United Nations CCPR/C/105/D/1226/2003

International Covenant on Civil and Political Rights

Distr.: General
29 August 2012

Original: English

Human Rights Committee

Communication No. 1226/2003

Views adopted by the Committee at its 105th session, 9–27 July 2012

Submitted by:	Viktor Korneenko (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	5 August 2003 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 27 November 2003 (not issued in document form)
Date of adoption of Views:	20 July 2012
Subject matter:	Holding the chairperson of a public association accountable under law for the use of computer equipment received as "untied foreign aid" for the preparation for and monitoring of elections and confiscation of the equipment in question
Substantive issues:	Right to a fair hearing by an independent and impartial tribunal; right to impart information and ideas; right to freedom of association; permissible restrictions; right to take part in the conduct of public affairs; right to the equal protection of the law without any discrimination
Procedural issues:	Level of substantiation of a claim; exhaustion of domestic remedies
Articles of the Covenant:	14, para. 1; 19, para. 2; 22, para. 1; 25 (a); 26
Articles of the Optional Protocol:	2; 5, para. 2 (b)

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 (105th session)

concerning

Communication No. 1226/2003*

Submitted by:	Viktor Korneenko (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	5 August 2003 (initial submission)

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

Meeting on 20 July 2012,

Having concluded its consideration of communication No. 1226/2003, submitted to the Human Rights Committee by Viktor Korneenko 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 Viktor Korneenko, a Belarusian national born in 1957 and residing in Gomel, Belarus. He claims to be a victim of violations by Belarus of article 14, paragraph 1, and article 26 of the International Covenant on Civil and Political Rights. The communication also appears to raise issues under article 19, paragraph 2; article 22, paragraph 1, and article 25, paragraph (a), of the Covenant. The Optional Protocol entered into force for the State party on 30 December 1992. The author is not represented.

The facts as presented by the author

2.1 The author is the Chairperson of the Gomel regional association Civil Initiatives. On 13 August 2001, premises of Civil Initiatives were searched by officers of the Department of State Security Committee of Gomel Region (DSSC) pursuant to a search warrant issued

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

by the Prosecutor of Gomel Region, in connection with a criminal investigation under article 341 of the Criminal Code (desecration of buildings and damage to property) concerning political slogans that had been painted on buildings in Gomel between May and 9 August 2001. The author states that the search and seizure of the Civil Initiatives' computer equipment[1] by the DSSC was carried out in violation of article 210 of the Criminal Procedure Code (the procedure of search and seizure) and the Instruction on the procedure of seizure, registration, storage and transfer of material evidence, money, valuables, documents and other property in criminal cases (Instruction). Specifically, seized computers were not packed and sealed by the investigator and other officers that took part in the search. This fact is documented in the search report of 13 August 2001.

2.2 On 17 August 2001, DSSC notified the Inspectorate of the Ministry of Customs and Duties of the Zheleznodorozhniy District of Gomel that, contrary to Civil Initiatives' statutory activities, it was using the computer equipment, reportedly received as untied foreign aid and subsequently seized in the search, to monitor the 2000 parliamentary elections and 2001 presidential elections in Belarus, as well as for other political activities such as the preparation and reproduction of unregistered publications and propaganda materials.

2.3 On 18 August 2001, the criminal case (see para. 2.1 above) was transmitted for jurisdictional reasons by DSSC to the Department of Investigation Committee under the Ministry of Internal Affairs of Gomel Region. On 9 October 2001, the Department's investigator suspended pretrial investigation in this case, as the investigation had exhausted all possibilities of identifying the culprits responsible for the painting of political slogans, and ordered DSSC to return the computer equipment seized to Civil Initiatives. By letter of the Deputy Head of the Department dated 14 October 2002, the author was informed that Civil Initiatives' property seized by DSSC during the search of 13 August 2001 was not admitted as material evidence and had not been transmitted to the Department together with the criminal case in question. The author adds that, under article 27 of the Belarus Constitution and article 8 of the Criminal Procedure Code, any evidence obtained in violation of the law is inadmissible and cannot be used as a basis for criminal prosecution.

2.4 On an unspecified date, the author complained to the Prosecutor of Gomel Region about a violation of the criminal procedure law by the DSSC investigator who carried out the search of Civil Initiatives' premises on 13 August 2001 and requested the Prosecutor to recognize the evidence obtained during the search as inadmissible in a legal proceeding. On 12 October 2001, the Prosecutor replied that the search of Civil Initiatives' premises was carried out under his search warrant and in compliance with criminal procedure law. By the same letter, the author was officially advised that, as of 9 October 2001, criminal prosecution of executive officers of Civil Initiatives in relation to that case had been terminated and that he should contact to the DSSC for the return of the seized property.

