of a book entitled, "The 2006 Presidential Election in Belarus: Facts and Comments". He claims that he is the author of one of the books and that they were not prohibited from being moved across the border, nor did he have to declare them in the customs declaration form.

2.4 The author admits that he was in possession of the above-mentioned books while he was leaving Belarus through a border checkpoint with Poland. He submits that, when he was filing the customs declaration, he explicitly asked the customs officer conducting the inspection whether he was supposed to declare the books that he was carrying and he received a negative answer. He reiterates that he is one of the authors of one of the books and states that the books contain no information that is harmful to the reputation of third persons or concerning State security, and that he did not intend to sell them. He claims that he was not informed of the time and date of the hearing, therefore the hearing was held in his absence.

2.5 The author submits that on 26 October 2006, he appealed the judgement of the Oktyabrsky District Court to the President of the Grodno Regional Court; the appeal was rejected on 16 November 2006. The latter court also confirmed that the books that the author had attempted to move across the border, "could indeed harm the political interests and national security of the Republic of Belarus". The Grodno Regional Court denied the author's claims that he was not informed about the date and time of the hearing.

2.6 The author submits that on 26 February 2007, the Supreme Court of Belarus rejected his appeal as well. In its decision, the Supreme Court stated that, according to the Tax Code of Belarus, "goods and means of transportation that cross the border of the Republic of Belarus" are subject to customs declaration. Failure to submit such customs declaration of goods and means of transportation constitutes a violation of article 193-9, paragraph 1, of the Code of Administrative Offences. The Supreme Court further stated that the author was duly informed of the date, time and place of the hearing, but failed to appear to court.

2.7 The author therefore contends that he has exhausted all available and effective domestic remedies.

The complaint

3.1 The author claims that, by stopping him at the border, seizing the above-mentioned books and imposing an administrative fine, the State party violated his rights under article 19 of the Covenant. He submits that the books, which he was forbidden to move across the border and which were confiscated by the customs officer, contain opinions about the situation in Belarus.

[1] Equivalent to US$ 775, based on the exchange rate on the date of the court decision.

3.2 The author further submits that the administrative hearing in the Oktyabrsky District Court violated his rights to a fair and public hearing, under article 14 of the Covenant, because it took place in his absence. He claims that he was not informed about when and where the hearing would be taking place and he did not waive his right to be present. He submits that the transcript of the hearing contains no evidence that he was summoned, nor that the judge attempted to verify the reason for his absence. The initial judgement by the Oktyabrsky District Court states that the author had been duly summoned to appear in court; however the author states that he had enquired with the post office and obtained evidence that the letter informing him that the court hearing would take place on 17 October 2006 was not delivered to him until 27 October 2006. He further claims that the Grodno Regional Court ignored this piece of evidence during the hearing of his appeal.

3.3 The author further claims that, in general, the courts in Belarus are not independent; he refers to the report of the Special Rapporteur on the independence of judges and lawyers of 8 February 2001 on his mission to Belarus (E/CN.4/2001/65/Add.1). He also points out that the courts relied on a letter from the State Security Committee, and submits that the State Security Committee's conclusion is formal and arbitrary; does not contain any grounds; nor does it specify on what expertise or information the books were banned. Nonetheless, the analysis and conclusion of the State Security Committee were accepted by the courts without any questioning of its validity and legality under domestic or international law. The author maintains that the above confirms that his rights under articles 14 and 19 of the Covenant were violated.

The State party's observations on admissibility

4.1 On 6 January 2011, the State party submitted, with regard to the present communication and several other communications before the Committee, that the author had not exhausted all available domestic remedies in Belarus, including filing a petition for supervisory review with the Prosecutor's Office of a judgment having the force of res judicata. It also submits that, upon becoming a party to the Optional Protocol, it did not give its consent to recognize the extension of the Committee's mandate to consider communications from individuals who have not exhausted domestic remedies; that the present communication was registered in violation of the provisions of the Optional Protocol; that there are no legal grounds for the State party to consider its admissibility; and that any references in that connection to the Committee's long-standing practice, methods of work, case law are not legally binding on it.

4.2 On 5 October 2011, the State party again challenged the admissibility of the communication, arguing that the author had failed to exhaust all available domestic remedies, as he had not filed a request with a prosecutor to initiate supervisory review proceedings of his case.

4.3 By a note verbale of 25 January 2012, the State party further noted that upon becoming a party to the Optional Protocol, it had recognized the Committee's competence, under article 1 thereof, to receive and consider communications from individuals subject to its jurisdiction, claiming to be victims of a violation by the State party of any of the rights set forth in the Covenant. However, that recognition of competence was 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, paragraph 2, of the Optional Protocol. It maintains that, under the Optional Protocol, States parties have no obligation regarding recognition of the Committee's rules of procedure nor its interpretation of the provisions of the Optional Protocol. It submits that, in the context of 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 also submits that any communication registered in violation of the provisions of the Optional Protocol will be viewed by the State party as being incompatible with the Optional Protocol and rejected without comments on admissibility or merits. The State party further maintains that decisions taken by the Committee on such rejected communications will be considered by its authorities as "invalid".

Issues and proceedings before the Committee

The State party's lack of cooperation

5.1 The Committee notes the State party's assertion that there are no legal grounds for the consideration of the author's communication, insofar as it was registered in violation of the provisions of the Optional Protocol; that it has no obligation regarding recognition of the Committee's rules of procedure nor regarding the Committee's interpretation of the provisions of the Optional Protocol; and that any decision taken by the Committee on the present communication will be considered "invalid" by its authorities.

