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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communications Nos. 2108/2011 and 2109/2011*, **

Communications submitted by:	Evgeny Basarevsky and Valery Rybchenko (not represented by counsel)
Alleged victims:	The authors
State party:	Belarus
Dates of communications:	12 August 2011 (initial submissions)
Documents references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 7 October 2011 (not issued in document form)
Date of adoption of Views:	14 July 2016
Subject matters:	Refusal of authorization to hold a peaceful assembly; freedom of expression
Procedural issues:	Exhaustion of domestic remedies; right to submission of individual communication by a third party on behalf of an alleged victim
Substantive issues:	Freedom of expression; freedom of assembly
Articles of the Covenant:	19 (2) and 21
Articles of the Optional Protocol:	2 and 5 (2) (b)

1. The authors of the communications are Evgeny Basarevsky (the first author) and Valery Rybchenko (the second author), Belarusian nationals born in 1946 and 1963,

* Adopted by the Committee at its 117th session (20 June-15 July 2016).

** The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Ahmed Amin Fathalla, Yuji Iwasawa, Ivana Jelić, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Yuval Shany and Margo Waterval.

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respectively. They claim to be victims of a violation by Belarus of their rights under articles 19 (2) and 21 of the Covenant. The Optional Protocol entered into force for Belarus on 30 December 1992. The authors are not represented by counsel.

The facts as submitted by the authors

2.1 On 7 February 2011, each author applied to the Zhlobin District Executive Committee with a request to hold a picket of up to 20 participants on 23 February 2011. The pickets were to be organized on Metallurgov Street in Zhlobin and in front of Dneprovskiy shop, respectively. The purpose of the pickets was to protest against the political persecution of former candidates for the post of President of Belarus and the members of their electoral teams.

2.2 On 15 February 2011, the authors' applications were rejected by the District Executive Committee on the ground that the Criminal Code of Belarus did not define the notion of "political persecution" and that the proposed locations for the pickets were not among those designated for the conduct of public events, as listed in the District Executive Committee decision No. 1507 of 6 August 2007 on determination of fixed locations for public events.[1]

2.3 On 3 March 2011, each of the authors appealed against the decision of the District Executive Committee before the Gomel Regional Executive Committee. Their appeals were rejected on 23 March 2011. On 28 March 2011, each of them appealed to the Zhlobin District Court. The court rejected the appeal of the second author on 18 April 2011 and the appeal of the first author on 19 April 2011. On 27 April 2011, each of the authors filed a cassation appeal with the Gomel Regional Court, which dismissed the first author's appeal on 7 June 2011 and the second author's appeal on 9 June 2011. The authors have not appealed further under the supervisory review procedure, since they did not consider such extraordinary judicial appeals to constitute an effective remedy, given the established domestic practice in similar cases.

The complaint

3. The authors claim that their right to freedom of expression has been restricted in violation of article 19 of the Covenant by an unjustified refusal of the State party's authorities to permit the pickets they intended to conduct. They also allege that their right to freedom of assembly under article 21 of the Covenant has been violated by the unjustified refusal of the authorities to give permission to hold the pickets.

State party's observations

4.1 In a note verbale dated 29 November 2011, the State party submitted its observations on both communications. The State party notes that the authors have not exhausted all available domestic remedies as required in article 2 of the Optional Protocol due to their failure to appeal under the supervisory review procedure to the President of the Gomel Regional Court, the Deputy President or the President of the Supreme Court, the Gomel Regional Prosecutor's Office or the Prosecutor General's Office. According to the State party, the supervisory review is an effective remedy, proven by the fact that, in 2011, out of 4,565 appeals filed under this procedure, 239 appeals were upheld by the Supreme Court's officials. In the State party's opinion, there were no legal grounds for consideration of the communications since they were registered in violation of article 1 of the Optional Protocol.

[1] Decision No. 1507 is based on the Public Events Act of 30 December 1997.

4.2 In a note verbale of 25 January 2012, the State party explains, with regard to a number of communications including the present ones, that, by becoming a party to the Optional Protocol, it had agreed, under article 1 thereof, to recognize the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State party of any rights protected by the Covenant. It noted, however, that that recognition was undertaken in conjunction with other provisions of the Optional Protocol, including those establishing criteria regarding petitioners and the admissibility of their communications, in particular articles 2 and 5. It maintained that under the Optional Protocol, States parties have no obligation to recognize the Committee's rules of procedure nor its interpretation of the provisions of the Optional Protocol, which could only be effective when undertaken in accordance with the Vienna Convention on the Law of Treaties. It submits that, in relation to the communications procedure, States parties should be guided first and foremost by the provisions of the Optional Protocol, and that references to the Committee's long-standing practice, methods of work and case law are not subjects of the Optional Protocol. The State party also submits that any communication registered in violation of the provisions of the Optional Protocol would be viewed as incompatible with the Optional Protocol and would be rejected without observations on admissibility or the merits, and that any decision taken by the Committee on such rejected communications would be considered by its authorities as "invalid". The State party reiterates its view that the present communications were registered in violation of the Optional Protocol.