2.5 From 5 to 27 November 2001, the Ministry of Customs and Duties of the Zheleznodorozhniy District of Gomel undertook a tax inspection of the activities of Civil Initiatives but did not establish any violation of the law. In its tax inspection report, however, it did use the information provided to it by the DSSC on 17 August 2001 on the use of computer equipment seized during the search of Civil Initiatives' premises (see para. 2.2 above). On 10 December 2001, the Ministry of Customs and Duties of the Zheleznodorozhniy District of Gomel drew up and transmitted to the court an administrative report in relation to the author. He was accused of having committed an administrative offence, envisaged by paragraph 4, part 3, of the temporary Presidential

[1] Equipment seized consisted of six central processing units, six monitors, three printers, one scanner, one copier, six keyboards and six computer mouse devices.

Decree No. 8 on certain measures emending the procedure for the acceptance and use of untied foreign aid of 12 March 2001 (Presidential Decree). The latter proscribes the use of untied foreign aid for the preparation for and conduct of elections, referendums, recall of a deputy or of a member of the Council of the Republic, for the preparation of gatherings, meetings, street marches, demonstrations, pickets, strikes, the production and dissemination of politically charged material, as well as the organization of seminars and other forms of politically charged activities directed at the public at large. In accordance with paragraph 5.3 of the Presidential Decree, untied foreign aid received shall be confiscated and its recipients shall incur an administrative penalty (fine) if such foreign aid was misused, as well as used for any of the purposes proscribed by paragraph 4, part 3, of the Decree.

2.6 The author notes that not all of the computer equipment seized during the search of Civil Initiatives' premises was received as untied foreign aid for the fulfilment of its statutory activities. Thus, not all of the computer equipment is subject to the punitive sanctions envisaged by the Presidential Decree.

2.7 On 25 January 2002, a judge for administrative cases and enforcement proceedings of the Zheleznodorozhniy District Court of Gomel examined the administrative report of 10 December 2001 in relation to the author and concluded that Civil Initiatives has used the computer equipment, received as untied foreign aid, "for the so-called independent monitoring of the 2001 presidential elections in Belarus and carrying out related publicity activities in the course of the 2001 presidential elections in Belarus", contrary to paragraph 4, part 3, of the Presidential Decree. Further to paragraph 5.3 of the decree, the author was fined 1 million Belarusian roubles (equal at that time to 615 US dollars) and the confiscation of five central processing units, two printers, five keyboards and five computer mouse devices seized was ordered. The author claims that:

(a) In finding him guilty, the court used the evidence obtained by DSSC in violation of procedural law. All the motions contesting the admissibility of such evidence that were submitted by the author and his defence counsel have been rejected by the court as unfounded. During the hearing, the judge stated that, despite the fact that the evidence was obtained in violation of the law, she had no grounds not to believe a public body such as DSSC. The author's testimony and that of witnesses appearing on his behalf were ignored;

(b) The DSSC investigator who carried out the search of Civil Initiatives' premises on 13 August 2001 testified in court that he did not seal the seized equipment as it was required of him by law and was reprimanded for that by his superiors. The author notes that the investigator effectively admitted that he obtained the evidence in violation of article 27 of the Belarus Constitution;

(c) The court refused to establish exactly what of the computer equipment seized appearing in the case as material evidence had been received as untied foreign aid;

(d) The court did not take into account that the information it considered to be contrary to paragraph 4, part 3, of the Presidential Decree was reportedly downloaded from the computer in the absence of any witnesses and only on 7 October 2001, that is, several months after DSSC notified the Ministry of Customs and Duties of the Zheleznodorozhniy District of Gomel of the improper use of the equipment in question by Civil Initiatives (see para. 2.2 above).

2.8 Under Belarusian law, a ruling of the first instance district court in an administrative case is final and cannot be appealed within the framework of administrative proceedings. It can, however, be appealed through a supervisory review procedure to the regional court and the Supreme Court.

2.9 On 1 March 2002, a Chairperson of the Gomel Regional Court dismissed the author's request for a supervisory review of the ruling of the Zheleznodorozhniy District Court of Gomel of 25 January 2002.

