UNITED NATIONS HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

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CE/AP/vsh 2040/2011

17 December 2015

Dear Mr. Suleymanov,

I have the honour to transmit to you herewith, the (advance unedited) text of the Views, adopted by the Human Rights Committee on 4 November 2015, concerning communication No. 2040/2011, which you submitted to the Committee for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights, on behalf of Mr. Akhliman Avyaz Ogly Zeynalov.

Two individual opinions signed by two Committee members are appended to the present Views.

In accordance with the established practice, the text of the Views will be made public.

Yours sincerely,

Ibrahim Salama
Director
Human Rights Treaties Division

Mr. Dzhavanshir Islam
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United Nations

CCPR C/115/D/2040/2011

International Covenant On Civil and Political Rights

Advance unedited version

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Human Rights Committee

Communication No. 2040/2011

Views adopted by the Committee at its 115th session

(19 October-6 November 2015)

Submitted by:	Akhliman Avyaz Ogly Zeynalov (represented by counsel Javanshir Islam Ogly Suleymanov)
Alleged victim:	The author
State party:	Estonia
Date of communication:	28 September 2009 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 12 April 2011 (not issued in a document form)
Date of adoption of Views:	4 November 2015
Subject matter:	State party courts did not allow the alleged victim to be represented by a counsel of his choice throughout criminal proceedings and did not allow adequate time and facilities for the preparation of his defence.
Procedural issue:	Admissibility ratione personae, admissibility exhaustion of domestic remedies, admissibility other procedure, accessory character of article 2 ICCPR
Substantive issues: Articles of the	Counsel, defence, adequate time and facilities
Covenant: Article of the Optional	2, 14
Protocol:	1,2,5(2) (a), 5(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 (115th session)

concerning

Communication No. 2040/2011*

Submitted by:	Akhliman Avyaz Ogly Zeynalov (represented by counsel Javanshir Islam Ogly Suleymanov)
Alleged victim:	The author
State party:	Estonia
Date of communication:	28 September 2009 (initial submission)

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

Meeting on 4 November 2015,

Having concluded its consideration of communication No. 2040/2011, submitted to the Human Rights Committee 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 Akhliman Avyaz Ogly Zeynalov, a national of Azerbaijan, born on 10 October 1979. He claims to be a victim of violations by Estonia of his rights under article 14 and article 2 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Estonia on 21 January 1992. The author is represented by counsel, Javanshir Islam Ogly Suleymanov.

The facts as presented by the author

2.1

The complaint

3.

State party's observations on admissibility

4.1.

Author's comments on the State party's observations

5.1

The State party's observations on admissibility and merits

6.1

Author's further comments

7.1.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claims contained in a communication, the Human Rights 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.

8.2 The Committee notes the State party's contention that the communication should be declared inadmissible *ratione personae,* because Mr. Suleymanov did not provide evidence that he was authorised by the author to submit a communication to the Committee. In this respect, it notes that, on 31 March ,2012, the author provided a power of attorney, signed by himself and dated 29 February 2012. The Committee therefore considers that it is not precluded by article 1 of the Optional Protocol from examining the communication.[1]

8.3 The Committee notes the State party's submission that the communication is inadmissible under article 5, paragraph 2(a) of the Optional Protocol, since the author had declared that he intends to submit a communication to the Committee against Torture on the account of acts of torture committed against him, and since his representatives submitted three applications to the European Court for Human Rights. The Committee, however, observes that no communication before the Committee against Torture had ever been submitted by or on behalf of the author and that the applications to the European Court were dismissed as inadmissible respectively on 16 April 2009 (Application No 11815/09), 13 October 2009 (Application No 48410/09), and 20 February 2014 (Application No 22046/11). The Committee recalls its jurisprudence[2] that it is only where the same matter *is being* examined under another procedure of international investigation or settlement that the Committee has no competence to deal with a communication under article 5, paragraph 2(a), of the Optional Protocol.[3] Accordingly, the Committee considers that it is not precluded by 5, paragraph 2(a), of the Optional Protocol from examining the communication.