Authors' comments on the State party's observations

5. In a letter dated 30 January 2012, the authors submitted their comments to the observations of the State party. According to them, the supervisory review procedure cannot be seen as an effective remedy in cases involving political rights. Such procedure depends on the discretion of a prosecutor or a judge to decline the appeal or to submit a "protest" to the higher court against the relevant final judgement. The authors claim that no "protest" has ever been submitted in cases concerning individual political rights in the State party.

State party's additional observations

6. In a note verbale dated 18 April 2012, the State party informs the Committee that communication No. 2109/2011 has been presented by a third party on behalf of the author and that it was not clear who that third party was and whether the information presented in the communication reflected the opinions of the author himself. The State party affirmed that it did not recognize the practice of the Committee to accept communications submitted by third parties on behalf of the alleged victims and that the decision to register communication No. 2109/2011 should be revoked as incompatible with the Optional Protocol. The State party informs the Committee that it would end correspondence on the said communication, under articles 1 and 2 of the Optional Protocol.

Issues and proceedings before the Committee

The State party's lack of cooperation

7.1 The Committee notes the State party's assertion that there are no legal grounds for consideration of the authors' communications, insofar as they were registered in violation of the provisions of the Optional Protocol; that it has no obligations regarding the recognition of the Committee's rules of procedure and regarding the Committee's interpretation of the Optional Protocol's provisions; and that if a decision is taken by the

Committee on the present communications, it will be considered "invalid" by its authorities.

7.2 The Committee observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and art. 1 of the Optional Protocol). Implicit in a State's adherence to the Optional Protocol is 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 those 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.[2] It is up to the Committee to determine whether a case 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 outright that it will not accept the Committee's determination of admissibility or the merits of the communications, the State party is violating its obligations under article 1 of the Optional Protocol.

7.3 The Committee also notes the State party's observation that it does not recognize the Committee's practice on registration of communications submitted by a third party on behalf of individuals claiming a violation of their rights. It notes that, by denying the right of an individual to be represented by a lawyer (or a designated person) of his or her choice before the Committee, the State party fails to meet its obligations under the Optional Protocol. With regard to the communication No. 2109/2011, the Committee notes, however, that it has been submitted and signed by the author himself and not by a third party.

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

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 that the authors have failed to initiate a supervisory review of the domestic courts' decisions before the President of the Gomel Regional Court, the President of the Supreme Court or his deputies, the Gomel Regional Prosecutor's Office or the Prosecutor General's Office. The Committee recalls its jurisprudence, according to which a petition to a prosecutor's office to initiate supervisory review against a judgment having the force of res judicata does not constitute an effective remedy that has to be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.[3] It also considers that requests for supervisory review to the president of a court directed against court decisions that have entered into force and depend on the discretionary power of a judge constitute an extraordinary remedy and that the State party must show that there is a reasonable prospect that such requests would provide an effective remedy in the

[2] See, for example, communications Nos. 1867/2009, 1936/2010, 1975/2010, 1977/2010-1981/2010 and 2010/2010, *Levinov v. Belarus*, Views adopted on 19 July 2012, para. 8.2; and No. 2019/2010, *Poplavny v. Belarus*, Views adopted on 5 November 2015, para. 6.2.

[3] See communications No. 1873/2009, *Alekseev v. the Russian Federation*, Views adopted on 25 October 2013, para 8.4; and *Koktish v. Belarus*, Views adopted on 24 July 2014, para.7.3.

circumstances of the case.[4] The Committee takes note of the statistics provided by the State party on a number of supervisory review appeals submitted and upheld by the Supreme Court officials. It notes, however, that those figures do not specify whether and in how many cases the petitions to the President of the Regional Court or the Supreme Court for supervisory review procedure were successful in cases concerning the right to freedom of expression and the right to peaceful assembly. In such circumstances, the Committee finds that article 5 (2) (b) of the Optional Protocol does not preclude it from considering the present communications.

8.4 The Committee considers that the authors' claims under articles 19 (2) and 21 of the Covenant are sufficiently substantiated for the purposes of admissibility, declares them admissible and proceeds to their examination on the merits.

Consideration of the merits

9.1 The Committee has considered the communications in the light of all the information made available to it by the parties, as provided under article 5 (1) of the Optional Protocol.

9.2 The Committee notes the authors' allegations that their right to freedom of expression has been restricted arbitrarily, since, without sufficient justification, they were refused permission to hold public pickets and to publicly express opinions. The Committee considers that the issue before it is to decide whether the prohibition to hold a public picket imposed on the authors by the Zhlobin municipal executive authorities amounts to a violation of article 19 of the Covenant. From the material before the Committee, it transpires that the authors' acts were qualified by the courts as an application to hold a public event and their requests were rejected on the basis that the notion of "political persecution" was not defined in the Criminal Code and that the locations chosen were not among the ones permitted by the town's executive. In the Committee's opinion, the above actions of the authorities, irrespective of their legal qualification, amount to a limitations of the authors' rights, in particular the right to impart information and ideas of all kind, under article 19 (2) of the Covenant.