2.10 On 5 March 2002, the same judge of the Zheleznodorozhniy District Court of Gomel who issued the ruling of 25 January 2002 sent to the author another version of that ruling with a handwritten addition to the effect that five monitors seized would also be confiscated. The author perceived the judge's actions as tampering with a court ruling that had already become executory and, on an unspecified date, complained about it to the Ministry of Justice. By letter of the Ministry of Justice dated 10 April 2002, the author was informed that his complaint was examined and that, indeed, the judge had made an error and consequently incurred a disciplinary penalty.

2.11 On 16 May 2002, the Ministry of Justice sent a letter to the Chairperson of the Gomel Regional Court, suggesting to him that he "takes measures in relation to the judge's omissions" in examining the author's administrative case. On 29 May 2002, the Chairperson of the Gomel Regional Court re-examined the author's case, annulled the ruling of the Zheleznodorozhniy District Court of Gomel of 25 January 2002[2] and sent the case back to the same court with a request for it to be examined by a different judge.

2.12 On 23 July 2002, another judge of the Zheleznodorozhniy District Court of Gomel examined the author's administrative case and again concluded that Civil Initiatives had used the computer equipment, received as untied foreign aid, "for the so-called independent monitoring of the 2001 Presidential elections in Belarus and carrying out related publicity activities in the course of the 2001 Presidential elections in Belarus", contrary to paragraph 4, part 3, of the Presidential Decree. Further to paragraph 5.3 of the Decree, the author was fined with one million Belarusian Roubles (equal at that time to 550 US dollars) and, this time, the confiscation of all seized equipment was ordered. The author submits that the court again used the evidence obtained by DSSC in violation of procedural law.

2.13 On 26 August 2002, a Chairperson of the Gomel Regional Court dismissed the author's request for a supervisory review of the ruling of the Zheleznodorozhniy District Court of Gomel of 23 July 2002.

2.14 On 29 November 2002, the Deputy Prosecutor General replied in writing to the author's repeated complaints on the inadmissibility in court of evidence that was obtained illegally by DSSC on 13 August 2001. According to the letter received, there was no violation of the procedural law in obtaining the evidence in question, no complaints or objections were entered into the search report by any of the staff members of Civil Initiatives present during the search and seizure of the property, and it was impossible for the DSSC officers to seal up the equipment seized from Civil Initiatives due to its size. The author submits that article 210 of the Criminal Procedure Code and the Instruction (see para. 2.1 above) do not make any exception to the obligation to seal up a seized object based on the size; otherwise, under article 27 of the Belarus Constitution, the evidence in question would lose its evidentiary value.

2.15 On 30 December 2002, the First Deputy Chairperson of the Supreme Court dismissed the author's appeal under the supervisory review procedure against the ruling of the Zheleznodorozhniy District Court of Gomel of 23 July 2002 and noted that an administrative penalty imposed on him was determined in accordance with the sanctions

[2] The Chairperson of the Gomel Regional Court ruled that a judge of the Zheleznodorozhniy District Court of Gomel failed to deliberate on what should have been done with each item of the computer equipment seized in the search of 13 August 2001, and not only with those that have been subject to confiscation under the court ruling.

provided for in the Presidential Decree, taking into account the offence committed and his "personal data". The author submits that, in his view, the phrase "personal data" refers to his political opinion and that of Civil Initiatives and, thus, violates article 26 of the Covenant, which prohibits discrimination on the ground of political opinion.

2.16 On 6 February 2003, the Head of the Department for Petitions and Citizens' Reception of the Supreme Court dismissed the author's repeated complaint under the supervisory review procedure, addressed to the Chairperson of the Supreme Court, about the ruling of the Zheleznodorozhniy District Court of Gomel of 23 July 2002.

2.17 On 24 January 2003, the author complained to the Constitutional Court about the ruling of the Zheleznodorozhniy District Court of Gomel of 23 July 2002 that was handed down on the basis of evidence obtained in violation of article 27 of the Belarus Constitution. By letter dated 11 February 2003, the Chairperson of the Constitutional Court confirmed that, under this article, any evidence obtained in violation of the law was inadmissible and could not be used as a basis for criminal prosecution, handing down of a court ruling or taking a decision by any public body. The author was advised that he had a right to complain about the ruling in question through the supervisory review procedure to the higher court or to the prosecutor. The letter further states that the Constitutional Court had confirmed on many occasions a direct application of article 60 of the Belarus Constitution, guaranteeing the right to judicial protection,[3] and that, by refusing to consider citizens' complaints, the courts take responsibility for the non-observance of the Constitution.

The complaint

3.1 The author claims that he was denied the right to equality before the courts and the determination of his rights and obligations in a suit at law (art. 14, para. 1, of the Covenant).