8.4 The Committee notes the State party's submission that the communication is inadmissible under article 5, paragraph 2(b) of the Optional Protocol, since according to the CPC, a court ruling, which cannot be contested by way of an appeal against the ruling, may. be contested by an appeal or appeal in cassation filed against the court judgement. The Committee, however, observes that in his appeal, dated 21 April 2010,[4] against the 31 March 2010 verdict of the Harju County Court before the Tallinn Court of Appeals, the author raised the issues regarding the removal of Mr. Suleymanov as his counsel and of the absence of adequate time and facilities for the preparation of his defence. The author also raised these issues in his cassation appeal to the Estonia Supreme Court against the 12 October 2010 decision of the Tallinn Court of Appeals, and this appeal was rejected as manifestly ill-founded on 17 January 2011. Accordingly, the Committee considers that it is not precluded by article 5, paragraph 2(b), of the Optional Protocol from examining the communication.

8.5 The Committee takes note of the author's claim that the removal of his chosen counsel from the criminal trial constitutes a violation of article 2 of the Covenant. The Committee recalls its jurisprudence in this connection, which indicates that the provisions of article 2 of the Covenant, which lay down general obligations for States parties, cannot, in and of themselves, give rise to a claim in a communication under the Optional Protocol. The Committee therefore considers that the author's contentions in this regard are inadmissible under article 3 of the Optional Protocol.[5]

See communication 688/1996, *Arredondo v. Peril,* Views of 27 July 2000, para 10.1.
[2] See Communication No. 824/1998, *Nicolov* v. *Bulgaria,* decision on admissibility adopted on 24 March 2000, para. 8.2; Communication No. 1185/2003, *Van den Hemel'v. The Netherlands,* decision on admissibility adopted on 25 July 2005, para. 6.2; Communication No. 1193/2003, *Sanders v. The Netherlands,* decision on admissibility adopted on 25 July 2005, para. 6.2.
[3] See also communication No. 2202/2012, *Castaheda* v. *Mexico,* Views adopted on 18 July 2013, para 6.3.
[4] Copy provided by the author.
See, for example, communications No. 802/1998, *Rogerson v. Australia,* Views of 3 April 2002, para. 7.9, No. 1887/2009, *Peirano Basso v. Uruguay,* Views of 19 October 2010, para 9.4.

8.6 The Committee considers that the author's remaining claims, raising issues under article 14 of the Covenant, have been sufficiently substantiated for purposes of admissibility and proceeds to their examination on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered this communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes the author's claim that his right to adequate time and facilities to prepare his defence had been violated, since the only documents provided to him in Russian were the indictment and the verdict and the translations were of poor quality, and because despite several requests he was not provided with an interpreter to his mother tongue. The Committee observes that the requirement of a fair hearing does not obligate States parties to make available to a person, whose mother tongue differs from the official court language, the services of an interpreter, if that person is capable of understanding and expressing himself or herself adequately in the official language. Only if the accused or the witnesses have difficulties in understanding or expressing themselves in the court language is it obligatory that the services of an interpreter be made available.[6]

9.3 The Committee also notes the State party's submission that Mr. Zeynalov was proficient in Russian and Estonian, that during the pre-trial proceedings he had requested to have a Russian language interpreter and that such an interpreter was provided to him throughout the proceedings and that on several occasions he had submitted hand written applications in Estonian and in Russian. In this context, the Committee notes that the notion of a fair trial in article 14, paragraph 1, together with paragraph 3(f), does not imply that the accused be afforded the possibility to express himself or herself in the language that he or she normally speaks or speaks with a maximum of ease. Accused persons whose mother tongue differs from the official court language are, in principle, not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively.[7] In the present case, it transpires from the decision of the Harju County Court and the Tallinn Court of Appeals that the accused was sufficiently proficient in the court's language, and that they did not need to take into account whether it would be preferable for the accused to express himself in a language other than the court language.[8] In the circumstances, the Committee finds that the information before it does not show that the author's right under article 14, paragraph 3(f), to have the free assistance of an interpreter if he cannot speak or understand the language used in court, has been violated.[9]

9.4 The Committee further takes note of the author's claim that the State party had violated his right to communicate with a counsel of his own choosing under article 14 of the Covenant by revoking the permission for Mr. Suleymanov to participate in the proceedings, despite the fact that he was the author's chosen counsel. The Committee also notes the State party's submission that Mr. Suleymanov's permission to participate in the proceedings as counsel was revoked because its court considered that he had shown himself to be an incompetent defence counsel and his removal was in the interest of the accused. The above conclusion was based primarily on the fact that Mr. Suleymanov had requested the adjournment of the trial because of other commitments and because he had been allegedly disrespectful towards other parties in the proceedings. The Committee also notes the State party's submission that the right to defence of the author was guaranteed, because after the removal of Mr. Suleymanov, a member of the Estonian Bar Association had been appointed as counsel for the author, and that the counsel was proficient in the language of the proceedings and knew the criminal procedure.

