HUMAN RIGHTS HOUSE NETWORK

Individual v. State:

Practice on complaints with the United Nations treaty bodies with regards to the Republic of Belarus

Volume I

Collection of articles and documents

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The present collection of articles "Individual v. State: Practice on complaints with the United Nations treaty bodies with regards to the Republic of Belarus" is the first part of the two-volume book, that is the fourth publication in the series about international law and national legal system of the republic of Belarus, implemented by experts and alumni of the Human Rights Houses Network's program "International Law in Advocacy" since 2007.

The first volume of this publication contains original writings about the contents and practical aspects of international human rights law concepts directly related to the Institute of individual communications, and about the role of an individual in the implementation of international legal obligations of the state.

The second volume, expected to be published in 2013, will include original analytical works on the admissibility of individual considerations and the Republic of Belarus' compliance with the decisions (views) by treaty bodies. It will include all decisions made by the Committee in 2000-2012 with regards to the Republic of Belarus that were not included in the first volume.

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Dedicated to Boris Zvozskov

FOREWORD

Everyone shall have the right in accordance with the international instruments ratified by the Republic of Belarus to appeal to international organizations to defend their rights and liberties, provided all available domestic remedies have been exhausted.
Article 61 of the Constitution of the Republic of Belarus

On 15 March 1994 the 12th Supreme Soviet of the Republic of Belarus adopted the Constitution of the Republic of Belarus that for the first time in the country's history secured the right of an individual to file a complaint with international organizations against their own state.

That period was marked by historical changes of international importance: legal systems that used to be within or under the influence of the Soviet Union, were preparing to join regional and international human rights systems.

Resolution of the Supreme Council of the Republic of Belarus of 10 January 1992 ratified the Optional Protocol to the International Covenant on Civil and Political Rights (1966) and recognized competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.

That time was marked by active cooperation with the Council of Europe. It began in 1989, when the Parliamentary Assembly of the Council of Europe established relations with the Supreme Council of the USSR, granting it the "special guest" status. In January 1992, the decision of the Bureau of Assembly transferred that status to the Supreme Soviet of the Russian Federation; in 1992 and 1993, Ukraine and Belarus obtained "guest quotas" in the Council of Europe. Over the next five years, the "guests" were accepted as full members of the European regional system of human rights defense, but Belarus never joined it: in 1997, the membership of Belarus as a guest member was suspended by a decision of the Parliamentary Assembly of the Council of Europe in connection with the changes in the legal system, that ran contrary to the underlying principles of the united European system.

The door of the European Court was closed for the population under the jurisdiction of the Republic of Belarus. Although the *Council of Europe Information* Point opened in *Minsk* in June 2009, and the Parliamentary Assembly of the Council of Europe called on the PACE Bureau to restore the special guest status to Belarus, this process is hindered by a number of political and legal complexities.

Meanwhile, despite the fact that the legal system of the Republic of Belarus is immune to the direct control of the European Court of Human Rights; the country's population has the possibility to realize their hope for international legal review of the observance of their individual rights.

The system for the protection of human rights within the United Nations Charter and Treaty bodies is open to those who is subject to the jurisdiction of the Republic of Belarus and complains about the non-fulfilment of obligations under the universal treaties.

In 2000, the Human Rights Committee considered the first communication from Belarus[1], and since 2008, there has been exponential growth in the number of registered communication (see Annexes 3, 4 and 5).[2]

Analysis of statistical data on the registered individual communications to the UN Human Rights Committee with regards to Belarus shows that while in the course of ten years (1997-2006) the Committee had registered for consideration 38 communications, during the last six years (2007-2012) there were several times as many and a total of 145 as of early 2013 (see Annex 1).

It is important to take note of the high "quality" of these communications: according to 2012 data by OHCHR, of 48 completed cases with regards to Belarus only 8 were declared inadmissible. For comparison: 45 out of 77 individual communications submitted to the Human Rights Committee with regards to France were declared inadmissible (information from the UN Human Rights Committee statistical survey of individual complaints as of 23 April 2012)[3].

The growth in the number of complaints filed with the body that monitors observance of the International Covenant on Civil and Political Rights is related to several factors. Analysis of the complaints suggests that they are filed with regards to the violation of rights and liberties that ensure the democratic governance in the country, and namely: the freedom of speech, the right to elect and to be elected, the right of access to public service, and freedom of associations[4]. It is these rights that have been on the list of the

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1 *Vladimir Laptsevich v Republic of Belarus*.Communication No. 780/1997. CCPR/C/68/D/780/199, 13/04/2000. <http://www.unhchr.ch/tbs/doc.nsf/0/cc98a0722c3d4c62c125690c003636a2?Opendocument> [2012-03-03].

2 Information was prepared and presented by human rights defender Raman Kisliak.

3 <http:www2.ohchr.org/english/bodies/hrc/docs/SURVEYCCPR.xls>

4 The analysis is made together with Vladimir Nepogodin, a student of the law faculty of the European Humanities University during his student practice under the mentorship of the

most vulnerable to those who would like to participate in and influence the democratic process in the country.

Another factor that could have had an impact on the quantitative and qualitative growth of individual communications from the Republic of Belarus, is that their authors or representatives of victims of violations of civil and political rights and freedoms were in most cases participants, experts and alumni of the "International Law in Advocacy" program[5] by Human Rights House Network. Since 2006, the program offers a systematic training of Belarusian lawyers and human rights defenders in international legal standards and their implementation.

The figures can serve as indicators of the importance of the training with regards to the process of effectiveness of application of international legal human rights protection mechanisms. Partners and organizers of the program are aimed at continuing to distribute information about the possibilities of human rights protection at the national and international levels, and to increase confidence of the legal community and civil society in general of the impact of this work.

The mechanism to make the process of implementation of international treaties and constitutional provisions more effective is being triggered by those who the rights and freedoms belong to, i.e. individuals.

The present two-volume collection of articles "Individual v. State: Practice on complaints with the United Nations treaty bodies with regards to the Republic of Belarus" covers the role of an individual in the process of promotion and protection of individual freedoms.

The work to prepare and publish this collection is part of the Human Rights Houses Network's program "International Law in Advocacy". The two-volume collection is yet another publication in the series related to international legal

author of the monograph in May 2009. See: Ulyashina, Lyudmila. "Universal human rights standards, and some issues of their implementation in the Republic of Belarus." Electronic edition: Bulletin of Human Rights. # 1 (2010).

[5] The Human Rights House Network's program "International Law in Advocacy" has been developed and is being implemented by partner organizations from several European countries, including the countries of the former Soviet Union. Program's projects "De facto implementation of international obligations of the Republic of Belarus" and "Distance learning for human rights lawyers" promote efforts to fulfil the commitments undertaken within the framework of the United Nations, the Council of Europe and other international organizations, to provide support in the implementation of commitments in the field of human rights within the Commonwealth of Independent States. The projects set their sights onto furthering promotion, protection and observance of human rights under the rule of law, capacity building through training of lawyers, networking and raising awareness with regards to the direct application of human rights standards at the national level. <http://humanrightshouse.org/Projects/ILIA_RU/index.html> [2012-04-03].

mechanisms to protect human rights and their influence on the formation of national legal systems[6]

The first volume of this publication contains original writings that reveal the contents and practical aspects of international human rights law concepts directly related to the Institute of individual communications (Sergei Golubok, Liudmila Ulyashyna). The book provides an analysis of legal issues resolved by the Human Rights Committee with regards to individual communications against the Republic of Belarus pertaining to violation of criminal and administrative proceedings (Natalia Matskevich) and cases of violation of the right to freedom of expression and peaceful assemblies (Leonid Sudalenko). An example of an individual communication as a means of positive change driver inside the legal system is reviewed in the article by Roman Kisliak. The book is finalized with the number of reference tables and materials, as well as texts of two decisions (views) of the Human Rights Committee (*Shumilin v. Belarus*, *Kovaleva et al v. Belarus*) and views of the Committee on the Elimination of Discrimination against Women (*Abramova v. Belarus*).

The second volume that is expected to be published in 2013 will include original analytical works on the admissibility of individual considerations and the Republic of Belarus' compliance with the decisions (views) by treaty bodies. The second volume will include all decisions made by the Committee in 2000-2012 with regards to the Republic of Belarus that were not included in the first volume.

In conclusion, I would like to thank the program team and those who worked on the book, as well as our colleagues, who continue their professional activities for the promotion and protection of human rights in Belarus.

Liudmila Ulyashyna,
Manager of the Human Rights Houses Network's Program
"International Law in Advocacy"

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[6] Freedom of expression, assembly and associations: international legal standards and laws of the Republic of Belarus. Minsk: Tesei, 2006. Examples of individual complaints to the Committee on Human Rights, the Constitutional Court of the Republic of Belarus, articles and essays of the "De facto implementation of international obligations of the Republic of Belarus" program/ / Regulations and practical handbook. Lawyers' Companion, Vilnius: Human Rights House, 2008. <http://
prava-by.info/archives/1205> [2012-04-02]. Human rights: international law and national legislation: collected stories by V.V. Filippov, 2011.

Sergei Golubok[1]

CASES AGAINST BELARUS AT THE HUMAN RIGHTS COMMITTEE: WHAT'S NEXT?

Belarus is a party to the First Optional Protocol to the International Covenant on Civil and Political Rights[2] that grants individuals the right to lodge complaints with the Human Rights Committee[3] since 1992.

Over the past twenty years, the Committee has registered 142 complaints against the Republic of Belarus; final decisions were made on 46 of them, in the vast majority of cases those stated that there had been one or more violations of the Covenant[4].

The articles published in this book analyse extensive practice of the Committee, elaborated on "Belarusian cases".

A considerable part of Committee's decisions against Belarus is related to violations of civil rights to freedom of speech, freedom of assembly and freedom of associations (Article 19, 21 and 22 of the Covenant), especially in connection with the obstruction of public events (rallies, pickets) and registration of independent non-profit organizations. This set of issues is joined by violation of various voting rights of citizens (Article 25 of the Covenant): "Belarusian cases" helped to significantly advance the practice of the Committee in this regard.