3.2 The author alleges that the State party authorities violated his right to equal protection of the law against discrimination (art. 26 of the Covenant), on the grounds of his political opinion.

3.3 Although he does not specifically invoke these articles, the facts as presented by the author appear to also raise issues under article 19, paragraph 2; article 22, paragraph 1, and article 25, paragraph (a), insofar as the compatibility of the Presidential Decree with the Covenant is concerned (see para. 6.1 below).

State party's observations on the merits

4.1 On 30 July 2008, the State party recalls the chronology of the case as summarized in paragraph 2.1 above and adds that the objects seized during the search of 13 August 2001 had been packed in 13 bags and sealed. It specifies that it had not been possible to pack the computer equipment due to its size and that it had been transported by officers to the DSSC premises. The State party argues that there was no violation of the procedural law by officers of the DSSC and submits that the author was informed of this fact on many occasions, including by the General Prosecutor's Office.

4.2 On 23 July 2002, a judge of the Zheleznodorozhniy District Court of Gomel had fined the author 1 million Belarusian roubles and ordered the confiscation of all computer equipment seized on the basis of paragraph 5.3 of the Presidential Decree. The author, as

[3] Article 60 of the Belarus Constitution reads: "Everyone shall be guaranteed protection of one's rights and liberties by a competent, independent and impartial court of law within time periods specified in law".

the Chairperson of Civil Initiatives, had been found guilty of having used, from 14 April to 13 August 2001, untied foreign aid (computer equipment) for purposes proscribed by the Presidential Decree, namely, the preparation for and conduct of the Presidential elections. The judge made the ruling on the basis of evidence that had been examined during the court proceedings. There were no corroborated facts that some evidence had been obtained in violation of law. The State party refutes the claim advanced by the author in court that he had reasons to believe that the aim of the proceedings was to discredit Civil Initiatives and him personally and states that his political opinion was irrelevant to the court proceedings and was not taken into account.

4.3 The State party asserts that the court proceedings in the author's case were public and that he was represented. On one occasion the author challenged the judge, who, in his opinion, was interfering with the examination of one of the witnesses by the author's representative. The State party submits that the judge has a right to pose questions to the participants at any stage of the court proceedings and that, for this reason, there were well-founded grounds to dismiss the author's challenge.

4.4 The State party concludes that there were well-founded reasons for holding the author administratively responsible under paragraph 5.3 of the Presidential Decree.

Author's comments on the State party's observations

5.1 On 7 November 2010, the author submits his comments on the State party's observations. He argues that that State party has effectively admitted that the computer equipment seized had not been sealed due to its size but continued to claim that it did not amount to a violation of procedural law. The author reiterates his initial claim that any evidence obtained in violation of law is inadmissible and cannot be used as a basis for criminal prosecution (paras. 2.1, 2.3 and 2.14 above). He refers to the letter of the Chairperson of the Constitutional Court of 11 February 2003 in support of this claim (para. 2.17 above) and submits that courts were supposed to exclude any evidence obtained in violation of law while examining his administrative case. The author claims that, by having based an administrative charge against him on the evidence obtained in violation of the law, the State party violated his rights under article 14, paragraph 1, of the Covenant to equality before the courts and to a fair hearing of his administrative case by a competent, independent and impartial tribunal.

5.2 The author further submits that the lack of competence, independence and impartiality of the State party's courts is also demonstrated by the manner in which his administrative case was examined by a judge of the Zheleznodorozhniy District Court of Gomel on 25 January 2002 (paras. 2.7 and 2.10 above) and by another judge of the same court on 23 July 2002 (paragraph 2.12 above). He recalls that none of his complaints to the Chairpersons of the Gomel Regional Court and of the Supreme Court have yielded any results.

5.3 As to the State party's claim that the author's political opinion was irrelevant to the court proceedings and was not taken into account (para. 4.2 above), he submits a short chronology of the events that preceded the search of the premises of Civil Initiatives on 13 August 2001, the seizure of computer equipment and the holding of him administratively responsible.

5.4 From 1996 onwards, the author was the Chairperson of Civil Initiatives, which brought together more than 300 citizens residing in the Gomel region who were actively involved in the monitoring of elections at all levels in the State party. Civil Initiatives was planning to dispatch some 300 independent observers to monitor the presidential elections that were scheduled for September 2001. All preparatory work was carried out on the premises of Civil Initiatives and the computer equipment seized was a key part of the

monitoring process. The author argues that, on the eve of the elections (13 August 2001), the State party authorities searched the premises of Civil Initiatives and seized its equipment under the pretext of a criminal case that had nothing in common with the activities of the association in question. Shortly after, Civil Initiatives itself was dissolved by court order on the basis of the evidence obtained from the information saved on the computer equipment seized.[4]

5.5 The author refers to the letter of the First Deputy Chairperson of the Supreme Court of 30 December 2002, acknowledging that the author was held administratively responsible "taking into account his personal data" (para. 2.15 above), and concludes that the State party authorities violated his right, guaranteed under article 26 of the Covenant, to equal protection of the law against discrimination on grounds of his political opinion.

