



## International Covenant on Civil and Political Rights

Distr.: General  
24 November 2016

Original: English

### Human Rights Committee

#### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2139/2012\*, \*\*

<i>Communication submitted by:</i>	Anatoly Poplavny and Leonid Sudalenko (not represented by counsel)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Belarus
<i>Dates of communication:</i>	27 February 2012 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 19 March 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	3 November 2016
<i>Subject matter:</i>	Refusal of authorization to hold a peaceful assembly; freedom of expression; effective remedy
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Freedom of expression; freedom of assembly; effective remedy
<i>Articles of the Covenant:</i>	2 (2)-(3), 19 and 21
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

\* Adopted by the Committee at its 118th session (17 October-4 November 2016).

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



1. The authors of the communication are Anatoly Poplavny and Leonid Sudalenko, citizens of Belarus, born in 1958 and 1966, respectively. They claim to be victims of a violation by Belarus of their rights under articles 19 and 21, in conjunction with articles 2 (2) and (3) of the Covenant. The Optional Protocol entered into force for Belarus on 30 December 1992. Mr. Poplavny submitted the communication on his own behalf and on behalf of Mr. Sudalenko.

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

2.1 On 22 November 2010, the authors filed an application to the Gomel City Executive Committee with a request to hold, on 10 December 2010, a picket of up to 50 participants in one of the central squares in the town, with the purpose of informing people of their right not to participate in the early voting in respect of the upcoming presidential elections in Belarus.

2.2 On 3 December 2010, the Gomel City Executive Committee refused to authorize the picket, stating that the authors, as organizers of the event, did not fulfil the requirements set out in Gomel Executive Committee decision No. 299 of 2 April 2008 on the holding of public events in the city of Gomel, which was adopted on the basis of the Public Events Act of Belarus of 30 December 1997. The authors were organizing a public event outside the location designated for that purpose in decision No. 299 and had not concluded the required contracts with the city services for the maintenance of security, medical assistance and cleaning.

2.3 On 5 January 2011, the authors appealed the decision of the Executive Committee before the Central District Court of Gomel, which rejected their appeal on 25 January 2011. On 1 February 2011, the authors filed a cassation appeal against the decision of the District Court before the Gomel Regional Court, which was rejected on 17 March 2011. On 14 October and 2 December 2011, under the supervisory review procedure, the authors appealed the decision of the Regional Court to the Chair of the Gomel Regional Court and to the Chair of the Supreme Court of Belarus, respectively. Those appeals were dismissed on 8 November 2011 and 9 January 2012, respectively. The authors did not file an application for supervisory review to the Prosecutor's Office, since they did not consider that it constituted an effective domestic remedy.<sup>1</sup>

#### **The complaint**

3.1 The authors claim that the rejection by the national authorities of their request to hold a picket amounts to a violation of their rights under articles 19 and 21 read in conjunction with article 2 (2) and (3) of the Covenant.

3.2 They claim that neither the Executive Committee nor the courts considered whether the limitations imposed on their rights under the decision No. 299 were justified by reasons of national security or public safety, public order, protection of public health or morals, or whether they were necessary for the protection of the rights and freedoms of others. They allege that decision No. 299 that restricts the holding of all public events in Gomel to a single, remote location and the request to conclude paid contracts with the city services beforehand unnecessarily limits the very essence of the rights under articles 19 and 21 of the Covenant.

3.3 The authors submit that the State party is violating article 19, read in conjunction with article 2 (2) and (3) of the Covenant, since it is not taking any action to fulfil its obligations under the Convention at the national level.

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<sup>1</sup> The authors refer to communication No. 1838/2008, *Tulzhenkova v. Belarus*, Views adopted on 26 October 2011.

3.4 The authors also submit that the State party is not fulfilling its obligations in relation to the right to peaceful assembly under article 21, read in conjunction with article 2 (2) and (3) of the Covenant, because the national Public Events Act contains vague and ambiguous provisions. For example, article 6 of the Act gives the heads of local executive committees the discretionary right to designate specific permanent areas for the organization of peaceful assemblies, without justification.

3.5 In this context, the authors request the Committee to recommend to the State party that it align its legislation, in particular the Public Events Act and the Gomel City Executive Committee decision No. 299, with the international standards set out in articles 19 and 21 of the Covenant.

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

4.1 In a note verbale dated 14 January 2013, the State party submitted its observations on the admissibility of the communication. It argued that the authors had not exhausted all available domestic remedies because they did not appeal under the supervisory review proceedings to the Prosecutor's Office, thus their complaint is inadmissible under article 5 (2) (b) of the Optional Protocol.

4.2 The State party further submitted that, since the communication was registered in violation of the provisions of the Optional Protocol, it is discontinuing proceedings regarding the communication and will disassociate itself from any views that might be adopted by the Committee on its merits.

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

5. In a letter dated 6 March 2013, the authors commented on the observations of the State party. Referring to the Committee's jurisprudence, they pointed out that an appeal to the Prosecutor General under the supervisory review procedure does not constitute an effective remedy.<sup>2</sup> On an unspecified date, however, the authors did appeal to the Prosecutor's Office under the supervisory review procedure. Their appeals were rejected on 13 August 2012 by the Gomel Regional Prosecutor's Office and on 20 October 2012 by the Office of the Prosecutor General of Belarus.