A whole series of interrelated violations of Article 7 (prohibition of torture), Article 9 (right to liberty and security), Article 10 (humane conditions of detention) and Article 14 (right to a fair trial) of the Covenant, is being recorded by the Committee with regards to cases related to criminal procedures.

Many violations of the Covenant by Belarus as revealed by the Committee are systemic in their nature, that is not deriving from an "excessive act" on the ground, but from a fundamental mismatch between the international legal standards, national laws and established practice. For example, the inability to appeal against the death sentence imposed by the Supreme Court in the first instance, inevitably entails a violation of Article 14, paragraph 5, of the Covenant, and, hence, Article 6[5] of it.

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1 Candidate of Law, Attorney of the St. Petersburg Bar Association, member of the editorial board of the scientific journal "International justice".

2 Hereinafter referred to as the Covenant.

3 Hereinafter referred to as the Committee.

4 The data are based on the analysis of statistical information provided by the Office of the UN High Commissioner for Human Rights.

5 Views of the Committee of 29 October 2012 on communication No. 2120/2011, § 11.6-

It should be noted that many of the issues in the "Belarusian practice" of the Committee are either addressed insufficiently or not addressed at all. For example, there were hardly any issues raised with regards to the violation of Article 7 in contexts other than the police violence (e.g., torture in psychiatric hospitals or in the army); civil proceedings are not being considered from the point of view of compliance with international legal standards under Article 14,paragraph 1, of the Covenant; arguments with regards to discriminatory, in violation of Article 26, treatment by the authorities, for example, on grounds of political opinion the applicant, are rarely corroborated in detail.

Complaints filed with the Committee against Belarus may for the time being be of only theoretical interest, since the authorities (of other state parties to the Covenant, Belarus is perhaps only joined by Sri Lanka in this regard) are not ashamed to officially consider Committee's decisions to be optional[6] and do not take any actions to implement them at the national level – either in terms of the restoration of applicants' violated rights, that have found protection in Geneva, or in terms of general measures to rectify the situation as a whole and to prevent similar violations of the Covenant in the future. This public disdain of Committee's position on the part of Belarus is most evident in the fact of the execution of applicants who filed a statement to the Committee that the death sentence imposed on them was in violation of the Covenant; and with regards to whom the Committee has requested interim measures of protection, and namely, Belarus was asked to refrain from execution of the alleged victim pending a decision by the Committee. Having once again faced with such a practice of the authorities of Belarus in 2012, Chairman of the Committee said: "The position of the Human Rights Committee is clear – Belarus has committed a grave breach of its legal obligations… We deplore these flagrant violations of the human rights treaty obligations of Belarus"[7].

While being a party to the Covenant and the First Optional Protocol thereto, Belarus cannot "ignore" decisions of the Committee –a body established by these international treaties and working in compliance with them. Behaviour of Belarusian authorities resembles that of a driver, who deems it possible to use automobile roads, yet "takes no notice" of the rules of the road.

The Constitutional Court of the *Russian Federation* in its recent decision on the possible revision of the verdict on the case of a person with regards to whom the Committee subsequently decided there had been the violation of the Covenant[8], commented on the legal nature of the Committee and decisions made by it, and came to the conclusion that because of universally

11.8.

6 See, for example, a letter by the Deputy Minister of Foreign Affairs of the Republic of Belarus (2009), reproduced: http://spring96.org/ru/news/30304.

7 See Annual Report of the Human Rights Committee, A/67/40/VOL. I, §57.

8 See: Judgment of June 28, 2012 № 1248-O.

recognized international law principle of *patstasuntservanda* (treaties must be respected) Russia "shall not abstain from adequate response to the views of the Human Rights Committee, including in cases where it believes that as a result of violation of the provisions [of the Covenant] there shall be provided a retrial of a criminal case... The otherwise will not only question the observance by the Russian Federation of obligations voluntarily assumed under the [Covenant] and its Optional Protocol... yet also make pointless the right of appeal – stemming from of Article 46 (part 3) of the Constitution of the *Russian Federation* in accordance with these international treaties of the Russian Federation – to the Human Rights Committee, if all available domestic remedies have been exhausted"[9].

Anyway, the Committee lacks – and there could hardly be any – its own mechanisms that may encourage (or compel) Belarus to enforce its decisions.

However, the Covenant provides for a mechanism that, in our view, can be applied in such cases of demonstrative and undisguised rejection by the State party to fulfil their international legal obligations. In accordance with Article 41 of the Covenant, if a State Party "considers" that another State Party "is not giving effect to the provisions of the present Covenant", it may submit a complaint in that regard. An inter-State complaint is being considered by the Committee and an ad hoc Conciliation Commission in compliance with procedures, provided for in Articles 41 and 42 of the Covenant.

Over the decades the Covenant has been in effect, no interstate complaints have been filed; however, in our opinion, that cannot indicate that the rifle hanging on the wall is destined to never fire. Non-fulfilment of Committee's decisions on individual cases is by itself a refusal "to enforce the regulations of the Covenant" and violation of Article 2, and demonstrative manner of those expressed by Belarus, requires other State Parties to provide adequate legal response, otherwise the effectiveness of the very system of collective protection of human rights, established by the Covenant and being one of the most significant achievements of the world's human rights protection architecture, would be jeopardized.

It is obvious that the decision that is to be made by the Committee on Inter-State complaint, by itself, without the use of additional appropriate leverages, will also fail to compel Belarus into doing something, but it can become an authoritative means of resolving legal disputes, dot l's and cross t's and explain to the international community what is required by international law to enforce decisions of the Committee.

In addition, even while remaining unfulfilled, Committee's decisions do not remain unheeded. Above all, they themselves become a form of redress for victims of human rights violations, recognizing their suffering and wrongfulness of their state. Moreover, they make possible to have some sort of a of

[9] Ibid, paragraph 4 of the reasoning part.

legal record on behalf of an international independent expert body of what is happening in the country. Through the generations, no one will be able say that there were no tortures and extrajudicial executions in 2000-s Belarus.

Finally, the decision of the Committee will, when the time comes, make it possible to build the program and contents of legal reforms in Belarus. Systemic problems identified by the Committee will refer to those elements of the legal system, that are to be replaced or reformed in the first place in order to ensure compliance with international legal standards, i.e. so that what is happening now in Belarus will never happen again.

Those who fearlessly and without much sense for themselves are now arguing with Belarus at the Committee, are working for the future. It is not only the future of the national legal system, but that of the whole human rights protection toolkit of the Covenant. We wish them good luck!

Lyudmila Ulyashina

INDIVIDUAL[1] VS. STATE: SUBMISSION, EQUALITY, CONFLICT? CHALLENGES AND POSSIBILITIES TO INCREASE EFFECTIVE IMPLEMENTATION OF INTERNATIONAL LEGAL HUMAN RIGHTS OBLIGATIONS

"I never considered myself a leader of a movement
and never aspired to that. All my actions and statements
were of private, individual nature,
reflected my beliefs (or doubts)
and my moral impulses.
I wrote in particular on the need of
pluralistic changes in the life of our country...
and human rights observance. "

Andrei Sakharov,
physicist, creator of the hydrogen bomb,
Nobel Peace Prize winner
one of the leaders of the human rights movement
in the USSR and of the Moscow Committee of Human Rights

Introduction

Over the centuries, mankind has tried to find a formula of legal relationship of "human and the state". Status of the individual was and still is the term that is being searched for.

The axiom of many year about the inequality of the two components – the human and the state – is reflected in the terminology. Exact nature of this relationship is expressed by the word "subject" that still has some international legal circulation. In accordance with this approach, the individual is subordinate to the state; their legal status is equal to the status of other *objects* that are under the authority of a *sovereign*: territories, waters and mineral resources.

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[1] The title of the article uses the term "individual" (from the Latin. *Individuum* - indivisible), widespread in psychology, sociology and international human rights law. The term is synonymous with the more familiar phrase of "natural person". The concept of "individual" means a separate person – a carrier of congenital and acquired properties. <http://ru.wikipedia.org/wikil> [2012-10-11].

From the second half of the previous century, the situation began to change: provisions have been introduced into international law that put an individual onto the same level with the state. First at the European level, and then at the international not only a human was recognized as the bearer of rights and freedoms, but also gained the procedural opportunity to become an equal party to a dispute with the state.

Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), commonly referred to as the European Convention for the Protection of Human Rights and Fundamental Freedoms, entitled any person, non-governmental organisation or group of individuals claiming to be the victim of violation by one of the High Contracting Parties (i.e. the state) of the rights set forth in the Convention or the protocols thereto, to submit applications with the European Court of Human Rights.

In accordance with Article 1 of the Optional Protocol (1966) to the International Covenant on Civil and Political Rights[2] (hereinafter – the Covenant) State Parties to the Covenant, that became parties to the Optional Protocol shall recognize the competence of the Committee to receive and consider communications from individuals against states whose jurisdiction they are subject to.

Since then, the role of individuals challenging the state in a dispute over protection of human rights and freedoms is becoming increasingly important. Individual started acting as an equal entity of legal relationships, governed by international law; it is no more considered a "supplicant".

Meanwhile, the doctrine of "the individual as a subject of international law" since its introduction into legal circulation has been the subject of criticism by international lawyers. After the accession of the countries of the former Soviet Union to the international and European human rights protection system, doctrinal disputes flared up.

The official status of a *subject of international law* requires a comprehensive study. Based on a review of theoretical research in this area, analysis of legal acts regulating the mandate of an individual in international public law, and legal assessment of certain cases reviewed by the Human Rights Committee, this Article will attempt to identify the status of an individual in terms of a legal doctrine in conjunction with the study of the actual activity of individuals to promote the values of human rights.

In the course of the study a number of scientific and practical issues are to be covered:

– How the role and potential of the individual are characterized in modern international human rights law?

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[2] The International Covenant on Civil and Political Rights, adopted by resolution 2200A (XXI) of the General Assembly on 16 December 1966.

– Is individual a "new" subject of international law in terms of the doctrine of international law?

– What is the de facto role of an individual in international human rights law? Is this role recognized by the international community?

– What is the role of the state and its institutions in the recognition of an individual as an active participant in the implementation and protection of human rights?

– How efficient are the activities of an individual in terms of the real impact on the state of national implementation of international legal requirements for the protection of human rights?