Further submissions from the State party and the author

6.1 On 23 May 2011, the Committee informed the State party that it had started the consideration of the present communication at its 101st session (14 March–1 April 2011). It noted that the communication appears to also raise issues under articles 19, 22 and 25 of the Covenant, although they have not been specifically invoked by the author. The Committee, therefore, decided to postpone the consideration of the communication in order to request the State party to provide further observations on the author's initial submission, taking into account the Committee's assessment that it also raised issues under articles 19, 22 and 25 of the Covenant.

6.2 On 25 January 2012, the State party submits, with regard to the present communication together with around sixty other communications that, when becoming a party to the Optional Protocol, it recognized the competence of the Committee under article 1, but that recognition of competence is done in conjunction with other provisions of the Optional Protocol, including those that set criteria regarding petitioners and admissibility of their communications, in particular articles 2 and 5 of the Optional Protocol. It maintains that under the Optional Protocol the State parties have no obligations on the recognition of the Committee's rules of procedure and its interpretation of the Protocol's provisions, which "could only be efficient when done in accordance with the Vienna Convention of the Law on Treaties". It submits that "in relation to the complaint procedure the State Parties should be guided first and foremost by the provisions of the Optional Protocol" and that "references to the Committee's longstanding practice, methods of work, case law are not subject of the Optional Protocol". It further submits that "any communication registered in violation of the provisions of the Optional Protocol to the Covenant on Civil and Political Rights will be viewed by the State party as incompatible with the Protocol and will be rejected without comments on the admissibility or on the merits". The State party further maintains that decisions taken by the Committee on such "declined communications" will be considered by its authorities as "invalid".

7.1 On 21 March 2012, the author argues in great detail that, by becoming a party to the Optional Protocol, the State party has recognized the Committee's competence 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 it has been determined that a violation has

[4] Reference is made to communication No. 1274/2004, *Korneenko* v. *Belarus*, Views adopted on 31 October 2006.

occurred.[5] He adds that, therefore, the State party is obliged to give effect to the Committee's Views and to accept the Committee's standards, practices, methods of work and jurisprudence.

7.2 The author further submits that he did not appeal the decisions taken by the State party's courts in relation to his case to the prosecutorial authorities under the supervisory review procedure because, in line with the Committee's jurisprudence, complainants are required to exhaust domestic remedies that are not only available but also effective. In this regard, he notes that the Committee has previously concluded that the supervisory review procedure constituted an extraordinary means of appeal and was not a remedy, which had to be exhausted for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

Issues and proceedings before the Committee

The State party's failure to cooperate

8.1 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 is registered in violation of the provisions of the Optional Protocol; that it has no obligations on the recognition of the Committee's rules of procedure and its interpretation of the Protocol's provisions; and that decisions taken by the Committee on the present communication will be considered by its authorities as "invalid".

8.2 The Committee recalls that article 39, paragraph 2, of the Covenant authorizes it to establish its own rules of procedure, which the States parties have agreed to recognize. The Committee further observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights 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 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, paras. 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 the communication, and in the expression of its Views.[6] It is for 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 shall be registered and by declaring beforehand that it will not accept the determination of the Committee on the admissibility and on the merits of the communications, the State party violates its obligations under article 1 of the Optional Protocol to the Covenant.

Consideration of admissibility

9.1 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.

[5] Reference is made to the Committee's general comment No. 33 (2008) on obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 40*, vol. I (A/64/40 (Vol. I)), annex V, paras. 11 and 13.

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

9.2 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.

9.3 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the fact that the author has interpreted the State party's further submission of 25 January 2012 as challenging the admissibility of his communication on the ground of non-exhaustion of domestic remedies. The Committee notes the author's explanation that he had exhausted all available domestic remedies and that he has not lodged any complaint with the prosecutorial authorities, since the supervisory review procedure does not constitute an effective domestic remedy. The Committee also notes that the author submitted an appeal for supervisory review to the Supreme Court, which upheld the ruling of the Zheleznodorozhniy District Court of Gomel of 23 July 2003. In this regard, the Committee recalls its jurisprudence, according to which the supervisory review procedure against court decisions which have entered into force constitutes an extraordinary means of appeal which is dependent on the discretionary power of a judge or prosecutor and is limited to issues of law only.[7] In the circumstances, the Committee considers that it is not precluded, for purposes of admissibility, by article 5, paragraph 2 (b), of the Optional Protocol, from examining the communication.