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

##### *Lack of cooperation from the State party*

6.1 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 was registered in violation of the provisions of the Optional Protocol, and that, if a decision is taken by the Committee on the present communication, its authorities will "disassociate" themselves from the Committee's Views.

6.2 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). Implicit in a State's adherence to the Optional Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications and, after examination, to forward its Views to the State party and to the individual (art. 5 (1) and (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the

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<sup>2</sup> The authors refer to communication No. 1418/2005, *Iskiyaev v. Uzbekistan*, Views adopted on 20 March 2009.

Committee in its consideration and examination of a communication and in the expression of its Views.<sup>3</sup> It is up to the Committee to determine whether a case should be registered. By failing to accept the competence of the Committee to determine whether a communication shall be registered and by declaring outright that it will not accept the Committee's determination of the admissibility and the merits of the communications, the State party is violating its obligations under article 1 of the Optional Protocol.

*Considerations of admissibility*

7.1 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.

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

7.3 The Committee takes note of the State party's argument that the authors have failed to request the Prosecutor's Office to initiate a supervisory review of the decisions of the domestic courts. The Committee recalls its jurisprudence, according to which a petition to a Prosecutor's Office requesting a review of court decisions that have taken effect does not constitute a remedy that has to be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.<sup>4</sup> In the present case, the Committee notes that the State party has not provided any further observations following the rejection by the Office of the Prosecutor General of the authors' appeals under the supervisory review procedure. Accordingly, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication. The Committee finds no other grounds preventing it from considering the authors' complaints and proceeds to its examination of the merits.

*Consideration of the merits*

8.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5 (1) of the Optional Protocol.

8.2 The Committee notes the authors' claim that decision No. 299 of Gomel City Executive Committee unduly restricts the right to freedom of expression and the right of peaceful assembly by imposing on the organizers of public events an obligation to conclude paid contracts with city services and designating one single and remote location for all public events held in Gomel, a city of 500,000 inhabitants. The Committee also notes the authors' allegation that the formal application of decision No. 299 by the Executive Committee in their case, without consideration of the necessity of the limitations in relation to the exercise of their rights, constitutes an unjustified restriction on their rights under articles 19 and 21 of the Covenant.

8.3 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

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<sup>3</sup> 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.

<sup>4</sup> See communications No. 1873/2009, *Alekseev v. the Russian Federation*, Views adopted on 25 October 2013, para. 8.4; No. 1929/2010, *Lozenko v. Belarus*, Views adopted on 24 October 2014, para. 6.3; and No. 2016/2010, *Sudalenko v. Belarus*, Views adopted on 5 November 2015, para. 7.3.

essential for any society (para. 2). They constitute the foundation stone for every free and democratic society (para. 22). 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.<sup>5</sup> The Committee also recalls<sup>6</sup> that it is for the State party to demonstrate that the restrictions on the authors' rights under article 19 of the Covenant were necessary and proportionate.<sup>7</sup>

8.4 The Committee notes that the refusal to authorize the picket was based on decision No. 299 of Gomel City Executive Committee of 2 April 2008, which was adopted on the basis of the Public Events Act of Belarus of 30 December 1997. The Committee observes, however, that neither the State party nor the national courts have provided any explanations as to how such restrictions, namely limiting pickets to certain predetermined locations and requiring that the organizers conclude service contracts with a number of government agencies in order to hold a picket, were justified pursuant to the conditions of necessity and proportionality set out in article 19 (3) of the Covenant. In the absence of any explanation by the State party the Committee concludes that the rights of the authors under article 19 (2) of the Covenant have been violated.

8.5 The Committee 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 the holding of the picket. In this 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 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) 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.<sup>8</sup>

8.6 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 in the light of the information available on file that the municipal authorities have not provided any justification or explanation as to how, in practice, the authors' picket would violate the interests of national security or public safety, public order (*ordre public*), the protection of

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<sup>5</sup> General comment No. 34, para. 22.

<sup>6</sup> 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.

<sup>7</sup> See, for example, communication No. 2092/2011, *Androsenko v. Belarus*, Views adopted on 30 March 2016, para. 7.3.

<sup>8</sup> See communication No. 2019/2010, *Poplavny v. Belarus*, Views adopted on 5 November 2015, para. 8.4.

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 case, the State party has violated the authors' rights under article 21 of the Covenant.

8.7 In the light of this conclusion, the Committee decides not to examine the authors' claims under articles 19 and 21, read in conjunction with article 2 (2) and (3) of the Covenant.

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

10. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide an effective remedy to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated to, inter alia, provide Messrs. Poplavny and Sudalenko with adequate compensation. The State party is also under an obligation to take all the steps necessary to prevent similar violations from occurring in the future. In this connection, the Committee reiterates that the State party should revise its legislation, as it has been applied in the present case, in accordance with its obligation under article 2 (2) with a view to ensuring that the rights under articles 19 and 21 of the Covenant may be fully enjoyed in the State party.<sup>9</sup>

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in Belarusian and Russian in the State party.

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