1. The "subject of international law" concept: rigid framework of traditions

Starting with the Peace of Westphalia (1648) and, until recently, the state was the only "full-fledged" subject of international law. Based on the concept of state sovereignty, only states were recognized as subjects of international law by international legal order. That approach served to ensure the stability of international relations. In practice, that meant that the state, having *legal capacity*, *legal ability* and *delictual capacity*, entered into agreements at the international level and were the bearers of rights and obligations arising from international obligations.

Individuals (along with other *objects*) were under the jurisdiction of their "sovereign", the amount of their rights, freedoms and responsibilities was determined by national law.

In the middle of the XX century, the United Nations Charter (1945), the Universal Declaration of Human Rights (1948), followed by other major documents, that laid foundations for international human rights law, recognized fundamental human rights as a target for international protection and introduced a new vocabulary into international law.

It was for the first time stated that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"[3].

From the moment when "the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom" and "Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms"[4] there emerged a need to reassess the doctrines of public international law.

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[3] The Universal Declaration of Human Rights (1948), Preamble

[4] Charter of the United Nations (1945), Articles 1, 55, 56

The real, rather than declarative value of acts adopted by the mankind, could only be revealed under the condition that the essence of the concept of human rights and freedoms would also be reflected in the doctrine of international law.

The traditional view of the individual as a voiceless "subject" of particular state or an *object* did not complied with the stated objectives of the international community.

One of the first to oppose inclusion of individuals amongst objects of international law was Professor J. O'Connell, who in 1965 substantiated the need to change the then-existing division of legal *actors* into subjects and objects. He wrote that the place and role of the individual in international law affects "the heart of the philosophy of law":

"Can this be true: while claiming that the well-being of the individual is the purpose of law, deny this individual the possibility to implement their rights? Can the proclaimed well-being be reached, if the person themselves is "instrumentalized" in the law, rather than acting as an independent actor?"[5]

Representatives of the positivist trend in law insisted on the different: since there is no rule of international law that recognizes that individuals have rights of subjects, they should remain "objects", and authority over them will be carried out by the state[6].

"Individuals – Professor A. Cassese agrees with them: "have long been under the exclusive control of the states, and if they found themselves mentioned in international treaties, it is only as 'beneficiaries'".

Cassese notes that the situation has changed due to the fact that individuals are regarded as holders of substantive rights that allow them to operate at the international level. In this case, the author notes, new actors have *limited* legal capacity: they are endowed with certain rights and powers while performing actions for the implementation of their rights, including in court proceedings and in the implementation of the decisions process[7].

Among Russian authors there are advocates of the classical approaches to the notion of the "subjects of international law". Professor I.I. Lukashuk writes that the individual is within the sovereign will of the state: "The international community can ensure human rights only through the state, exerting appropriate influence onto it"[8].

Other authors, such as V. A. Kartashkin recognize that "the individual became the immediate subject of international law"[9]. A Professor G. V. Ig-

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5 O'Connell, Daniel Patric. *International Law*. Volume I. London, 1965. P. 116.

6 Schwarzenberger, Georg. *International Law as Applied by International Courts and Tribunals*. London: Stevens and Sons Ltd, 1957. P. 140–155; Norgaard Carl Aage. *The Position of the Individual in International Law*. Munksgaard, 1962. P. 325.

7 Cassese, Antonio. *International Law*. Oxford, 2005. P. 47.

8 Lukashuk, I. *International law*. The general part. Wolters Kluwer, 2008. Pp. 37-38.

9 Kartashkin, V. A. *Human rights in domestic and international public law*. Moscow, 1995.

natenko supports this point of view and opposes those who find it impossible to "allow" individuals into the circle of subjects of international law. The author writes: "... the current state of international law indicates direct inclusion of individual-oriented provisions into international agreements. They establish rights, freedoms and duties of a human and at the same time provide them legal possibilities for safeguarding and protection"[10].

The reasons for such contradictory views were laid down in the texts of international agreements in the field of human rights. Thus, the Covenant and other treaties governing the international protection of human rights, lack signs or terms that would indicate that individual is the *object* of international relations; these international instruments likewise lack directions that would definitely indicate that status of an individual –a bearer of rights and freedoms – is recognized as that a *subject* of international law.

Texts of international human rights treaties have the following terms and concepts: *individuals* in UN documents[11]; *persons*, *non-governmental organizations or group of individuals* in the documents of the Council of Europe[12].

It is important to note that the abovementioned Articles were related to the establishment of competence of international judicial and quasi-judicial bodies to receive and consider complaints (communications) stating that these persons (individuals) have become victims of violation by one of the contracting parties (states) of their rights recognized by an international agreement.

Thereby, the procedural capabilities of individuals were probably more of derivatives of the capabilities of states and were "granted' as a result of the will of state parties in order to create an additional mechanism for monitoring the implementation of international agreements.

Therefore understandable is the caution with which, for example, the Human Rights Committee is choosing the words in describing the status of the individual. Instead of nouns, reflecting an active actor of legal relationships, other terms are being used in its terminology.

For example, General Comment No. 31, "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" emphasizes that "the *beneficiaries* of the rights recognized by the Covenant are individuals" and points to "the existence of the obligations of State Parties towards individ-

S. 100.

10 *International law*. Textbook for high schools / Man. Ed. G. V. Ignatenko, O. I. Tiunov. Moscow: Publishing NORMA • M, 2008. Pp. 92-95.

11 See Article 1 of the Optional Protocol (1966) to the International Covenant on Civil and Political Rights.

12 See Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

uals as the *right-holders* under the Covenant [Emphasis added : Liudmila Ulyashyna][13].

And yet it is this opinion of the Committee that seems logical and consistent: it allows for exact correspondence of the explanatory comments to the text of the international treaty – the Covenant.

Therefore, it may not be amiss to mention that, despite numerous innovations that marked the birth of international human rights law, the texts of international agreements retained the conservative approach: the states remain their subjects. This classic model means that from the legal point of view the responsibility for fulfilment of obligations with regards to all persons subject to the jurisdiction of individual states, is vested in these states and the powers to implement these commitments are in their hands.

It should be noted, however, that the classical model of international law, based solely on inter-state relations in the field of human rights have especially clearly shown its weaknesses. Suffice it to cite one example.

In order to make the institute of responsibility of states in the field of protection of human rights of the individual more efficient, basics of the mechanism of "collective" responsibility of states should be introduced into international law.

To this end, provisions that secured the commitment to implement the principle of *erga omnes*[14] were included into Article 33 of the European Convention and Article 41 of the International Covenant on Civil and Political Rights.

As is known, this generally accepted principle that have developed already in the "classical" international law, for the institute of protection of the *individual* meant "rules concerning the basic rights of the human person", create obligations for any contracting state party. Each contracting party shall be obliged to every other state party to comply with its commitments, and to take joint and separate action in collaboration with the United Nations Organizations to achieve stated goals of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion[15].

The triumph of this principle would mean that every state realizing itself potentially responsible for how human rights are being observed in other

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[13] "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", par. 9 *General Comment No. 31 [80].* CCPR/C/21/Rev.1/Add.13, 26 May 2004 <http://www1.umn.edu/humanrts/gencomm/hrcom31.html>

[14] erga omnes (Latin legal) – having regard to everything, relating to all (eg, the workers' entering into a collective agreement) < https://en.wikipedia.org/wiki/Erga_omnes>

[15] See paragraph 4 of the Preamble of the International Covenant on Civil and Political Rights; Articles 1, 55 and 56 of the Charter of the United Nations.

state parties to the agreement should have used procedural mechanisms and speak out in defense of the rights of individuals[16].

The Human Rights Committee provided an explanation to States Parties in this connection, stressing that "that violations of Covenant rights by any State Party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest."[17]

This mechanism, unfortunately, has not yet received practical development; states are almost never using this legal mechanism to respond to violations of individual rights and freedoms in state parties to international agreements.

On the contrary, the procedural mechanism of individuals complaints with international bodies, which was and is still viewed and as a secondary (subsidiary) one in relation to domestic remedies, have seen a rapid development. For example, since the ratification of the Optional Protocol to the International Covenant on Civil and Political Rights in 1996, more than 140 people applied to this UN treaty body with complaints over alleged violations by the Republic of Belarus of their rights and freedoms, provided for by pertinent treaties. The growth was exponential: while only one communication was considered in 2000; the Committee considered 17 complaints during the nine months of 2012. And a total of more than 140 individual communications have been registered by the Committee during this time from persons under the jurisdiction of the Republic of Belarus[18]. Even more impressive is the statistic that characterizes the number of complaints filed annually to the European Court, for example, from the Russian Federation[19].

These examples indicate that individuals actually play the major role in drawing attention of international institutions to the problems of national implementation of state obligations in the field of human rights and freedoms.

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16 Article 33 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Article 41 of the International Covenant on Civil and Political Rights (1966).

17 "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", par. 2 *General Comment No. 31 [80].* CCPR/C/21/Rev.1/Add.13, 26 May 2004 <http://www1.umn.edu/humanrts/gencomm/hrcom31.html>

18 The statistical overview was prepared by Belarusian lawyer Roman Kisliak.

19 As of 2011, about 40 cases, in which there is at least one violation, are annually admitted against the Russian Federation. See: Emmert, Frank. The Implementation of the European Convention on Human Rights and Fundamental Freedoms in New Member States of the Council of Europe-Conclusions Drawn and Lessons Learned.
Indiana University Robert H. McKinney School of Law, December 12, 2011. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971230> [2012-09-09].

At the same time, the fact of the wide use of the Institute of individual complaints by itself does not lead to a change in those characteristics that would lead to a change of subject structure in international relations.

Summarizing the results of the analysis of international treaties and doctrinal views of scientists from different legal systems, it is possible to come to the following conclusions:

– Novellae and features characterizing the area of international human rights law have not formally changed the subject structure of international law, which is de jure still dominated by the states.

– International standards that secured the procedural right of states and individuals to file complaints with international bodies with regard to violations of international obligations in the field of human rights and freedoms are widely used only by individuals; the states are not filing complaints to protect human rights of individuals.

