



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 1969/2010

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

<i>Submitted by:</i>	Taras Surgan (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	28 May 2010 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 12 August 2010 (not issued in document form)
<i>Date of adoption of Views:</i>	15 July 2015
<i>Subject matter:</i>	Imposition of a fine for displaying a traditional flag
<i>Procedural issues:</i>	Exhaustion of domestic remedies; level of substantiation of claims
<i>Substantive issues:</i>	Right to freedom of expression; right of peaceful assembly
<i>Articles of the Covenant:</i>	19, 21 and 26
<i>Articles of the Optional Protocol:</i>	1, 2 and 5 (2) (b)



## 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. 1969/2010\***

*Submitted by:* Taras Surgan (not represented by counsel)

*Alleged victim:* The author

*State party:* Belarus

*Date of communications:* 28 May 2010 (initial submission)

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

*Meeting on 15 July 2015,*

*Having concluded* its consideration of communication No. 1969/2010, submitted to it by Taras Surgan 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**

1.1 The author of the communication is Taras Surgan, a Belarusian national born in 1975. He claims to be a victim of a violation by Belarus of his rights under articles 19 (2) and 26 of the International Covenant on Civil and Political Rights. In a subsequent submission, he also claimed to be a victim of a violation of his rights under article 21 of the Covenant. The Optional Protocol entered into force for the State party on 30 December 1992. The author is unrepresented.

1.2 On 15 October 2010 and on 29 November 2011, the State party requested the Committee to examine the admissibility of the communication separately from its merits, in accordance with rule 97 (3) of the Committee's rules of procedure. On 22 November 2010, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to examine the admissibility of the communication together with its merits. This decision was reiterated on 30 November 2011.

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\* The following members of the Committee participated in the consideration of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujall Seetulsingh, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

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

2.1 On 16 July 2009, the author was arrested and brought to a district police station in Vitebsk, where an official record was drawn up, stating that he had committed an administrative offence under article 23.34, part 1, of the Belarus Code of Administrative Offences.<sup>1</sup> On 11 August 2009, the Court of the Zheleznodorozhnyi District in Vitebsk found him guilty of a violation of the established procedure for organizing and holding mass events, under article 23.34, part 1, of the Belarus Code of Administrative Offences, fined him 175,000 Belarusian roubles<sup>2</sup> and confiscated a white-red-white flag the author had in his possession. The District Court found that the author had taken part in an unauthorized picket on 16 July 2009. More specifically, he had been picketing at the Blokhin bridge, trying to attach a white-red-white flag to the bridge railing.

2.2 On 11 September 2009, the Vitebsk Regional Court rejected the author's appeal and upheld the District Court's decision.

2.3 On 28 December 2009, the Supreme Court dismissed the author's application for a supervisory review of the court decisions of 11 August and 11 September 2009.

2.4 The author submits that the domestic courts failed to establish that he had participated in a picket on 16 July 2009 and claims that the event in question could not be considered to be a mass event because he alone participated therein. He claims that he sought to express publicly his political views, as on 16 July 2009 all opposition activists in Belarus were celebrating a day of solidarity with the victims of repression by the regime in place. He notes that the right to freedom of expression is guaranteed under article 33 of the Constitution.

2.5 The author explains that, due to the unplanned nature of the event, he did not deem it necessary to request permission from the authorities to conduct it. Furthermore, he remained at the Blokhin bridge for only 10 minutes before being apprehended by the police. Due to the limited duration of the event, his actions did not affect the rights of others or cause damage to citizens or the city administration, and nobody sued him for damages as a consequence.

2.6 The author explains that his political views run counter to the official State ideology. He therefore considers that his arrest and the imposition of a fine by the national authorities amount to persecution and discrimination on political grounds.

2.7 He submits that he has exhausted all available domestic remedies.

### **The complaint**

3. The author claims that the facts as submitted amount to a violation of his rights under articles 19 (2) and 26 of the Covenant. Subsequently to his initial submission, the author also claimed that his rights under article 21 of the Covenant had been violated.<sup>3</sup> He requests that his rights be restored and claims compensation for non-pecuniary damages.

