



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 1982/2010

##### Views adopted by the Committee at its 114th session (29 June-24 July 2015)

<i>Submitted by:</i>	Svetlana Mikhalchenko (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	27 April 2010 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 27 September 2010 (not issued in document form)
<i>Date of adoption of Views:</i>	22 July 2015
<i>Subject matter:</i>	The author fined for distributing political party leaflets
<i>Procedural issues:</i>	Admissibility — exhaustion of domestic remedies
<i>Substantive issues:</i>	Freedom of expression; fair trial — legal assistance
<i>Articles of the Covenant:</i>	14 (3) (d) and 19, in conjunction with article 2 (2)
<i>Articles of the Optional Protocol:</i>	2

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\* Reissued for technical reasons on 25 September 2015.



## Annex

### **Views of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights (114th session)**

concerning

#### **Communication No. 1982/2010\*\***

*Submitted by:* Svetlana Mikhalchenko (not represented by counsel)  
*Alleged victim:* The author  
*State party:* Belarus  
*Date of communication:* 27 April 2010 (initial submission)

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

*Meeting* on 22 July 2015,

*Having concluded* its consideration of communication No. 1982/2010, submitted to it by Svetlana Mikhalchenko 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 (4) of the Optional Protocol**

1. The author of the communication is Svetlana Mikhalchenko, a Belarusian national born in 1945. The author claims to be a victim of a violation, by Belarus, of her rights under articles 14 (3) (d) and 19, read in conjunction with article 2 (2), of the Covenant. The Optional Protocol entered into force for the State party on 30 December 1992. The author is not represented by counsel.

#### **The facts as submitted by the author**

2.1 The author submits that she was a secretary of the local branch of the Belarus Communist Party in the Svetlogorsk district of the city of Gomel. On 3 October 2009, she

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\*\* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval. The text of an individual opinion of Committee members Anja Seibert-Fohr and Yuji Iwasawa (concurring) is appended to the present Views.

was distributing her political party's leaflets on Zavodskaya Street in Gomel. The leaflets were entitled "Leftist march", and she submits that she had 299 copies of the leaflet in her possession.

2.2 When she had about 25 copies of the leaflet left, she was apprehended by several police officers. The officers took her to the local police station, confiscated the leaflets and issued her with a record for having committed an administrative offence under article 22.9, paragraph 2, of the Belarusian Code of Administrative Offences, prohibiting the publication of unregistered printed materials. The author clarifies that the requirements of the Mass Media Act should be followed for more than 300 copies of any printed materials and the violation of these requirements leads to a violation of the above-mentioned provision of the Code of Administrative Offences.

2.3 The author submits that, as she did not have the required number of copies (300) to trigger the application of those provisions, her arrest and prosecution were arbitrary. On 29 October 2009, the Svetlogorsk District Court sentenced the author to pay an administrative fine of 1,225,000<sup>1</sup> Belarusian roubles; the 25 copies of the leaflets confiscated were to be destroyed.

2.4 The author claims that she was not able to defend herself through legal counsel of her own choosing.<sup>2</sup> Furthermore, the author contends that it is not clear to her why it was necessary to limit her freedom of expression by arresting her and seizing the remaining leaflets.

2.5 The author submits that she appealed the decision of the Svetlogorsk District Court before the Gomel Regional Court, which, on 25 November 2009, rejected the author's appeal and fully supported the lower court's decision. A supervisory appeal was rejected by the Supreme Court of Belarus on 11 February 2010. The author claims that supervisory appeals made through the Procurator's Office are "ineffective", because these procedures are discretionary and do not lead to a full reconsideration of the case. In accordance with the well-developed jurisprudence of the Committee, the author submits that the domestic remedies must be exhausted only if they are effective.

2.6 The author further claims that the Gomel Regional Court and the Supreme Court of Belarus ignored or failed to consider her claims that were based on the provisions of the Covenant. The author argued before the courts that the provisions of the Mass Media Act were not applicable to her case, since there were fewer than 300 copies of the leaflet. Even if those requirements were to be applied, the courts did not explain which of the restrictions under article 19 (3) of the Covenant were applicable in her case.