2. De facto: the role of the individual in the evolution of international and national law

Realities, in which international human rights are being formed and developed, require moving away from the formal approach to the interpretation of the legal subjects and making an assessment of the actual role of the individual in international protection.

First of all it is important to understand that the very fact of the introduction of international legal responsibility of states for fulfilment of obligations in the field of promotion and protection of human rights *of individuals* meant that as awareness of rights and freedoms would increase, more and more individuals (right-holders) will remind states of these obligations and require their implementation.

In this regard, it was logical to expect the increasing role of the individual already at the first stage of development of international human rights law: individual voices were bound to be heard in the general chorus of actors operating in the processes of promoting and protecting individual rights and freedoms.

Indeed, owing to the broad participation of individuals and representatives of the civil society in these processes, most of international legal activities in the field of promotion and protection of human rights are performed with their assistance: they voice problems related to implementation of human rights during international forums, they are involved in the preparation of legal expertise, alternative reports, applications and complaints on cases of violation of individual rights and freedoms that are being sent to "statutory" and "treaty" bodies of international organizations.

For example, in 2012 the interests of civil society at the United Nations Organization were represented by 3,743 non-governmental organizations with

the ECOSOC[20] status[21]. Thousands upon thousands of organizations and individuals lacking this status have actively communicated with the UN bodies, reporting on violations of human rights in all parts of the world and calling for help.

If we go back to estimates given in academic studies of the "subject of international law" institute, and pay attention to those in which authors[22] point to a change in the attitude to the individual in international law, it becomes clear that the formal status of the individual is in no way an obstacle to the expansion of their influence in the international human rights law.

Thus, Thomas Burgenthal (Judge of the International Court of Justice from 2000 to 2010) in his review of the international human rights system writes that if previously the activities in the field of international law were related only to the activities of the states, now an individual or group of individuals may replace or supplement the role of states in the international legal regulation.

"New technologies and growing complexity of solving global problems have increased the level of uncertainty in decision making, contributed to the 'blurring' of authority in decision-making at the international level", "technology destroyed the state monopoly on the collection and dissemination of information"[23] – all these factors have contributed even more to new actors having taken on some of the operational functions in contemporary international law.

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[20] NGO Branch, Department of Economic and Social Affairs, *All organizations in consultative status* <http://esango.un.org/civilsociety/getByAllHavingStatus.do;jsessionid=DC5FAFE6A791FF742DDA60E23FCEA98A?method=getByAllHavingStatus&searchType=csSearch> [2012-11-11].

[21] Consultative status is being assigned to the non-governmental organizations by the UN community. Consultative status with the Economic and Social Council of the United Nations is assigned on the basis of the UN Charter by the decision of the Economic and Social Council to organizations interested in matters of concern to the Council. In addition, certain intergovernmental organizations grant consultative status to non-governmental organizations (eg, the Council of Europe); the rules for granting consultative status to international non-governmental organizations are attached to the resolution of the Committee of Ministers of the Council of 18 October 1993 No. 93 (38) "On the relations between the Council of Europe and international non-governmental organizations". International non-governmental organizations with consultative status at the Council of Europe have the right to file complaints about violations by governments of the Council of Europe states of human rights guaranteed by the international agreement "European Social Charter".

[22] Burgenthal, Thomas. «The Evolving International Human Rights System», in *International Law: classic and contemporary readings edited by Charlotte Ku London. 2009*. P. 289–319; Charnovitz, Steve. Nongovernmental Organizations and International Law. Ibid. P. 117–137.

[23] Mathews, J.T. «Power Shift», Foreign Affairs,76, № 1 (1997). P. 50–66.

Professor R. Higgins, former President of the International Court of Justice, suggested using the term "participants" instead of "subjects and objects", meaning the state, international organizations, multinational companies and corporations, non-governmental groups, organizations, and individuals[24]. Based on the postulate that not all of these entities have the same amount of power at the international level, the professor notes that these groups have been recognized by their actual actions and the role they play in the recognition and protection of the most important values[25] .

It appears that in this way a balance may be achieved between a dogmatic approach between the traditional international law concerning the concept of the "subject of international law" and modern conditions that form the role of the individual. In her assessment Professor R. Higgins "reconciled" the strict rules of traditional law and the actual role of new actors in the society. In such a way the requirements of certainty and predictability of legal concepts were met and the "live" and evolving international human rights law was sustained.

Summarizing what was said one can conclude that the dispute over status and position of individual in the international law is nowadays no longer a dogmatic dispute about the amount of formal authority in accordance with international law. This dispute is within the sphere of assessment of actions carried out by individuals to implement regulatory requirements.

3. Individual – defender of human rights, participant of human rights defense activities, human rights defender

If at the initial stage of shaping of international human rights law norms that have fixed individual substantive rights were formulated, and at the following stage frameworks of the procedural mechanism to appeal to international bodies were created, the nowadays international human rights law is working to create conditions in which the activities of individuals in the promotion and protection of human rights would be more efficient.

Further strengthening of the position of the individual and preparation of the basis for joint activity of groups of individuals were facilitated by the international act that has become a "normative shield" or a kind of "human rights defenders' code of practice."

"Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms"[26], often referred to as the "Declaration

[24] Higgins, Rozalyn. «Conceptual Thinking about the Individual in International Law». British Journal of International Studies. № 41 (1978). P. 5.

[25] Higgins, Rozalyn. Problems and Process: International Law and How We Use It. Oxford, UK: Clarendon, 1994.

[26] "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms",

on Human Rights Defenders " (1998), recognized the work of individuals, groups and associations in contributing to, the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals, including in relation to mass, flagrant or systematic violations [27].

The Declaration endowed everyone with the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.

While stressing the obligation of states to "take prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms", the Declaration established a legal framework for the activities of individuals at both the national and international level.

Human rights community brings together representatives of very different professions working in their countries and joining efforts for common activities held at the international level. "Human rights defenders are men and women on the front line of the struggle for ensuring that the principles enshrined in the Universal Declaration of Human Rights are respected. These people work in human rights organizations, youth groups, churches, women's organizations and organizations for economic development, others are lawyers, journalists, teachers, social workers or leaders of local communities"[28].

Due to the wide acceptance and practice of constant use at the international level and in some states[29] this Declaration – a document of "soft" law – is transformed into an international custom, and thus becomes a normative act, implementation of which is mandatory for certain states.

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adopted by General Assembly resolution 53/144 of 09 December 1998 <http://www1.umn.edu/humanrts/instree/Res_53_144.html>.

27 Ibid., preamble.

28 Shire Shekin, Hassan. «Challenges to National Implementation of International Human Rights Standards: Human Rights Defenders in the East and Horn Africa». *Global Standards – Local Action. 15 Years Vienna World Conference on Human Rights*. Edited by: Benedek, Wolfgang; Gregory, Clare; Kozma, Julia; Nowak, Manfred and others. Wien; Graz, 2009. P. 205.

29 "Mandate of the Special Representative of the Secretary-General on the situation of human rights defenders", Human Rights Council, U.N. Doc. A/HRC/7/L.23, 25 March 2008. The former special representative, Hina Jilani, submitted two reports on her visits to South-Eastern Europe. See "Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani: Addendum: Mission to Serbia, including Kosovo", *Human Rights Council, U.N. Doc. A/HRC/7/28/Add.3*, 29 February 2008. "Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani:Addendum : Mission to the Former Yugoslav Republic of Macedonia", *Human Rights Council, U.N. Doc. A/HRC/7/28/Add.4, 3* March 2008. «On Council of Europe action to improve the protection of human rights defenders and promote their activities», *Declaration of the Committee of Ministers* adopted by the Committee of Ministers on 6 February 2008 at the 1017th meeting of the Ministers' Deputies.

After the adoption of the Declaration on Human Rights Defenders, a number of documents have been developed and adopted at the international and regional levels, aimed at further support of the activities of individuals who work to promote and protect human rights at the national level.

During the last decade, other documents emerged to reinforce the status of human rights defenders:

– The mandate of the United Nations Special Rapporteur on human rights defenders (2000)[30];

– European Union Guidelines on Human Rights Defenders (2004)[31];

– Declaration of the Council of Europe "On improving the protection of human rights defenders" (2008)[32];

– Resolution of the Commission on Human Rights (2005), the Human Rights Council (2008, 2010, 2011) and the UN General Assembly (2009)[33].

These documents once again emphasize that the level of respect of and support to human rights defenders and their work is essential to the comprehensive implementation of human rights. They also contain a reference that the legal framework individuals, groups and organs of society are acting to promote and protect human rights and fundamental freedoms, is within the national law, which should correspond to the Charter of the United Nations and international human rights law[34].

Many governments have welcomed the adoption of international measures to support individuals and groups in their human rights defense activities and advocated the establishment of a new mechanism to promote activities of representatives of civil societies. According to those governments, creation of international and regional mechanisms is an important and necessary step to ensure greater recognition and more effective protection of

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30 The mandate of the Special Representative of the UN Secretary General on Human Rights Defenders (2001). <http://www.hri.ru/docs/?content=doc&id=243>> [2012-04-03].

31 EU-Human Rights Defenders Guidelines <http://www.consilium.europa.eu/uedocs/cmsUpload/16332-re01.een08.ppdf>> [2012-04-03].

32 «On Council of Europe action to improve the protection of human rights defenders and promote their activities», *Declaration of the Committee of Ministers* adopted by the Committee of Ministers on 6 February 2008 at the 1017th meeting of the Ministers' Deputies. < https://wcd.coe.int/ViewDoc.jsp?id=1245887&Site=CM>> [2012-04-03].

33 Resolution 2005/67 of the Commission on Human Rights of April 20, 2005; Resolution 7/8 of 27 March 2008, 13/13 of 25 March 2010 and A/HRC/16/L.15 of 18 March 2011 of the Human Rights Council; as well as resolution 64//163 of 18 December 2009 of the UN General Assembly.

34 See, eg, "Protection of human rights defenders". *Resolution of the UN Human Rights Council*, 25 March 2010, the Thirteenth Session, 13/13, paragraph 3.

human rights defenders around the world[35]. Thousands of individuals use these mechanisms in their work[36].