<sup>1</sup> Article 23.34, part 1, of the Belarus Code of Administrative Offences reads: "Violation of the established procedure of organizing or holding mass events or pickets. Violation of the established procedure of organizing or holding assemblies, meetings, rallies, demonstrations or other mass events or pickets is punishable by a warning, or a fine of up to 10 minimum wages, or by administrative arrest."

<sup>2</sup> Equivalent to approximately 43 euros on 11 August 2009. *Source*: National Bank of the Republic of Belarus (see [www.nbrb.by](http://www.nbrb.by)).

<sup>3</sup> See paragraph 5.6 below.

**State party's observations on admissibility**

4. On 15 October 2010, the State party challenged the admissibility of the communication, arguing that the author had failed to exhaust all available domestic remedies, as he had not applied for supervisory review of the domestic courts' decisions in his case. The right to apply for supervisory review of a *res judicata* court ruling in an administrative case is guaranteed under article 12.11 of the Code of Administrative Procedure. Such an application shall be made within six months after the ruling becomes final. An application for supervisory review is an effective remedy aimed at avoiding as much as possible instituting proceedings against citizens without justification. The author has not applied to the Prosecutor's Office under the supervisory review procedure and hence has failed to avail himself of such a remedy. Therefore, the communication should be declared inadmissible.

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

5.1 On 14 September 2011, the author commented on the State party's observations. He notes that, under article 2 (2) of the Covenant, Belarus undertook to adopt such legal and legislative measures as may be necessary to ensure the exercise of rights by individuals subject to its jurisdiction. The author submits that article 33 of the Constitution guarantees to everyone freedom of thought and opinion, and freedom of expression, whereas article 35 of the Constitution establishes that the "freedom to hold assemblies, meetings, street marches, demonstrations and pickets that do not disturb law and order or violate the rights of other citizens of Belarus shall be guaranteed by the State. The procedure for holding the above-mentioned events shall be determined by law." He states that these rights can be exercised by a citizen of Belarus under any circumstances, subject to the restrictions that are provided by law and are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

5.2 The author reiterates his argument that, at the time of his detention and trial, he was not accused of encroaching upon national security or public safety by his actions, nor was he accused of disrupting public order, posing a threat to the life and health of individuals, or their morals, or breaching their rights and freedoms. The author submits that he was fined for the mere fact of holding a picket, which allegedly was organized without regard for the procedure for conducting mass events.

5.3 The author notes that article 23.34 of the Code of Administrative Offences does not prescribe sanctions for mere participation in a mass event, but rather for the organization of such an event. He adds that, at the time of his apprehension and trial, it was not established that he had either organized or led the picket. Therefore, as a mere participant in the event, he could not have been taken away from the venue and subjected to administrative penalty. The author explains that, by taking him away from the picket, the State party's authorities deprived him of the right of peaceful assembly. The peacefulness of the assembly was determined by the aim of displaying a flag in a public place. The flag carried by the author is a historic national flag of Belarus and has not been banned by the courts. The peaceful nature of the author's picket has not been disputed by the police officers who detained him, the State party's courts that have examined his case or by the State party in its observations to the Committee.

5.4 The author adds that he deliberately chose this way of expressing his opinion because it did not pose any threat to national security or public safety, public order, public health or morals or the rights and freedoms of others. He reiterates that neither the State authorities nor private individuals sued him for monetary or moral damage. The State party did not raise claims in this regard in its observations either.

5.5 Concerning the argument of non-exhaustion of domestic remedies, the author responds that the supervisory review of his claim by the Supreme Court was superficial and ineffective. He therefore assumed that a supervisory review by the Prosecutor's Office would be ineffective as well and decided not to resort to this remedy.

5.6 The author claims a violation of article 21, in addition to the earlier allegations of violation of articles 19 (2) and 26 of the Covenant.