5.2 The Committee recalls that under article 39, paragraph 2, of the Covenant, it is empowered to establish its own rules of procedure, which the States parties have agreed to recognize. It further observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the 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 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 and the individual (art. 5, paras. 1 and 4). It is incompatible with those obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication and in the expression of its Views.[2] It is up to the Committee to determine whether a communication should be registered. The Committee observes that, by failing to accept the competence of the Committee to determine whether a communication should be registered and by declaring beforehand that it will not accept the Committee's determination on the admissibility or the merits of the communication, the State party is violating its obligations under article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights.[3]

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 case is admissible under the Optional Protocol to the Covenant.

6.2 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.

6.3 The Committee notes that the State party has challenged the admissibility of the communication on the grounds of non-exhaustion of domestic remedies under article 5, paragraph 2 (b), of the Optional Protocol, observing that the author did not request the

[2] See, inter alia, communication No. 869/1999, *Piandiong et al.* v. *the Philippines*, Views adopted on 19 October 2000, para. 5.1.

[3] See, inter alia, communications No. 1226/2003, *Korneenko* v. *Belarus*, Views adopted on 20 July 2012, paras. 8.1 and 8.2; No. 1948/2010, *Turchenyak et al* v. *Belarus*, Views adopted on 24 July 2013, paras. 5.1 and 5.2.

Prosecutor's Office to consider his case under supervisory review proceedings. The Committee recalls its jurisprudence, according to which a petition to a Prosecutor's Office for supervisory review of court decisions that have taken effect does not constitute a remedy which has to be exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.[4] Accordingly, the Committee considers that it is not precluded by the requirements of article 5, paragraph 2 (b), of the Optional Protocol from examining the present communication.

6.4 In the light of the information before it, the Committee considers that the author has sufficiently substantiated his claims under articles 14 and 19 of the Covenant for purposes of admissibility. Accordingly, it declares the communication admissible and proceeds to its examination on the merits.

Consideration of merits

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

7.2 The first issue before the Committee is whether the seizure of books that were in the author's possession when he was crossing the border with Poland and his subsequent sentence to an administrative fine constitute a violation of the author's rights under article 19 of the Covenant.

7.3 The Committee recalls that article 19, paragraph 2, of the Covenant requires States parties to guarantee the right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print. The Committee refers to its general comment No. 34 (2011) on article 19: freedoms of opinion and expression, according to which freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society and constitute the foundation stone for every free and democratic society (para. 2). Any restrictions on the exercise of these freedoms must conform to the strict tests of necessity and proportionality. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated (para. 22).[5]

7.4 The Committee recalls that article 19, paragraph 3, of the Covenant allows certain restrictions, but only as provided by law and necessary: (a) for respect of the rights or reputation of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals. The Committee notes that if the State imposes a restriction, it is up to the State party to demonstrate that the restriction on the rights under article 19, paragraph 2, of the Covenant was necessary in the case in question, and that even if, in principle, States parties may introduce a system aimed at reconciling an individual's freedom to impart information and the general interest of maintaining public order in a certain area, the system must not operate in a way that is incompatible with the object and purpose of article 19 of the Covenant.[6]

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

[5] See also communication No. 1948/2010, *Turchenyak et al.* v. *Belarus*, Views adopted on 24 July 2013, para. 7.7.

[6] See, for example, communication No. 1948/2010, *Turchenyak et al.* v. *Belarus*, Views adopted on 24 July 2013, para. 7.8.

7.5 The Committee further notes that the State party has not submitted its observations on the merits of the present communication nor any justification or reasons as to how, in practice, the mere possession of copies of the books in question would fall under one of the legitimate restrictions set out in article 19, paragraph 3, of the Covenant. The Committee observes that the national authorities have failed to explain why it was necessary to restrict the author's right to freedom to seek, receive and impart information in relation to respect of the rights or reputations of others or the protection of national security or of public order (ordre public), or of public health or morals.

7.6 In the circumstances, and in the absence of any information in that regard from the State party justifying the restriction for the purposes of article 19, paragraph 3, the Committee concludes that the author's rights under article 19, paragraph 2, of the International Covenant on Civil and Political Rights have been violated.

7.7 The Committee further notes the author's claim that he was not informed about the time and date of the administrative hearing, in violation of his rights under article 14, paragraph 1, of the Covenant. The Committee recalls that the Covenant provides for everyone to have the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, and that the equality of arms is an indispensable aspect of the fair trial principle.[7] The Committee refers to its general comment No. 32 (2007) on article 14: right to equality before the courts and tribunals and to a fair trial, which states that courts must make information regarding the time and venue of oral hearings available (para. 28). The author claims that the letter informing him about the time and date of the hearing to take place on 17 October 2006 was delivered to him only on 27 October 2006. He also claims that the evidence that he obtained from the post office in that regard was ignored by the court when it examined his appeal. In those circumstances, and in the absence of any observations from the State party on that specific claim, the Committee decides that due weight must be given to the author's allegation. Accordingly, the Committee concludes that the author's rights under article 14, paragraph 1, of the Covenant have been violated.

8. 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 information before it discloses violations by the State party of the author's rights under article 14, paragraph 1, and article 19, paragraph 2, of the Covenant.

9. 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 any legal costs incurred by the author and the present value of the fine that he was required to pay, together with compensation[8]. The State party is also under the obligation to take steps to ensure that no similar violations occur in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant 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 when 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

[7] See, for example, communication No. 307/1988, *John Campbell* v. *Jamaica*, Views adopted on 24 March 1993, para. 6.4.

[8] See, for example, communication No. 1830/2008, *Pivonos* v. *Belarus*, Views adopted on 20 October 2012, para. 11; and No. 1785/2008, *Olechkevitch* v. *Belarus*, Views adopted on 18 March 2013, para. 10.

to the Committee's present 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.