9.4 With regard to the author's claim that his rights under article 14 of the Covenant were violated, the Committee recalls that the right to a fair and public hearing by a competent, independent and impartial tribunal is guaranteed in cases regarding the determination of criminal charges against individuals or of their rights and obligations in a suit at law. It recalls that criminal charges relate in principle to acts declared to be punishable under domestic criminal law.[8] The notion, however, may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.[9] In this respect, the Committee recalls that the concept of a "criminal charge" bears an autonomous meaning, independent of the categorizations employed by the national legal system of the States parties, and has to be understood within the meaning of the Covenant.[10] The issue before the Committee is, therefore, whether article 14 of the Covenant is applicable in the present communication, that is, whether the sanctions in the author's case concerned "any criminal charge" within the meaning of the Covenant, i.e., regardless of their qualification in domestic law.

9.5 As to the "purpose and character" of the sanctions, the Committee notes that, although administrative according to the State party's law, the sanctions imposed on the author had the aim of repressing, through penalties, offences alleged against him and of serving as a deterrent for others. In the Committee's view, this objective is analogous to the general purpose of criminal law. It further notes that the rules of law infringed by the author are directed, not towards a given group possessing a special status – in the manner, for example, of disciplinary law – but towards everyone in his or her capacity as recipients of

[7] See, for example, communication No. 1537/2006, *Gerashchenko* v. *Belarus*, decision of inadmissibility adopted on 23 October 2009, para. 6.3; communication No. 1814/2008, *P.L.* v. *Belarus*, decision of inadmissibility adopted on 26 July 2011, para. 6.2; communication No. 1838/2008, *Tulzhenkova v. Belarus*, Views adopted on 26 October 2011, para. 8.3.

[8] General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 15.

[9] Ibid. See also communication No. 1015/2001, *Perterer* v. *Austria*, Views adopted on 20 July 2004, para. 9.2.

[10] Communication No. 1311/2004, *Osiyuk* v. *Belarus*, Views adopted on 30 July 2009, para. 7.3.

untied foreign aid in Belarus; they proscribe conduct of a certain kind and make its commission subject to a sanction that is punitive. Therefore, the general character of the rules and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offences in question were, in terms of article 14 of the Covenant, criminal in nature. Consequently, the communication is admissible *ratione materiae*, insofar as the proceedings related to the use of foreign aid (computer equipment) for the preparation for and monitoring of the elections, fall within the ambit of "the determination" of a "criminal charge" under article 14, paragraph 1, of the Covenant.[11]

9.6 The Committee further notes that the author's claim under article 14, paragraph 1, of the Covenant concerns the manner in which the State party's courts examined his administrative case, inter alia, in having based an administrative charge against him "on the evidence obtained in violation of law". The Committee observes that these allegations relate primarily to the evaluation of facts and evidence by the court. It recalls that it is generally for the courts of States parties to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice, or that the court otherwise violated its obligation of independence and impartiality.[12] In the present communication, the author has failed to demonstrate that, even if the seized computer equipment was not packed and sealed, contrary to the requirements of the State party's own procedural law, the court's findings in this respect reached the threshold of arbitrariness in the evaluation of the evidence or amounted to a denial of justice. Accordingly, the Committee considers that the author's allegations under article 14, paragraph 1 of the Covenant are insufficiently substantiated and are therefore inadmissible under article 2 of the Optional Protocol.

9.7 As to the alleged violation of article 26 of the Covenant, in that the author was denied the right to equal protection of the law against discrimination, the Committee considers that this claim is insufficiently substantiated, for purposes of admissibility, and is thus inadmissible under article 2 of the Optional Protocol.

9.8 The Committee considers that the remaining part of the author's allegations, raising issues under article 19, paragraph 2; article 22, paragraph 1, and article 25, paragraph (a), of the Covenant, have been sufficiently substantiated, for purposes of admissibility, declares them admissible and proceeds to their examination on the merits.

Consideration of the merits

10.1 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.