9.3 The Committee refers to its general comment No. 34 (2011) on the freedoms of opinion and expression, which states that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, and that such freedoms are essential for any society.[5] They constitute the foundation stone for every free and democratic society.[6] The Committee recalls that article 19 (3) of the Covenant allows certain restrictions only as provided by law and necessary (a) for the respect of the rights and reputation of others; and (b) for the protection of national security or public order (*ordre public*) or public health or morals. Any restriction on the exercise of such freedoms must conform to the strict tests of necessity and proportionality. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.[7] The Committee recalls[8] that it is for the

[4] See communications No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted on 17 March 2003, para. 7.4; No, 1851/2008, *Sekerko v. Belarus*, Views adopted on 28 October 2013, para. 8.3; *Protsko and Tolchin*, Views adopted on 1 November 2013, para. 6.5; No. 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3; and No. 1814/2008, *P.L. v. Belarus*, decision of inadmissibility adopted on 26 July 2011, para. 6.2.

[5] See general comment No. 34 (2011), para. 2.

[6] Ibid., para. 2.

[7] Ibid., para. 22.

State party to demonstrate that the restrictions on the author's rights under article 19 were necessary and proportionate.[9]

9.4 The Committee observes that prohibiting a protest against political persecution because the terms of political persecution are not defined in criminal law and limiting pickets to certain predetermined locations does not appear to meet the standards of necessity and proportionality under article 19 of the Covenant. The Committee notes that neither the State party nor the national courts have provided any explanations for such restriction. The Committee considers that, in the circumstances of the case, the prohibition imposed on the authors, although based on domestic law, was not justified pursuant to the conditions set out in article 19 (3) of the Covenant. In the light of the above consideration, the Committee concludes that the rights of the authors under article 19 (2) of the Covenant have been violated.

9.5 The Committee further notes the authors' claim that their right to freedom of assembly under article 21 of the Covenant was also violated by the refusal of the municipal authorities to allow holding of the pickets. In that context, the Committee recalls that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is a fundamental human right that is essential for the public expression of an individual's views and opinions and indispensable in a democratic society. This right entails the possibility of organizing and participating in a peaceful assembly, including the right to a stationary assembly (such as a picket) in a public location. The organizers of an assembly generally have the right to choose a location within sight and sound of their target audience and no restriction to this right is permissible unless if it is (a) imposed in conformity with the law; and (b) is necessary in a democratic society, in the interests of national security or public safety, public order, protection of public health or morals or protection of the rights and freedoms of others. When a State party imposes restrictions with the aim of reconciling an individual's right to assembly and the aforementioned interests of general concern, it should be guided by the objective of facilitating the right, rather than seeking unnecessary or disproportionate limitations to it. The State party is thus under the obligation to justify the limitation of the right protected by article 21 of the Covenant.[10]

9.6 In the present case, the Committee must consider whether the restrictions imposed on the authors' right to freedom of assembly are justified under any of the criteria set out in the second sentence of article 21 of the Covenant. The Committee notes that, in the light of the information available on file, the municipal authorities have not provided any justification or explanation as to how, in practice, the authors' pickets would violate the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others as set out in article 21 of the Covenant. Accordingly, the Committee concludes that in the present cases, the State party has violated the authors' rights under article 21 of the Covenant.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose violation of the authors' rights under articles 19 (2) and 21 of the Covenant.

[8] See, for example, communications No. 1830/2008, *Pivonos v. Belarus*, Views adopted on 29 October 2012, para. 9.3, and No. 1785/2008, *Olechkevitch v. Belarus*, Views adopted on 18 March 2013, para. 8.5.

[9] See, for example, communication No. 2092/2011, *Androsenko v. Belarus*, Views adopted on 30 March 2016, para.7.3.

[10] See communication No. 2019/2010, *Poplavny* v. *Belarus*, Views adopted on 5 November 2015, para. 8.4.

11. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to take appropriate steps to provide the authors with adequate compensation and to take steps to prevent similar violations occurring in the future. In that connection, the Committee reiterates that the State party should revise its legislation consistent with its obligation under article 2 (2), in particular, decision No. 1507 of the Zhlobin District Executive Committee and the Public Events Act of 30 December 1997, as it has been applied in the present case, with a view to ensuring that the rights under articles 19 and 21 of the Covenant may be fully enjoyed in the State party.[11]

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.

[11] See, for example, communications No. 1851/2008, *Sekerko v. Belarus*, Views adopted on 28 October 2013, para. 11; No. 1948/2010, *Turchenyak and others v. Belarus*, Views adopted on 24 July 2013, para. 9; No. 1790/2008, *Govsha and others v. Belarus*, Views adopted on 27 July 2012, para. 11; and, mutatis mutandis, No. 1992/2010, *Sudalenko v. Belarus*, Views adopted on 27 March 2015, para. 10, and No. 2019/2010, *Poplavny v. Belarus*, Views adopted on 5 November 2015, para. 10.