9.5 The Committee observes that according to the court assessment Mr. Suleymanov met the educational requirements to act as counsel in the proceedings and that the State party has not substantiated in what way Mr. Suleymanov was disrespectful to the other participants of the trial. The Committee further observes that the author was accused of serious crimes and potentially faced a conviction entailing a considerable prison sentence. The Committee lastly notes the author's

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See for example communication No. 323/1988, *Le Bihan v. France,* Views adopted on 11 April 1991, para 5.6.
See the Committee's General comment No 32, CCPR/C/GC/32, at para 40.
See for example communication No. 323/1988, *Le Bihan* v. *France,* Views adopted on 11 April 1991, para 5.7.
See also communications No. 623/1995, 624/1995, 626/1995, 627/1995, *Domukovsky, Tsiklauri,*

uncontested submission that in 2010, he had requested the participation in the appeals proceedings of two other Azerbaijani lawyers to defend him, but the Tallinn Court of Appeals rejected his requests.

9.6 The Committee recalls that the right to a defence in criminal proceedings is a fundamental right which entails the right to be tried in one's presence and through legal assistance of one's own choosing.[10] The Committee also recalls that the interests of justice may require the assignment of a lawyer against the wishes of the accused, particularly in cases of a person substantially and persistently obstructing the proper conduct of trial.[11] However, any such restriction must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice.[12] While the State party has explained why the Harju Court requested the Estonian Bar Association to appoint another Estonian lawyer to represent the author, it has not provided sufficiently convincing reasons to explain why it was necessary in the interest of justice to entirely remove Mr. Suleymanov as the author's counsel and how his remaining on the defence team would have jeopardized the interests of justice.[13] Furthermore, the State party has not shown that it made efforts to otherwise provide the author with counsel of his choice, nor has it persuasively justified its decision to prevent two Azerbaijani lawyers chosen by the author from joining the defence team at the appeal stage. Accordingly, the Committee concludes that the facts in the instant case disclose a violation of the author's right under article 14, paragraph 3(d) to be assisted by counsel of his choice.

10. The Human Rights Committee, acting under article 5 (4), of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of the author's rights under article 14, paragraph 3(d), of the Covenant.

11. In accordance with article 2, paragraph 3(a) of the Covenant, the State party is under an obligation to provide the victim with an effective remedy. This requires it to make reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia,* to provide the author with adequate compensation. The State party is also under an obligation to take steps to prevent similar violations occurring in the future.

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 or not there has been a violation of the Covenant, and that pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information concerning 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 translated into Estonian and widely disseminated in Estonian and Russian in the State party.

Gelbakhiani and Dokvadze v. Georgia, Views adopted on 6 April 1998, para. 18.7.

See the Committee's Views *inter alia* in communications Nos. 623/1995, 624/1995, 626/1995, 627/1995, *Domukovsky, Tsiklauri, Gelbakhiani and Dokvadze v. Georgia,* Views adopted on 6 April 1998, para. 18.9; No. 52/1979, *Sadias de Lopez v. Uruguay,* Views adopted on 29 July 1981, No. 74/1980, *Estrella v. Uruguay,* Views adopted on 29 March 1983. See also communication No. 232/1987, *Pinto* v. *Trinidad & Tobago,* Views adopted on 20 July 1990, para. 12.5.

See communication No 1123/2002, *Correia de Matos v. Portugal,* Views adopted on 28 March 2006, para 7.4.

Ibid. Cf. General comment No 32, CCPR/C/GC/32, para 37.

Ibid., para 7.5.

Appendices

Appendix I

Individual opinion of Committee member Nigel Rodley (concurring)

1. I agree with the Committee's finding in this case, only on the basis that the State party has failed adequately to explain the need to remove Mr. Suleymanov from the author's defence team. There is no implication that a State party is required to recognize the credentials of counsel from a foreign country's Bar. But, once such credentials are recognized, then there should be no basis for distinguishing the status of members of the defence team.

2. Equally, there is no reason why the court system should have its proceedings disrupted by unreasonable demands to accommodate the special needs of counsel from abroad. The appropriate response to such demands would normally have been to reject them, not to remove the lawyer.

Appendix II

Individual opinion of Committee member Dheerujlall Seetulsingh (dissenting)

1. The facts of the case do not reveal a violation of Article 14 (3) (d) of the Covenant (the fundamental but not absolute right to a Counsel of one's own choosing in a trial).