10.2 There are three closely interlinked issues before the Committee. The first issue is whether the imposition of a fine on the author for the use by Civil Initiatives of the computer equipment, received as untied foreign aid, for the preparation for and monitoring of the elections, as well as the confiscation of the computer equipment in question, amounted to a restriction of the author's right to freedom of association, and whether such restriction was justified. The Committee notes that, according to the author, the computer equipment seized was a key part of the elections monitoring process carried out by Civil

[11] Ibid., paras. 7.4 and 7.5.

[12] See, inter alia, communication No. 541/1993, *Simms* v. *Jamaica*, decision of inadmissibility adopted on 3 April 1995, para. 6.3; communication No. 1188/2003, *Riedl-Riedenstein et al.* v. *Germany*, decision of inadmissibility adopted on 2 November 2004, para. 7.3; communication No. 886/1999, *Bandarenko* v. *Belarus*, Views adopted on 3 April 2003, para. 9.3; communication No. 1138/2002, *Arenz et al.* v. *Germany*, decision of inadmissibility adopted on 24 March 2004, para. 8.6.

Initiatives and the evidence obtained from the information saved on the computer equipment seized served as a basis for the subsequent dissolution of Civil Initiatives by court order.[13] In this regard, the Committee observes that the right to freedom of association relates not only to the right to form an association, but also guarantees the right of its members freely to carry out statutory activities of the association. The protection afforded by article 22 of the Covenant extends to all such activities, and any restrictions placed on the exercise of this right must satisfy the requirements of paragraph 2 of that provision. In the light of the fact that the seizure of the computer equipment and the imposition of a fine on the author effectively resulted in the termination of elections monitoring by Civil Initiatives, the Committee considers that they amount to a restriction of the author's right to freedom of association.

10.3 The Committee observes that, in accordance with article 22, paragraph 2, in order for the interference with the right to freedom of association to be justified, any restriction of this right must cumulatively meet the following conditions: (a) it must be provided for by law; (b) may only be imposed for one of the purposes set out in paragraph 2; and (c) must be "necessary in a democratic society" for achieving one of these purposes. The reference to the notion of "democratic society" in the context of article 22 indicates, in the Committee's opinion, that the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably received by the Government or the majority of the population, is a cornerstone of a democratic society.[14]

10.4 The Committee notes that, in the present communication, the author was held responsible and the computer equipment of Civil Initiatives was confiscated under paragraph 5.3 and paragraph 4, part 3, of the Presidential Decree (see para. 2.5 above). The State party, however, has not advanced any arguments, despite having been given an opportunity to do so, as to why it would be *necessary*, for purposes of article 22, paragraph 2, to prohibit and penalize the use of such computer equipment "for the preparation for and conduct of the elections, referendums, recall of a deputy or of a member of the Council of the Republic, for the preparation of gatherings, meetings, street marches, demonstrations, pickets, strikes, the production and dissemination of politically charged material, as well as the organization of seminars and other forms of politically charged activities directed at the public at large".

10.5 The Committee further notes that the activity for which the author was held responsible, namely, the use of computer equipment, received as untied foreign aid, for elections monitoring and related publicity activities falls within the scope of article 25, paragraph (a), of the Covenant, which recognizes and protects the right of every citizen to take part in the conduct of public affairs. In this regard, the Committee recalls its general comment No. 25 (1996) on article 25, according to which citizens take part in the conduct of public affairs, inter alia, by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves.

10.6 The Committee further recalls that the rights protected by article 25 of the Covenant may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable.[15] In the light of its finding that the prohibition and penalization of the use of the computer equipment received as untied foreign aid for the preparation for and monitoring of the elections does not meet the requirement of necessity

[13] Supra note 4.

[14] Ibid., para. 7.3.

[15] General comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40*, vol. I (A/51/40 (Vol. I)), annex V, paras. 4 and 25.

provided for in article 22, paragraph 2, of the Covenant, the Committee is of the view that the same provisions of the relevant domestic law can also be exploited to unreasonably restrict the rights protected by article 25, paragraph (a), of the Covenant.