"Human rights are not just a part of the democratic process in the country, their presence and activity in a particular country is both an indicator of democracy in this country and the motor in its further development,"[37] Hina Jilani said about the role of human rights defenders at a conference on the 15th Anniversary of the World Conference on Human Rights (2008).

According to the judge of the International Court of Justice Thomas Burgenthal, human rights non-governmental organizations play an even more important role as a community in helping to transform the conglomerate of "rather weak" institutions, that are the international human rights defense system, into the structure that makes it more difficult for states to simply "filibuster" their international obligations in the field of human rights[38]

It is important to remind that many and many human rights defenders are being harassed for their work. Ban on the provision of assistance in the field of human rights under the pretext of licensing of legal aid, use of extremist and anti-terrorist legislation against organizations and activists, denial of registration to associations of human rights defenders, criminalization of human rights work, pressure on organizations and individuals over politically motivated charges of violating reporting requirements, tax laws , growing monopolization of interaction of non-governmental organizations and the state by creating of controlled vertically integrated structures of "the managed civil society"[39] – these are just some manifestations of the growing pressure by governments onto organizations active in human rights defense.

Speaking at the UN General Assembly on 02 November 2012, the Special Rapporteur on human rights defenders, Margaret Sekaggya, raised the issue of national legislation being used to persecute human rights defenders[40].It

35 "On the situation of human rights defenders". *Report of the Special Representative of the Secretary-General to the United Nations at the 57th Session of the UN Commission on Human Rights* (2001), E / CN. 4/2001/94.

36 You can find about the work of human rights defenders around the world by visiting the website: http://humanrightshouse.org/Articles/15409.html [02.04.2012].

37 Jilani, Hina. «The Role of Civil Society and Human Rights Defenders in the National Implementation of International Human Rights Standards». Global Standards – Local Action. 15 Years Vienna World Conference on Human Rights. Edited by: Benedek, Wolfgang; Gregory, Clare; Kozma, Julia; Nowak, Manfred and others, Wien; Graz, 2009. 77.

38 Burgenthal, Thomas. «The Evolving International Human Rights System»in International Law: classic and contemporary readings. Edited by Charlotte Ku. London, 2009. P. 309.

39 "Recommendations of Russian NGOs on the issue of freedom of association," 01 October 2009, the Centre for Democracy and Human Rights, "Public verdict" Foundation and SOVA Centre for Information and Analysis http://www.publicverdict.org/topics/international_instances/7513.html [02.04.2012].

40 National laws must not restrain the work of rights defenders – UN expert <http://www.ohchr.org /EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12740&LangID=E> [11.11.2012].

is with anxiety that she noted a negative trend: activities of human rights defenders are being criminalized by states including via use of national laws. These trends are illustrated by two decisions of the UN Human Rights Committee, adopted on appeals by human rights defenders against the Republic of Belarus[41]. In the case of *Zvozskov*[42] *et al. v. Belarus*[43] (2006) The Human Rights Committee considered the individual appeal of Boris Zvozskov on refusal to register a human rights NGO "Helsinki XXI" and concluded that the refusal to register is in conflict with requirements of Article 22, part 2 of the Covenant and violates the authors' right to the freedom of association.

In particular, while assessing the legislation and law enforcement practice by Belarusian governmental bodies, the Committee stated: "According to the Supreme Court's judgment of 20 August 2001, the only criterion which the "Helsinki XXI'" statutes and, respectively, the authors' application for registration did not meet was a compliance with domestic law, under which public organizations do not have a right to represent and defend the rights of third persons. This restriction was assessed by the Committee in the light of the consequences which aroused for the authors and their association. The Committee noted that the State party has not advanced any argument as to why it would be necessary, for purposes of Article 22, paragraph 2, to condition the registration of an association on a limitation of the scope of its activities to the exclusive representation and defense of the rights of its own members".

When considering the individual communication by the head of the human rights organization "Viasna" Ales Bialiatski (case *Belyatsky et al. v. Belarus*[44] (2007), the Committee also considered that by dissolving the Human Rights Centre "Viasna" the Supreme Court of the Republic of Belarus violated the authors' right to freedom of association.

In that case, according to the Committee, court's order which dissolved "Viasna" was based on perceived violations of the electoral laws carried out during the monitoring of the 2001 Presidential elections. While making considerations on the case the Committee assessed it in the light of the consequences which arose for the author and the co-authors of the communication

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41 The review is based on an analysis of: Kuznetsova, Catherine. "Freedom of associations: international standards." *Human Rights: International standards and national legislation*: Collection of stories. Edited by: V. Filippov. Vilnius, 2011. Pp. 89-91.

42 Boris I. Zvozskov - Belarusian human rights activist, one of the founders of Belarusian human rights movement, founder of the House of the Belarusian Human Rights House, died on 17 June 2012. Decision of the UN Human Rights Committee (CCPR/C/88/D/1039/2001) was not enforced by the Republic of Belarus.

43 *Zvozskov et al. v. Belarus*. Communication No. 1039/2001, views adopted on 17 October 2006. CCPR/C/88/D/1039/2001.

44 *Belyatsky et al. v. Belarus*. Communication No. 1296/2004. UN Doc CCPR/C/90/D/1296/2004.

with regards to criminalization of the operation of unregistered associations in Belarus.

It should be clarified in this regard that, according to national criminal legislation (Article 193 part 2 of the Criminal Code) organization or management of a public association whose activities involve violence against citizens, or infliction of bodily harm, or otherwise infringement on the rights, freedoms and legitimate interests of citizens, or obstruct citizens in performing their state, public, family responsibilities, and which have not passed the established procedure of state registration, shall be punished by arrest for up to six months or imprisonment for up to three years. During 2006-2010, 17 persons were known to be convicted under Article 193-1 of the Criminal Code of the Republic of Belarus. Under this Article, six people were punished by restriction of freedom (imprisonment or arrest).

In 2008-2009, the Supreme Court of the Republic of Belarus refused to comply with the Committee's decision and did not uphold the application of human rights defenders on the registration of the new organization "Nasha Viasna".

In early 2011, the authorities issued a written warning to the head of the "Viasna" human rights centre over inadmissibility of participation in the activities of an unregistered association. Soon, chairman of "Viasna" public association Ales Bialiatski was arrested and put into the detention centre on charges of alleged tax evasion. The grounds for his arrest was information about his receiving money in Lithuanian banks, which was provided by the Ministry of Justice of Lithuania under the existing agreement with Belarus at the request of the Belarusian side. Belarusian tax authorities considered all the money to be personal income of human rights defender Ales Bialiatski and accused him of tax evasion.

Objections that funds that were transferred by foreign foundations, were in no way personal funds, that the funds were transferred for the human rights centre, whose registration had been refused, and they were also spent by the centre were not taken into account. During the court hearing, evidence was presented that "Viasna" centre had helped thousands of victims of human rights violations, monitored and effectively participated in the preparation of alternative country reports, and held numerous educational and outreach programs for young people.

Bialiatski was sentenced to four and a half years in prison. His arrest and conviction gave rise to a wave of protests and statements by international organizations, governments, human rights defenders in many countries[45].

Unfortunately, these dramatic examples could be continued: governments of a number of states are working hard to create a negative image of

[45] *Monitoring results on the trial of Ales Bialiatski*. http://spring96.oorg/ru/news/49731 [2012-04-03].

non-governmental human rights organizations, depicting their activities as hostile to the state and society[46].

In such cases, efforts of international legal regulation are futile: creation of the mandate of human rights defenders, for example, cannot by itself provide them with reliable protection, if the state does not support the work of individuals by creating an enabling environment at the national level.

States often "forget" about the erga omnis obligations with regard to universal agreements on the protection of human rights when weighting them against their own economic or political interests.

Protection of the objects of common heritage[47] that include human rights, as opposed to protection of interests of individual states require a new model of behaviour at the international level in the process of international relations, as well as in the process of implementing these commitments into national legal systems.

Recognizing the differences inherent in the individual national legal systems, international human rights law is based on the principle of universality, which presupposes the possibility of a single algorithm of actions applicable to the promotion and protection of human rights, including at the level of individual states.

The International Bill of Human Rights[48] is laying the foundations of the algorithm via regulatory requirements contained in its collection of instruments. This algorithm, in case of states' bona fide compliance with their obligations under international agreements on human rights, would contribute to a more effective implementation of international legal obligations, including through the inclusion of the individual and taking into account his role in contemporary law.

For example, Article 2 defines the scope of legal obligations undertaken by States and imposes a general obligation to respect and ensure to all individuals within its territory and subject to its jurisdiction, the rights recognized in these international instruments.

The Human Rights Committee made provisions of Article 2 of the International Covenant on Civil and Political Rights more specific, by pointing out that "all branches of government (executive, legislative and judicial), and other

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[46] Tonkacheva, Elena, Smolyanka, Olga. "National regulation of freedom of association: basic approaches". *Human rights: international standards and national legislation.* Collection of articles, Edited by V. Filippov. Vilnius, 2011. Pp. 107-123.

[47] Tietje, Christian. «Recht ohne Rechtsquellen?» *Zeitschrift für Rechtssoziologie*. № 24 (2003). S. 27–42.

[48] As is known, the International Bill is a collection of international documents: the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the First and the Second Optional Protocol and the Universal Declaration of Human Rights.

public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party"[49].

While clarifying legal nature of the decisions made based on the results of appeals of individuals who claim that the State violated its obligation to respect the rights and freedoms, the Committee in its General Comments "Nature of the General Legal Obligation Imposed on States Parties to the Covenant", wrote that "all the conclusions, recommendations and considerations of international monitoring bodies should be brought to the attention of the national authorities for their actual implementation"[50], and that States should implement " legislative, judicial, administrative, educational and other appropriate measures to fulfil their legal obligations"[51].

The following and final part of this Article will analyse the legal positions of two states that reflect approaches to the implementation of the decisions of the Human Rights Committee, made at the request of individuals who were under the jurisdiction of these countries. Comparative analysis will help seeing the role of government in shaping the legal model that can affect both the performance of the individual in the process of implementation by States of obligations under the International Bill of Human Rights, and the latest implementation of its obligations to the international community.