#### **State party's additional observations**

6.1 On 29 November 2011, the State party reiterated its position of 15 October 2010, regarding the admissibility of the communication. It adds that it considers the communication as having been registered in violation of article 1 of the Optional Protocol.

6.2 On 25 January 2012, the State party submitted that, upon becoming a party to the Optional Protocol, it recognized the competence of the Committee under article 1, but that the recognition of competence is done 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. It maintains that, under the Optional Protocol, States parties have no obligation to recognize the Committee's rules of procedure or its interpretation of the Protocol's provisions, which could be effective only when done in accordance with the Vienna Convention on the Law of Treaties. It submits that, in relation to the complaints 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 subject to the Optional Protocol. It further 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 comment on the 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 lack of cooperation from the State party*

7.1 The Committee notes the State party's submissions that there are no legal grounds for the consideration of the author's communication insofar as it was registered in violation of article 1 of the Optional Protocol, because the author has failed to exhaust available domestic remedies, that it has no obligation to recognize the Committee's rules of procedure and its interpretation of the Protocol's provisions, and that the decision taken by the Committee on the communication will be considered by its authorities as "invalid".

7.2 The Committee recalls that article 39 (2) of the Covenant authorizes it to establish its own rules of procedure, which the States parties have agreed to recognize. 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 Optional Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (art. 5 (1) and (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of a

communication and in the expression of its Views.<sup>4</sup> It is up to the Committee to determine whether a case should be registered. By failing to accept the competence of the Committee to determine whether a communication shall be registered and by declaring outright that it will not accept the Committee's determination regarding the admissibility and the merits of communications, the State party has violated its obligations under article 1 of the Optional Protocol.

*Consideration of admissibility*

8.1 Before considering any claim contained in a communication, the 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.

8.2 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.

8.3 The Committee takes note of the State party's objection to the effect that the author should have requested the Prosecutor's Office to initiate a supervisory review of the domestic courts' decisions. It also takes note of the author's explanation that the supervisory review proceedings with the Supreme Court were ineffective and superficial in his case. The Committee recalls its jurisprudence according to which the State party's supervisory review proceedings before the Prosecutor General's Office, which allow the review of court decisions that have taken effect, do not constitute a remedy that has to be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.<sup>5</sup> In the circumstances, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

8.4 The Committee notes that the author claims a violation of his rights under article 21 of the Covenant. In the circumstances and in the absence of any other pertinent information on file, the Committee considers that this part of the communication is inadmissible *ratione materiae* under article 3 of the Optional Protocol.

8.5 The Committee further notes the author's claim under article 26 of the Covenant. However, the author does not provide enough information to substantiate his claim for the purpose of admissibility. In the absence of any further pertinent information on file, the Committee considers that this part of the communication is unsubstantiated for the purposes of article 2 of the Optional Protocol and is thus inadmissible.

8.6 Finally, the Committee considers that the author has sufficiently substantiated the remaining claim that raises issues covered under article 19 (2) of the Covenant for the purposes of admissibility. It declares this part of the communication admissible with regard to these provisions of the Covenant and proceeds to its examination on the merits.

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<sup>4</sup> See communications Nos. 1867/2009, 1936/2010, 1975/2010, 1977/2010, 1978/2010, 1979/2010, 1980/2010, 1981/2010 and 2010/2010, *Levinov v. Belarus*, Views adopted on 19 July 2012, para. 8.2; and communication No. 869/1999, *Piandiong et al. v. the Philippines*, Views adopted on 19 October 2000, para. 5.1.

<sup>5</sup> See communications No. 1785/2008, *Oleshkevich v. Belarus*, Views adopted on 18 March 2013, para. 7.3; No. 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3; No. 1814/2008, *P.L. v. Belarus*, decision of inadmissibility adopted on 26 July 2011, para. 6.2.; No. 1839/2008, *Komarovsky v. Belarus*, Views adopted on 25 October 2013, para. 8.3; and No. 1903/2009, *Youbko v. Belarus*, Views adopted on 17 March 2014, para. 8.3.