2.7 Finally, the author notes that, by becoming a signatory to the Covenant, Belarus agreed to uphold the provisions of the Covenant, including its article 2 (2). In accordance with article 2 (2), the State party undertakes to take the necessary steps to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the Covenant.

### **The complaint**

3.1 The author claims that by detaining her and subjecting her to an administrative fine, the State party violated her rights under article 19, read in conjunction with article 2 (2) of the Covenant.

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<sup>1</sup> At the time of the administrative hearing, this amount was equal to about 490 United States dollars (source: the National Bank of Belarus, [www.nbrb.by/engl/](http://www.nbrb.by/engl/)). The author also submits that this amount greatly exceeded the average monthly salary in Belarus at that time.

<sup>2</sup> The author provides no further information regarding this allegation.

3.2 She further claims that her rights under article 14 (3) (d) of the Covenant were violated as she was unable to use a counsel of her own choosing.

#### **State party's observations on admissibility**

4.1 In a note verbale dated 6 January 2011, the State party conveyed, with regard to the present communication and several other communications before the Committee, its concern about unjustified registration of communications submitted by individuals under its jurisdiction who, it considers, have not exhausted all available domestic remedies in the State party, including appealing to the Procurator's Office for supervisory review of a judgement having the force of *res judicata*, in violation of article 2 of the Optional Protocol. The State party claims that registration of communications submitted by a third party, such as advocates, lawyers or other persons, on behalf of an individual claiming violation of his or her rights is an abuse of the Committee's mandate and of the right to submit communications, and is in violation of article 3 of the Optional Protocol. It submits that, as a party to the Optional Protocol, it recognizes the competence of the Committee under article 1, but it did not consent to the extension of the Committee's mandate, in particular regarding the Committee's interpretation of the provisions of the Convention and of the Optional Protocol (preamble and art. 1), and notes that such interpretation should be undertaken strictly in accordance with articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties. It submits that the present communication and several other communications were registered in violation of the provisions of the Optional Protocol; that there are no legal grounds for the State party to consider those communications; and that any decision taken by the Committee on such communications will be considered legally invalid. It further states that any references in that connection to the Committee's long-standing practice are not legally binding on it.

4.2 In a note verbale dated 25 January 2012, the State party added that, upon becoming a party to the Optional Protocol, it had agreed, under article 1 thereof, to recognize the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State party of any rights protected by the Covenant. It notes, however, that that recognition was undertaken in conjunction with other provisions of the Optional Protocol, including those establishing criteria regarding petitioners and the admissibility of their communications, in particular articles 2 and 5. The State party maintains that, under the Optional Protocol, States parties have 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 on the Law of Treaties. It submits 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 are 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 incompatible with the Optional Protocol and will be rejected without comments on the admissibility or merits, and any decision taken by the Committee on such rejected communications will be considered by its authorities as "invalid". The State party considers that the present communication as well as several other communications before the Committee were registered in violation of the Optional Protocol.

#### **Author's comments on the State party's observations**

5.1 On 1 September 2011, the author submits that, by ratifying the Optional Protocol to the Covenant, the State parties have recognized the Committee's competence to issue decisions ("Views"), related to violations or non-violations of the Covenant, and, in accordance with article 40 (4) of the Covenant, to adopt "reports and general comments"

that the Committee might consider appropriate. With reference 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, the author notes that paragraph 13 reads: "The Views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These Views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol."

5.2 The author submits that, based on the above, the State party must respect not only the Committee's decisions, but also its rules of procedure, practice and methods of work. This principle is encompassed by *pacta sunt servanda*, by which States parties must respect their obligations under international law.

5.3 Regarding the State party's argumentation regarding the exhaustion of domestic remedies, in particular the supervisory review proceedings before the Supreme Court of Belarus, the author submits that those proceedings are discretionary and cannot be considered effective. She notes that the State party itself recognizes the ineffectiveness of this procedure, such that one individual was convicted to a death sentence and executed while his supervisory review request was pending with the Supreme Court of Belarus.