4. One treaty, two views of the (non) implementation of the decisions of the Human Rights Committee: a comparative analysis of legal position of Russia and Belarus

For further comparative analysis we have used legal assessments contained in the documents adopted in connection with the application of two individuals - Mr. Katsora against the Republic of Belarus[52] and Mr. Khoroshenko[53] against the Russian Federation. Legal assessments are contained, respectively, in response by the Ministry of Foreign Affairs of the Republic of

[49] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, par. 4, *General Comment No. 31* [80]. CCPR/C/21/Rev.1/Add.13, 26 May 2004 http://www1.umn.edu/humanrts/gencomm/hrcom31.html

[50] "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", paragraph 7. General Comment No. 31. International human rights treaties, Volume I. Compilation of general comments and general recommendations adopted by human rights treaty bodies <www2.oohchr.org/english/bodies/icm-mc/.../HRI.GEN.1.Rev9_ru.pdf> [2012-02 - 05]

[51] Ibidem.

[52] *Katsora v. Belarus*.Communication 1377/2005. 2010. CCPR/C/99/D/1377/2005. http://www1.umn.edu/humanrts/undocs/1377-2005.html [2012-02-04].

[53] *Andrei Khoroshenko v. Russian Federation*, CCPR/C/101/D/1304/2004

Belarus[54] and in the decision of the Constitutional Court of the Russian Federation[55].

It is important to note that the two countries – Russia and Belarus – have long been part of a common legal system. Today, the legal systems of these countries differ amongst other things in one of them being a member of the Council of Europe and owing to thousands of individual complaints feels the constant critical eye of the European Court of Human Rights, while the other remains in self-isolation from the international and European justice and relies exclusively on the national law.

Among a number of common features that serve as the basis for the use of the comparative analysis the following ones should be listed.

First, both countries – Russia and Belarus – have agreed that provisions of the Covenant and the Optional Protocol are mandatory: on 01 October 1991, the Russian Federation has assumed an obligation to respect human rights provided for by the Covenant, and ratified the Optional Protocol, thus recognizing the competence of the Committee on Human Rights (hereinafter referred to as the Committee) to receive and consider individual communications from individuals subject to its jurisdiction[56]. Since 1992, the Republic of Belarus, de jure recognizes the Committee's competence to receive communications from individuals claiming to be victims of violations by Belarus of any of the rights contained in the Covenant[57].

Second, in the cases submitted for consideration, both countries were found guilty of violating individual rights under the Covenant. The Committee stated:

Violation by the Russian Federation of the rights of Mr. Andrei Khoroshenko[58], provided for by Article 2, paragraphs 1 and 3, Article 6, paragraphs 1

[54] Document is provided by Gomel Centre for Strategic Litigation. Response of the Ministry of Foreign Affairs on implementation of the decision of the Human Rights Committee on the case 1377/2005 *Katsora v. Belarus*. See the text of the decision: http://www1.umn.edu/humanrts/russian/hrcommittee/Rview1377sess99.html [2012.02.02].

[55] Decision of the Constitutional Court of the Russian Federation on the complaint by citizen Andrei Khoroshenko with regards to the violation of his constitutional rights by Paragraph 5 of Article 403, Paragraph 4 of Article 413 and paragraphs 1 and 5 of Article 415 of the Criminal Procedures Code of the Russian-Federation, Saint-Petersburg, June 28, 2012 . http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=ARB;n=295458 [2012-11-11].

[56] The Optional Protocol to the International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of the General Assembly of December 16, 1966
http://www1.umn.edu/humanrts/instree/b4ccprp1.htm [2012-03-03].

[57] The Covenant was ratified in 1973 http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en [2012-11-11].

[58] *Andrei Khoroshenko v. Russian Federation*, CCPR/C/101/D/1304/2004 <http://www.worldcourts.com/hrc/eng/decisions/2011.03.29_Khoroshenko_v_Russia.pdf> [2012-11-11].

and 2, Article 7, Article 9, paragraphs 1, 2, 3 and 4, Article 10, paragraph 1, Article 14, paragraphs 1, 2, 3(a), 3(b), 3(c), 3(d), 3(e), and 3(g), Article 15, paragraph 1 and Article 26 (the right to a fair trial, the right to life, freedom from torture, the right to personal inviolability, freedom from discrimination);

Violation by the Republic of Belarus of the rights of Mr. Vladimir Katsora provided for in Article 19, paragraph 2, of the Covenant (the right to freedom of expression).

Third, both individuals (Mr. Katsora and Mr. Khoroshenko), after their applications were considered by the Human Rights Committee, asked the national authorities to develop procedures for the resumption of cases over *newly discovered circumstances* in connection with the decision made by the Human Rights Committee.

Fourth, actions of the respective branches of both state – the Constitutional Court of the Russian Federation and the Ministry of Foreign Affairs of the Republic of Belarus – may engender international legal responsibility.

Finally, legal assessments that are given by those bodies are related to the interpretation of the same concepts and principles (in particular, the principle of pacta sunt servanda[59], the sovereignty of the state, the supremacy of international law, binding character of Human Rights Committee's decisions, etc.).

Vladimir Katsora v. Belarus

On 09 July 9 2010, the Human Rights Committee considered the individual communication *Vladimir Katsora v. Republic of Belarus*[60] and addressed to the Government of the Republic of Belarus, among others, the request to provide *the author with an effective remedy, including full reparation and appropriate compensation, and also take measures to prevent similar violations in the future*[61].

None of the requests of the Committee was fulfiled, and Mr. Katsora appealed to the Ministry of Foreign Affairs of the Republic of Belarus[62] as a body, that, in accordance with the national legislation, is coordinating and monitoring the implementation of international agreements and clarifies the

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59 Latin for "Agreements must be kept".

60 Katsora v. Belarus. Communication 1377/2005. 2010. CCPR/C/99/D/1377/2005. http://www1.umn.edu/humanrts/undocs/1377-2005.html [2012-02-04].

61 "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 Committee's Views". (Communication 1377/2005. 2010. CCPR/C/99/D/1377/2005).

62 Appeal to the Ministry of Foreign Affairs was due to the fact that this agency is coordinating and monitoring the implementation of international treaties (Article 35 of the law "On international treaties of the Republic of Belarus").

procedure for the application of the provisions of international treaties of the Republic of Belarus[63].

Katsora's request for clarification of the order of execution of decisions of the Human Rights Committee had been rejected. Legal reasoning for rejection, stated in a letter from the Deputy Minister of Foreign Affairs Belarus Igor Petrishenko, is quoted below almost in its entirety:

"The Ministry of Foreign Affairs considered your appeal and within its competence is informing you of the following ... Please note that the principle of the sovereign equality of States enshrined in the UN Charter, is one of the basic principles of international law and peremptory norms of international law. It is from that principle, in particular, stems the understanding of the sovereignty of the state as the supremacy of the authority on its own territory (including the judiciary), as well as the autonomy and independence of the state in international relations. Correlation of this principle with the principle of good faith compliance with international legal obligations (pacta sunt servanda) is based on the recognition of any decisions of international bodies to be binding as the exception to the principle of state sovereignty. It is allowed only in cases where the State, in the exercise of its sovereign rights, has expressed its consent to be bound by an international treaty, clearly and unambiguously provides for bindingness of such decisions for the States Parties. These, in particular, are such agreements as the UN Charter, Article 25 of which states: Members of the organization agree in accordance with the present Charter to accept and carry out the decisions of the Security Council."

The obligation of the Republic of Belarus to abide by international treaties, to which it is a State party, is not the obligation to follow the opinion of the group of experts…

It should be stressed, that in the case of the Human Rights Committee and other bodies established to monitor observance of universal international treaties for the protection of human rights, one can only speak of the recommendations to the States on a fuller and more effective implementation of the provisions of these international treaties. At the same time states are free to decide on the extent to which these recommendations are taken into account"[64].

So, the government has refused to implement the decisions of the UN Committee. Of interest is the legal position the reply is based upon.

First, noteworthy is the fact that senior officials of the Ministry of Foreign Affairs – one of the executive bodies, that is responsible for monitoring the implementation of international agreements –were obviously using a selective and discriminatory approach to human rights treaties, which is reflected in their contraposition to the UN Charter.

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63 See Articles 35 and 36 of the law "On international treaties of the Republic of Belarus".

64 The document is provided by Gomel Centre for Strategic Litigation.

The group of human rights treaties, or, as the authors of the letter refer to them, "universal international treaties for the protection of human rights", are being placed below the UN Charter in some sort of a self-created hierarchy of international agreements.

This "hierarchy", is built by experts from the Ministry of Foreign Affairs of the Republic of Belarus in order to justify their conclusion that with regards to "universal international treaties for the protection of human rights" the "the principle of "good faith compliance with international legal obligations" is applied with exceptions that are set by the sovereign states themselves.

According to the logic of the Ministry of Foreign Affairs of the Republic of Belarus, obligations arising from human rights treaties do not require a State to unconditionally adhere to the principle of good faith fulfilment of obligations; yet can only be *allowed* in certain cases, such as for decisions made by the UN Security Council.

An important component of the position of the government of Belarus is the interpretation of the concept of sovereignty of the state as the as "supremacy of the authority on its own territory" and independence of the state in international relations. Sovereignty within this vision is the grounds for the rejection of the principle of good faith observance of agreements, in particular in relation to the "universal human rights treaties".

And finally, in the eyes of government officials of the Republic of Belarus decisions of the Committee are "recommendations", "opinion of a group of experts" and, accordingly, do not obligate the government to fulfil them.

This position is voiced by representatives of all branches of the government of the Republic of Belarus (from judicial to the executive), who claim that there is no obligation of the state to fulfil the decisions of the treaty bodies' committees[65].

In order to illustrate what does this position leads to, one can bring up another document – the reply of the Ministry of Foreign Affairs of the Republic of Belarus to the inquiry of human defenders (including Mr. K.), in which they asked for clarification of the order of fulfilment of decisions of international organizations, that determined the violation by the Republic of Belarus of its international obligations.

It argues that "views of the Human Rights Committee with regards to the complaint, in accordance with Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights, are advisory in nature" and that "Article 61 of the Constitution provides for the right of citizens to appeal to the international organizations in order to protect their rights and freedoms. The documents you have provided indicate that the right of Mr.