*Consideration of the merits*

9.1 The Committee has considered the 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.

9.2 The Committee notes the author's claim that his apprehension and subsequent fining for having attempted to display a traditional Belarusian flag on a bridge and thus express his opposition to the regime in place, which was considered by the authorities as an unauthorized picket, constitute an unjustified restriction on his right to freedom of expression, as protected under article 19 (2) of the Covenant. Furthermore, the Committee notes the author's allegation that he was imparting information and not holding an assembly, and that the Law on Mass Events is not applicable to his actions.

9.3 The Committee is called upon to decide whether the imposition of the fine on the author for his actions amounts to a violation of article 19 (3) of the Covenant.<sup>6</sup> From the material before the Committee, it transpires that the author's activities were qualified by the courts as participation in an unauthorized picket and not as the "imparting of information". In the Committee's opinion, by applying a "procedure for holding mass events", the State party effectively established restrictions regarding the exercise of the author's freedom to impart information, as guaranteed by article 19 (2) of the Covenant.<sup>7</sup>

9.4 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), 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.

9.5 The issue before the Committee is, therefore, whether in the present case the restrictions were justified under article 19 (3) of the Covenant. 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 reputations of others; or (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. It observes that any restrictions on the exercise of the rights provided for in article 19 (2) must conform to the strict test of necessity and proportionality and must be directly related to the specific need on which they are predicated.

9.6 The Committee points out that, if a State party imposes a restriction on the rights under articles 19 (2) of the Covenant, it should demonstrate that the restriction was necessary in the case in question and that, even if, in principle, a State party may introduce a system aimed at reconciling an individual's freedom to impart information with the general interest of maintaining public order in a certain area, that system must not operate in a way that is incompatible with the object and purpose of article 19 of the Covenant.<sup>8</sup>

9.7 In this regard, the Committee notes that the State party has not attempted to explain why it was necessary, for one of the legitimate purposes set out in article 19 (3) of the Covenant, for the author to obtain authorization prior to his activity and why the breach of

<sup>6</sup> See communication No. 1604/2007, *Zalesskaya v. Belarus*, Views adopted on 28 March 2011, para. 10.4.

<sup>7</sup> See communication No. 780/1997, *Laptsevich v. Belarus*, Views adopted on 20 March 2000, para. 8.1, communication No. 1772/2008, *Belyazeka v. Belarus*, Views adopted on 23 March 2012, para. 11.3.

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

this requirement necessitated the arrest of the author, the imposition on him of pecuniary sanctions and confiscation of the flag that belonged to him.<sup>9</sup> Neither has it explained how in practice, in the case at issue, the author's actions would have violated the rights and freedoms of others or would have posed a threat to public safety or public order.<sup>10</sup> In this light, the Committee concludes that the facts as submitted reveal a violation by the State party of the author's rights under article 19 (2) of the Covenant.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the State party has violated the author's rights under article 19 (2) of the Covenant.

11. 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 adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the Committee reiterates that the State party should review its legislation, in particular, the Law on Mass Events of 30 December 1997, as it has been applied in the present case, with a view to ensuring that the rights under article 19 of the Covenant may be fully enjoyed in the State party.<sup>11</sup>

12. 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 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 it has been determined that a violation has occurred, 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.

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<sup>9</sup> See *Laptsevich v. Belarus*, para. 8.5.

<sup>10</sup> Communication No. 1934/2010, *Bazarov v. Belarus*, Views adopted on 24 July 2014, para. 7.5.

<sup>11</sup> See, for example, communications No. 1851/2008, *Sekerko v. Belarus*, Views adopted on 28 October 2013, para. 11; *Turchenyak et al. v. Belarus*, para. 9; No. 1790/2008, *Govsha et al. v. Belarus*, Views adopted on 27 July 2012, para. 11.