First instance

2. After being arrested in December 2007, the author was prosecuted in November 2008 in Estonia along with other 'participants' or accomplices for the offence of smuggling narcotics. Being from Azerbaijan, he chose Mr. Suleymanov (Mr. S.) a lawyer from his home country, to represent him (which choice was accepted by the Estonian Court). Mr. S., who is also the author's Counsel before the Committee, appeared in the trial which started on 8 April 2009 and continued for 7 days until 24 April 2009. The Court fixed dates for continuation of the case on 6 days in May 2009 and 2 days in June 2009. Only the first 2 days (7 and 8 May) were convenient to Mr. S. who was present on 8 May and who requested that the trial should continue on 22 July 2009. The author also had an Estonian lawyer, but on 7 May the author refused his services. The Court rejected Mr. S.'s request, which rejection was the subject matter of different appeals (all dismissed), and appointed another Counsel to appear for the author.

3. The grounds as given by the State Party for the rejection are that Mr. S.'s actions were contrary to the interests of the accused and disrespectful towards the other parties in the proceedings and he did not fulfil the duties he had undertaken and caused repeated adjournment of the hearings of the criminal matter. Mr. S. was allegedly a busy lawyer in his own country and had to appear in trials and participate in conferences in other states. The State Party claimed that the lawyer could not actually provide solid evidence that he was otherwise engaged. This contention was not rebutted by the author.

Appellate Stage

4. The author claimed that at the appellate stage, following his conviction on 14 March 2010, he was deprived of the right to choose two Azerbaijani lawyers to represent him. Their request to appear was declined on the grounds that (1) they had produced bad quality copies of their education credentials, which did not enable them to be registered in the Estonian Court, (2) that the author already had a lawyer who had filed his grounds of appeal and (3) that they were not participants in the proceedings.

5. The author did have an Estonian lawyer who had filed his grounds of appeal. He has not satisfactorily shown to us what prejudice he suffered by the rejection of his request and what additional benefits their participation would have brought him. A mere assertion to the right to Counsel of one's own choosing is not sufficient. As pointed out by the majority in paragraph 9.6 of their views the two lawyers only intended to join the defence team.

6. The underlying principles applicable in the case are:

(a) The author was initially allowed to have Counsel of his own choosing. Once a chosen Counsel has been retained to appear, he has to make himself available to the Court to defend the interests of his client and has to give valid reasons to justify his later absence. Participation in conferences cannot have priority over Court business. Views expressed by the Committee in the past concern cases where at the very initial stage an accused party was not allowed to retain counsel of his own choosing or where Counsel was imposed on him.

(b) There were other participants (co-defendants) in the trial and their Counsel were agreeable to appear on the dates fixed by the Court. The Court could not let one Counsel override the interests of the other accused parties in the case and prefer the dates of one Counsel to those accepted by the others. Should a Court be dictated by the demands of each Counsel, the trial may be unduly prolonged to the detriment of all accused parties and more especially in this case, to the detriment of the author who had been detained since December 2007.

(c) Not only must the interests of accused parties be protected, but a fair balance must be struck between the interests of the accused in choosing Counsel and the convenience of the witnesses, both for the prosecution and the defence.

(d) The Court cannot adjust its calendar of sittings according to the diary of Counsel. Case management has become a major preoccupation of the judiciary, often widely criticised for systemic delays. A Court has a heavy schedule and other cases to attend to. Cases already fixed cannot be displaced to satisfy the demands of one accused party and his Counsel in any particular case, thus penalising other litigants.

(e) It is also for the Appellate Courts to assess whether the author suffered prejudice by being 'denied' Counsel of his choice in the middle of the proceedings. The Courts have an obligation to assess the practicability and effectiveness when an accused party insists on choosing his Counsel, if this creates problems and are better placed to do so.

7. In presenting the case to the Committee, Mr. S. gives the impression that he claimed an absolute right to be author's counsel. He took a position that was obstructing the proper conduct of the trial and not serving the interests of justice. The Court was obliged to entirely remove Mr. S. as he claimed to be the lead Counsel, even imposing dates for continuation. Had he been allowed to remain on the defence team, it would have been impossible for other counsel to take the lead. Finally, where the author has invoked any prejudice he may have suffered, this claim has been totally rejected in the views of the majority at paragraphs 9.2 and 9.3, as to adequate time and facilities to prepare his defence and language difficulties. Consequently, it has not been shown that the removal of Mr. S. deprived the author of the right to a fair trial.