[65] The given example is related the decision of the UN Human Rights Committee on 1377/2005 *Katsora v. Belarus*. See the text of the decision: http://www1.umn.edu/humanrts/undocs/1377-2005.html [2012.02.02].

K., guaranteed by the Constitution of the Republic of Belarus to appeal to international organizations for the protection of their rights has not been violated"[66].

Such an interpretation means that the constitutional guarantee to appeal "to international organizations to protect their rights and freedoms" is reduced to the state's allowing to apply for international protection, not intending to accept the decisions of these organizations' bodies. Obviously, such an interpretation is an example of a deep misunderstanding or failure to follow the essence of human rights.

Brief analysis of the documents makes it possible to come to the following conclusion: by refusing to fulfil the decisions of the UN Human Rights Committee, the Republic of Belarus denies individuals not only the opportunity to restore those substantive rights, the violation of which was determined by the Committee, but also refuses to take the "necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant[67]".

Khoroshenko v. Russian Federation

In March 2011, the Human Rights Committee came to the conclusion on the individual applications by Andrei Khoroshenko[68] and addressed a request to the Government of the Russian Federation to provide the author with an effective remedy, including: conducting full and thorough investigation into the allegations of torture and ill-treatment and initiating criminal proceedings against those responsible for the treatment to which the author was subjected; a retrial in compliance with all guarantees under the Covenant; and providing the author with adequate reparation including compensation. The State party is also under an obligation to take steps to prevent similar violations occurring in the future.

In connection with the decision of the Committee and based on the appeal by Andrei Khoroshenko to the Constitutional Court of the Russian Federation, filed there after the Prosecutor General's Office and the Supreme Court referred to the national procedural law as restricting his right to a review of court decisions over newly discovered circumstances on the basis of such an act, as views of the UN Committee on Human Rights, the Constitutional Court considered the appeal and come to some important conclusions.

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66 The document is provided by Gomel Centre for Strategic Litigation.

67 The International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, Article 2, part 2.

68 Human Rights Committee, 14 March to 1 April 2011 Communication No., 1304/2004, <http://www.worldcourts.com/hrc/eng/decisions/2011.03.29_Khoroshenko_v_Russia.pdf> [2012-11-11].

First, it should be clarified that, having examined the complaint, the Constitutional Court found no grounds for it to be upheld as to recognizing certain provisions of the criminal procedures legislation to be unconstitutional. In so doing, however, the Court gave such an interpretation of the national legislation that allows to renew hearings over newly discovered circumstances in the future within the existing procedures and without the need to change the legislation.

Second, while considering the appeal the Court gave important legal assessment, reflecting the position of the Russian Federation with regards to international obligations arising from the Covenant.

It is also interesting that judges of the Constitutional Court of the Russian Federation, while unlikely being familiar with the legal views of lawyers of the Ministry of Foreign Affairs of the Republic of Belarus, seemed liked engaging in a legal dispute with them, offering conflicting estimates with regards to the same concepts, and in particular on the nature of international obligations of the states under the Covenant and decisions of the Human Rights Committee.

Judgments of the Constitutional Court in this part are given with minimal cuts:

"... Although neither the International Covenant on Civil and Political Rights nor the Optional Protocol contain provisions that directly determine the meaning to the States Parties of the Human Rights Committee's views, adopted on individual communications, it does not relieve the Russian Federation, that has recognized the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of violations by the Russian Federation of any of the rights contained in the Covenant, and thus to determine the presence or absence of violations of the Covenant, from a reliable and responsible fulfilment of the views of the Committee within the framework of the voluntarily assumed obligations under international law.

As pointed out by the Constitutional Court in its decision of 27 March 2012 No. 8-P, the Russian Federation, having state sovereignty (Preamble, Article 3, part 1, Article 4, part 1, of the Constitution), is an independent and equal participant of interstate communication and at the same time, while declaring itself a democratic state ruled by law (Article 1, part 1, of the Constitution), must follow voluntarily assumed obligations under international agreements, as evidenced by the Vienna Convention on the Law of Treaties, by which each state has capacity to contract, the obligation which is impossible without the expression of pertinent consent (Articles 6 and 11), every treaty is binding upon the parties to it and must be performed by them in good faith (Article 26), and the party may not invoke provisions of its internal law as justification for failure to perform the contract (Article 27).

Because of the generally recognized principle of international law pacta sunt servanda and within the meaning of of Article 2, paragraph 3, subparagraph "a", of the International Covenant on Civil and Political Rights obligating each State party to the Covenant to ensure that any person whose rights or freedoms recognized in the Covenant are violated, be provided with an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity, the Russian Federation may not eschew from an adequate response to the Human Rights Committee's Views, including in cases where it considers that because of the violation of the provisions of the International Covenant on Civil and Political Rights a retrial shall be ensured of the criminal case of a person whose communication was the basis for the Committee's relevant Views.

To hold otherwise would not only impugn the observance by the Russian Federation of the voluntarily assumed obligations under the International Covenant on Civil and Political Rights and the Optional Protocol thereto, and thus would be the evidence of non-fulfilment of state's obligation provided for in Articles 2 and 17 (part 1) of the Constitution of the Russian Federation to recognize and guarantee the rights and freedoms of the person and the citizen in accordance with the universally recognized principles and norms of international law, but would also render senseless the right of any person, stemming from Article 46 (part 3) of the Constitution of the Russian Federation, to appeal in accordance with these international treaties of the Russian Federation to the Human Rights Committee if all available domestic remedies are exhausted".

These legal wordings of the Constitutional Court of the Russian Federation are based on a broad interpretation of the obligations stemming from international human rights agreements and deserve the high praise both from the point of view of legal reasoning and from the point of view of consistency with regard to the fundamental principles of law.

The decision of the Constitutional Court contains a comprehensive analysis of a number of concepts that are related to the regulation of human rights and at the same time constitute the basis of the constitutional system of the Russian Federation.

I would like to express the hope that this decision of the Constitutional Court of the Russian Federation will promote not only the criminal process, but also all national laws and practices, which from now on will have to consider the legal standards of the bodies established within the United Nations Organization.

The Decision of the Constitutional Court is valuable in that it creates national legal doctrine and behaviour model for the state with regards to the implementation of international obligations in the spirit of the rule of law, fulfilment in good faith of treaties and observance of constitutional guarantees of human rights and freedoms.

Of equal importance the judgment of the Constitutional Court of the Russian Federation will be for the legal systems of neighbouring countries. Having inherited the common legal approaches from the Soviet past, they need to share experiences, which lead to creation of the legal culture and enrichment of national legal systems.

Finally, this example may serve as a stimulus for those individuals who choose to protect human rights in a dispute with the state, as well as a proof that the state is considering the work with individual cases to be an important activity in which the declaration of the rule of law does find real implementation in a person's life.

Conclusions

Normative securing of individuals' substantive rights and providing them with procedural opportunities for international protection, backed up by establishment of an international mandate of the human rights defender, makes an individual a strong contributor to the promotion and protection of human rights and freedoms at the international and national levels.

As such, individuals – persons, groups and public associations – are the new driving force that is capable of both influencing the creation and improvement of certain regulatory requirements, and facilitating the implementation of the model of the behaviour of states that is incorporated in the International Bill of Human Rights, and stems from other international human rights agreements.

Dynamics and progress in this regard are particularly noticeable in countries that implement the legal doctrine of human rights defense into the work of national state bodies with regard to the principle of good faith in the execution of contracts and the rule of law.

It should be remembered that the novellae and the opportunities offered by international human rights law, can reveal their full potential only if the main actors of international legal relations – the states – fulfil their obligations with respect to a person, act in accordance with the letter and the spirit of international agreements and national constitutions, as well as consider the individual to be an equal participant in the protection and promotion of universal values – human rights.

Natalia Matskevich

ON CERTAIN LEGAL ISSUES CONSIDERED BY THE HUMAN RIGHTS COMMITTEE WITH REGARDS TO COMMUNICATIONS BY INDIVIDUALS, WHO CLAIMED THEIR RIGHTS SECURED BY THE ICCPR WERE VIOLATED IN ADMINISTRATIVE AND CRIMINAL PROCEEDINGS (THROUGH THE EXAMPLE OF CASES AGAINST REPUBLIC OF BELARUS)

The Article attempts to provide an overview of the Human Rights Committee's views on a number of cases dealt with by the Committee with regards to the Republic of Belarus. The scope of this review is limited to cases in which communications about violations of the rights, guaranteed by the Covenant, during administrative and criminal proceedings against authors of communications were admitted by the Committee (or the persons they represent.) Committee's views on such cases were largely resolving legal issues of enforcement of the Articles of the Covenant dealing with the rights that are the most vulnerable in the implementation by the state of the following types of persecution: of Article 9 (arrest and detention), Article 7 (torture), Article 10 (the content in custody liberty) and Article 14 (right to a fair trial) of the Covenant.

The study of these cases gives the idea of legal approaches of the Committee with regards to certain appeals of individuals who believe that their rights have been violated, to introduce the sustainable practices of the Committee, and thus give an opportunity to learn from the communications considered by the HRC, and provide arguments for making subsequent communications to the Committee in order to improve the professional protection of human rights and development of practices of this international body.

1. Issues related to application of Article 9 of the Covenant

Article 9 of the International Covenant on Civil and Political Rights:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation".

1.1. Terminology

Before considering the issues of Article 9 of the Covenant, as reflected in decisions of the Human Rights Committee on cases filed against the Republic of Belarus, it is necessary to clarity the term of "arrest" as used in the sense of this Article. Some of the difficulties in its clarification may be caused by the fact that in the current legislation of Belarus the term of "arrest" denotes one of the forms of criminal punishment that may be imposed by the court upon conviction of a crime. It is in this sense the term "arrest" is used in the current Criminal and Penal Code of the Republic of Belarus. At the same time, Article 25 of the Constitution states: "The person in custody has the right to judicial review of the lawfulness of his detention or arrest". That is, the Constitution views the term "arrest" as detention, which must have been inherited from the Criminal Procedures Code of the Republic of Belarus (1960) that was in effect (no longer in force as of 01.01.2001) at the time of the adoption of the Constitution, in which the term "arrest" meant detention as a measure of restraint. The current legislation on criminal procedures has the following measures of procedural coercion associated with the deprivation of personal liberty: short-term detention (Article 108 of the Criminal Procedures Code), as well as measures of restraint – detention (Article 126 of the CPC) and house arrest (Article 125 of the CPC). Right to judicial review of such measures is provided for by the Criminal Procedures Code.