### **Issues and proceedings before the Committee**

#### *The State party's lack of cooperation*

6.1 The Committee notes the State party's assertion that there are no legal grounds for 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 to recognize the Committee's rules of procedure nor 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.

6.2 The Committee recalls that, under article 39 (2) of the Covenant, it is empowered to establish its own rules of procedure, which 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 of the Optional Protocol). 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 and the individual (art. 5 (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.<sup>3</sup> 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

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<sup>3</sup> See, inter alia, communication No. 869/1999, *Piandiong and others v. Philippines*, Views adopted on 19 October 2000, para. 5.1.

admissibility or the merits of the communication, the State party is violating its obligations under article 1 of the Optional Protocol.<sup>4</sup>

*Consideration of admissibility*

7.1 Before considering any claims contained in a communication, the Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes that the State party has initially challenged the admissibility of the communication for non-exhaustion of domestic remedies under article 5 (2) (b) of the Optional Protocol, observing that the author has not asked the Procurator General's Office to have her case considered under the supervisory review proceedings. The Committee further notes that, on that ground, the State party has challenged the registration of the communication, since it was registered prior to exhaustion of "all available domestic remedies". The Committee recalls its jurisprudence, according to which a petition for supervisory review to a prosecutor's office, allowing review of court decisions that have taken effect, does not constitute a remedy that has to be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.<sup>5</sup> Accordingly, the Committee considers that it is not precluded by the requirements of article 5 (2) (b) of the Optional Protocol from examining the present communication.

7.4 The Committee takes note of the authors' claim that her rights under article 14 (3) (d) of the Covenant have been violated, as the author was not able to defend herself through legal counsel of her own choosing during the administrative proceedings. However, in the absence of further explanations or evidence in support of that claim, the Committee finds it insufficiently substantiated, for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

7.5 The Committee notes the author's submission that the State party has violated its obligations under article 2 (2) of the Covenant, read in conjunction with article 19, since it failed to adopt such laws or other measures as may be necessary to give effect to the rights recognized in article 19 of the Covenant. The Committee recalls its jurisprudence, which indicates that the provisions of article 2 of the Covenant set forth a general obligation for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol.<sup>6</sup> The Committee also considers that the provisions of article 2 cannot be invoked as a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim. The Committee notes, however, that the author has already alleged a violation of her rights under article 19, resulting from the interpretation and application of the existing laws of the State party, and

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<sup>4</sup> See also communications No. 1226/2003, *Korneenko v. Belarus*, Views adopted on 20 July 2012, paras. 8.1 and 8.2; and communication No. 1948/2010, *Turchenyak and others v. Belarus*, Views adopted on 24 July 2013, paras. 5.1. and 5.2.

<sup>5</sup> See communication No. 1873/2009, *Alekseev v. Russian Federation*, Views adopted on 25 October 2013, para. 8.4.

<sup>6</sup> See communications No. 2202/2012, *Castañeda v. Mexico*, decision adopted on 29 August 2013, para. 6.8; No. 1834/2008, *A.P. v. Ukraine*, decision adopted on 23 July 2012, para. 8.5; No. 1887/2009, *Peirano Basso v. Uruguay*, views adopted on 19 October 2010, para. 9.4.

the Committee does not consider that examination of whether the State party also violated its general obligations under article 2 (2) of the Covenant, read in conjunction with article 19, to be distinct from examination of the violation of the author's rights under article 19 of the Covenant.<sup>7</sup> The Committee therefore considers that the author's claims in that regard are incompatible with article 2 of the Covenant, and inadmissible under article 3 of the Optional Protocol.

7.6 In the light of the information before it, the Committee considers that the author has sufficiently substantiated her remaining claims under article 19 of the Covenant, for purposes of admissibility, declares them admissible and proceeds to the examination of the merits.

#### *Consideration of the merits*

8.1 The 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 (1) of the Optional Protocol.

8.2 The issue before the Committee is whether the author's arrest for having distributed leaflets and the seizure of the leaflets in her possession constitute an unjustified restriction of her rights as protected by article 19 of the Covenant.