10.7 The Committee also notes that the activity for which the author was held responsible, namely, the use of computer equipment, received as untied foreign aid, for elections monitoring and related publicity activities also falls within the scope of article 19, paragraph 2, of the Covenant, which inter alia guarantees freedom to seek, receive and impart information and ideas. The Committee then has to consider whether the respective restrictions imposed on the author are justified under article 19, paragraph 3, of the Covenant, i.e. are provided by law and necessary: (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. The Committee recalls in this respect its general comment No. 34, in which it stated inter alia that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, that they are essential for any society, and that they constitute the foundation stone for every free and democratic society.[16] Any restrictions to their exercise must conform to the strict tests of necessity and proportionality and "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".[17]

10.8 The Committee observes that, in the present case, the State party has failed to invoke any specific grounds, despite having been given an opportunity to do so, on which the restrictions imposed on the author's activity would be *necessary* for one of the legitimate purposes set out in article 19, paragraph 3, of the Covenant. The Committee recalls that it is for the State party to show that the restrictions on the author's right under article 19 are necessary and that even if a State party may introduce a system aiming to strike a balance between an individual's freedom to impart information and the general interest in maintaining public order in a certain area, such a system must not operate in a way that is incompatible with article 19 of the Covenant.[18] The Committee considers that, in the absence of any pertinent explanations from the State party, the restrictions of the exercise of the author's freedom to seek, receive and impart information and ideas, although permitted under domestic law, cannot be deemed necessary for the protection of national security or of public order (*ordre public*) or for respect of the rights or reputations of others.

10.9 In the light of the information before it, and in the absence of any pertinent explanations from the State party in this connection, the Committee concludes that the imposition of a fine on the author for the use by Civil Initiatives of the computer equipment, received as untied foreign aid, for the preparation for and monitoring of the elections and related publicity activities, as well as the confiscation of the computer equipment in question, violated the author's rights under article 22, paragraph 1, read in conjunction with article 19, paragraph 2, and also in conjunction with article 25, paragraph (a), of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by the State party of article 22, paragraph 1, read in conjunction with article 19, paragraph 2, and also in conjunction with article 25, paragraph

[16] See general comment No. 34 (2011) on article 19 (freedoms of opinion and expression), *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), paras. 2, 37 and 38.

[17] Ibid., para. 22.

[18] See, communication No. 1157/2003, *Coleman v. Australia*, Views adopted on 17 July 2006, para. 7.3.

(a), of the Covenant. The Committee reiterates its conclusion that the State party also breached its obligations under article 1 of the Optional Protocol.

12. 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 the present value of the fine and any legal costs incurred by the author, return of the confiscated computer equipment or reimbursement of its present value, as well as compensation. The State party is also under an obligation to prevent similar violations in the future and should ensure that the impugned provisions of the Presidential Decree are made compatible with articles 19, 22 and 25 of the Covenant.

13. 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 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.

[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.]

Appendix

Individual opinion by Committee members Mr. Gerald L. Neuman and Mr. Walter Kälin (concurring)

1. We agree in substance with the Committee's disposition of this case, but we write separately to address two issues tangential to its opinion, which we would have addressed slightly differently.

2. First, we would have found that the State party had violated article 22, paragraph 1, in conjunction with article 19, paragraph 2, and omitted the reference to article 25. We agree that article 25 is relevant, but discussing article 25 is not strictly necessary, and the discussion of article 25 in the opinion might mislead readers about the broader implications of the decision. The Committee invokes general comment No. 25 on article 25, and some of the generalities that citation prompts take us rather far afield from the context of the present case. This case is fundamentally about the monitoring of elections by civil society observers, and not about the conduct of election campaigns. As we understand it, the Committee is not taking a position one way or the other about the regulation of funding from foreign sources for campaign finance or political parties or advocacy of the election of particular candidates. These issues would deserve fuller discussion in a case that actually involved them.

3. Second, we would like to expand on why the violation concerns article 22 (freedom of association) "in conjunction with" article 19 (freedom of expression). The author was personally fined and equipment was confiscated from the association precisely because the equipment was used by the association in activities that are protected by article 19. Thus the author's exercise, in association with others, of the right to seek, receive and impart information and ideas provoked sanctions directed partly at the author and partly at the association. The Committee properly demands a high level of justification for this interference, and the State party has not supplied it.

4. Not every activity in which an association might engage would be as strongly protected by article 22, standing alone. The Committee has had relatively few opportunities to analyse the content of the right to freedom of association, mostly in cases involving the formation, registration, or dissolution of associations. The Committee says in paragraph 10.2 of its opinion, as it has said before, that article 22 protects the right of members of an association to carry out its statutory activities. Within limits, we agree. For instance, a State would interfere with freedom of association if it prohibited the members of an association from performing together acts that individuals are permitted to perform alone, and the interference would violate article 22 unless it were justified under article 22, paragraph 2. We do not think, however, that in a state that banned the consumption of alcohol (which we assume raises no issue under the Covenant), individuals could acquire an article 22 right to drink beer together merely by forming a beer-drinking club. The example is trivial, but it points to a question regarding the content of article 22 that the Committee may need to address in future cases.

[Done in English, French and Spanish, the Spanish 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.]