8.3 The Committee recalls that article 19 (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 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. Any restrictions on the exercise of those freedoms must conform to 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.

8.4 The Committee recalls that article 19 (3) of the Covenant allows certain restrictions, but only as provided by law and as necessary: (a) for respect of the rights or reputation of others; or (b) for the protection of national security or of public order, or of public health or morals. The Committee notes that if the State party imposes a restriction, it is for the State party to demonstrate that the restriction on the rights under article 19 (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.<sup>8</sup>

8.5 The Committee notes that, pursuant to the information adduced on file, the State party has made no observations on the merits of the communication, nor has it provided any justification or reason to explain how, concretely, the arrest of the author, her sentence to a fine and the confiscation of the leaflet in her possession were linked to one of the legitimate aims for restriction under article 19 (3), even if those three measures were authorized by law. The Committee notes that the national authorities did not explain why it was necessary to restrict the freedom of the author to seek, receive and impart information in order to

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<sup>7</sup> See communication No. 2030/2011, *Poliakov v. Belarus*, Views adopted on 17 July 2014, para. 7.4.

<sup>8</sup> See, for example, communication No. 1948/2010, *Turchenyak and others v. Belarus*, Views adopted on 24 July 2013, para. 7.8.

ensure the respect of the rights or reputations of others, or for the protection of national security or of public order, or of public health or morals.

8.6 In the light of the above, and given that the State party has not presented any justification for the restrictions for purposes of article 19 (3), the Committee concludes that the author's rights under article 19 (2) of the Covenant have been violated.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the information before it discloses a violation by the State party of the author's rights under article 19 (2) of the Covenant.

10. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. The State party is also under the obligation to take steps to prevent similar violations in the future, in particular by reviewing its national legislation and the implementation thereof in order to make it compatible with its obligations to adopt measures able to give effect to the rights recognized by article 19.

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 present Views, and to have them widely disseminated in Belarusian and Russian in the State party.



## Appendix

### **Individual opinion of Committee members Anja Seibert-Fohr and Yuji Iwasawa (concurring)**

We concur with the Committee's conclusions on this communication, but disagree with part of the reasoning expressed in paragraph 7.5, which considers the author's claim that the State party violated its obligations under article 2 (2) of the Covenant, when read in conjunction with article 19, by failing to adopt such laws or other measures as may be necessary to give effect to the rights recognized in this article. In that passage, the Committee again holds open the possibility that an individual could invoke article 2 (2) of the Covenant in conjunction with another provision of the Covenant if the failure of a State party to observe its obligations under article 2 (2) is "the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim". We refer to our joint opinion in *Kuznetsov and others v. Belarus*, in which we explained why the Committee should have regarded the authors' claim under article 2 (2), in conjunction with article 19, as inadmissible on the ground that article 2 (2) can never be invoked in this manner, any more than it can be invoked in isolation.<sup>9</sup> Article 2 (2) does not provide individuals with a right to demand from a State party the adoption of legislation or other such measures. This conclusion does not change when reading this provision in conjunction with a substantive right. Instead, if individuals are affected in their rights by a law that on its face violates a substantive right, or by the application of a law, or by the absence of a law, the Committee is competent to find a violation of the substantive rights and make an appropriate remedial recommendation. Adding a violation of article 2 (2), read in conjunction with the substantive provision, would not add anything to the protection of the individual. As we predicted in *Kuznetsov and others v. Belarus*, leaving open the possibility of finding conjoined violations involving article 2 (2) leads the Committee to unproductive discussions that absorb limited time that would be better spent on more significant issues, or on giving more victims earlier decisions on their communications. Therefore, the Committee should have recognized that article 2 (2) cannot be invoked either in isolation or jointly as a claimed violation in a communication.

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<sup>9</sup> Communication No. 1976/2010, *Kuznetsov and others v. Belarus*, joint opinion by Committee members Gerald L. Neuman, Anja Seibert-Fohr, Yuji Iwasawa and Konstantine Vardzelashvili (concurring).