However, according to the practices of international bodies, guarantees of Article 9 of the International Covenant on Civil and Political Rights (and Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that corresponds to it text-wise) are interpreted more broadly and applied to detention in connection with criminal proceedings and on other grounds. Moreover, with regard to the criminal prosecution, one can talk about two situations of deprivation of personal freedom:

1) both before and after conviction by the court (Parts 1 and 5 of Article 9 of the Covenant), 2) during the preliminary investigation (parts 2 -4 of Article 9 of the Covenant). It seems that it is in this perspective that Article 25 of the Constitution of Belarus should be interpreted, guided by the supremacy of international law it declares, and use these norms of the Covenant and the Constitution in practice in relation to the defense of any restriction of the right to liberty and security of person. In this approach, the term "arrest" with regards to the criminal process acquires the meaning of its direct translation from English – "detention", with all the safeguards against arbitrary deprivation of liberty being used since the apprehension of the person, if any, or from the time of detention (the term "detention" is contained in Article 9 of the Covenant), or house arrest.

In respect to Belarusian cases issues pertaining to Article 9 were considered by the Committee with regards to the criminal justice process, and these issues were resolved in Views on Communications by *Bandajevsky v. Belarus*[1], *Smantser v. Belarus*[2], *Marinich v. Belarus*[3]. In each of these cases, the Committee considered that there was a violation of some right protected by Article 9, and at the same time part of authors' claims was considered either inadmissible or the Committee came to the conclusion that there had been no violations of rights, as the authors had claimed.

1.2. Lawfulness of the arrest and detention: an internal affair of the state, or ambit of international control?

Bandajevsky v. Belarus

Yuri Bandajevsky, professor and former rector of the Gomel State Medical Institute, was arrested in 1999 and later sentenced to imprisonment.

In his communication to the CHR, the author claimed that he was arrested on 13 July 1999, with approval of the Prosecutor General, and detained for 30 days under a Presidential Decree of 21 October 1997 "On the urgent measures for the fight of terrorism and other particularly dangerous violent crimes"[4]. He claimed that he was not informed of the charges against him at the time of his arrest, and that he was accused of having received bribes only three weeks after the apprehension. This offense, he said, had nothing to do with terrorism or other violent or particularly dangerous crimes specified

1 Communication No. 1100/2002 *Bandajevsky v. Belarus*, Views adopted on 28 March 2006.

2 Communication No. 1178/2003 *Smantser v. Belarus*, Views adopted on 23 October 2008.

3 Communication No. 1502/2006 *Marinich v. Belarus*, Views adopted on 16 July 2010.

4 Paragraph 1.8 this Decree permitted to applying to persons against whom there is credible evidence that they were involved in terrorism or other particularly dangerous violent crime or are in charge of a criminal organization, an organized criminal group or belong to them, preventive detention for up to 30 days, by reasoned decision of the head of the body of inquiry, or his deputy, and sanctioned by a prosecutor.

in the Decree, and the latter had been applied in order to limit his defense rights.

The Committee considered these statements in the light of Article 9, paragraph 1 , of the Covenant, and took into account the objections of the State party, that insisted on the lawfulness of the author's arrest and detention, as a criminal case for bribery had been opened on 12 July 1999 against him (one day before his arrest); there were grounds for believing that he was a leader of a criminal group, and that the investigators had information that he exercised pressure on witnesses of the case. According to the State party, the author's arrest under the provisions of the Decree was fully justified, as the crime he was suspected of was serious; he was informed of the reasons for arrest, and was accused within 23 days, and also he was represented by a lawyer throughout the preliminary investigation.

On the basis of the information before it, the Committee concluded that there had been no violation of Article 9, paragraph 1.

In studying the views of the HRC on this case one can note that the Committee had not concluded on the dispute between the author and the State party as to the existence or absence of the need to application in this case of an internal legal instrument – Presidential Decree of 21 October 1997 and the lawfulness (under national law) of bringing official charges 23 days after the arrest.

Smantser v. Belarus

Aleksander Smantser, a consultant on foreign economic activity with a company registered in the United Kingdom, was arrested in Minsk on 03 December 2002 and was in pre-trial detention for ten months before the first hearing of the case by court on 07 October 2003, and two years before a final conviction for illegal business activity, that took place on 03 December 2004.

In the communication submitted to the Committee, the author claimed a violation of Article 9, paragraphs 1 and 2, challenging the *lawfulness* of his arrest and detention. In that part of his complaint, the dispute with the state was whether the timing of detention had been correct and, consequently, whether the period of detention lasted for more than 72 hours as envisaged by the law; as well as whether there had been a violation of the maximum period of detention in connection with the revision of the case. On this occasion, the Committee noted that "the author's claims under Article 9, paragraphs 1 and 2, relate, in their essence, to the evaluation of facts and evidence and to the interpretation of domestic legislation", which was refuted by the state. In this regard, the Human Rights Committee referred to its prior jurisprudence, according to which "it is generally for the courts of States parties to the Covenant to evaluate facts and evidence, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a de-

nial of justice"[5]. In the absence of any relevant information or documentation to enable the Committee to determine whether there were such inherent drawbacks to the procedure as a result of which the author was imprisoned, and the subsequent proceedings, the Committee found that this part of the communication was inadmissible under Article 2 of the Optional Protocol.

Thus, in the present case, as in the case *Bandajevsky v. Belarus*, the Committee demonstrated that the assessment of the lawfulness of arrest and detention may only be made in extreme cases.

However, the provision of Article 9, paragraph 1, of the Covenant expressly states: "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are *established by law* (Emphasis added: Natalia Matskevich)". The European Court of Human Rights, while considering this issue in relation to paragraph 1 of Article 5 of the ECHR (which is textually similar to paragraph 1 of Article 9 of the Covenant) with regards to the *Baranowskiy v. Poland* case, concluded: "the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, it is otherwise in relation to cases where, as under Article 5 § 1, failure to comply with that law entails a breach of the Convention. In such cases the Court can and should exercise a certain power to review whether national law has been observed".

It therefore appears that the aforementioned position of the Committee is nonetheless not an obstacle to filing the communication in which a substantiation for a particular fact was given that the detention procedure performed by a state authority is not in compliance with domestic law, or the question was raised that the law itself, on the basis of which such detention takes place, is not consistent with the principles of the Covenant, which is a violation of Article 9, paragraph 1, of the Covenant.

1.3. Groundlessness of arrest and detention as part of the concept of arbitrariness under paragraph 1 of Article 9

Marinich v. Belarus

Mikhail Marinich, formerly a high-level state official[6] and a candidate to the presidential elections of Belarus in 2001, was detained in Minsk on 24

[5] See in particular: Communication No. 541/1993 *Errol Simms v. Jamaica*, inadmissibility decision of 3 April 1995, paragraph 6.3.

[6] He was a former Mayor of Minsk city, former deputy of the Parliament, former Minister of Foreign Economic Relations and former Ambassador of Belarus to several European countries.

April 2004. During the preliminary investigation of the criminal case against him, he spent eight months in custody at the KGB remand jail, and was sentenced to five and a half years in prison.

The author of the communication to the Human Rights Committee claimed violations of Article 9 of the Covenant, as the charges pressed, the pretrial constraint measure selected, and the continued extension of his incarceration were unlawful. In support of this, he argued that:

– he was taken to the KGB without a warrant issued by the prosecutor's office or any other competent authority. No charges were laid for five days;

– the decision on the pretrial constraint measure did not take into account the circumstances of the case, the severity of the charge, the services he rendered to the society and the State, his health condition or the appeals of the public at large;

– the preliminary investigation lasted for eight months, which he spent in the KGB remand prison. During this time, he was presented with a variety of trumped-up charges in order to prolong his incarceration;

– a criminal case which led to his conviction was launched on 23 September 2004, five months after his detention.

The Committee noted these claims as well as the fact that the State party did not countered them, yet merely stated that there were no violations of the rights of the accused which could lead to the annulment of the trial.

Based on this information, the Committee concluded that there had been a violation of Article 9 of the Covenant, substantiating its decision as follows: "The drafting history of Article 9, paragraph 1, confirms that *"arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means inter alia that remand in custody pursuant to arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.* The State party has not shown that these factors were present in the instant case"[7].

Thus, comparing the findings of the HRC in this case and in the cases mentioned above, one can conclude that arguments about groundlessness of arrest and detention are more comprehensible and tangible for the Committee than a debate about the violation of domestic law, especially when the facts speak for themselves, as in this case.

It appears that the use of logic expressed in the Committee's Views in the case, could significantly strengthen the arguments of the defense in appealing arrest and detention in the domestic legal system, and in the future – lead to a successful resolution of a complaint filed with the HRC.

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[7] See: Communication No. 305/1988 *Alphen v. The Netherlands*, Views adopted on 23 July 1990, paragraph 5.8.

1.4. Length of remand

In the case of *Smantser v. Belarus* the author claimed that, in violation of Article 9, paragraphs 1, 2 and 3, of the Covenant, he was not brought before a judge for more than eight months from the date of his actual arrest and the date when his case was transmitted to the court. This argument should be paid attention to, because it will be relevant to all Belarusian cases where remand is used before the court hearing by decision of a person who does not have judicial powers. Therefore, until the first hearing of the case in all such cases there will be the violation of the "anyone arrested or detained on a criminal charge shall be brought promptly before a judge" standard, established by Article 9, paragraph 3, of the Covenant.

In addition, this provision has a rule: «anyone arrested or detained on a criminal charge shall be ... entitled to trial within a reasonable time or to release», which really means a prompt hearing of the case, if the accused is in custody. Otherwise, as a general rule, there should be release pending trial, which is in accordance with the provisions of Article 9, paragraph 3, "may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement".

It is with that interpretation of this provision, the Committee came to the following conclusion in the present case: "13 months passed between the author's arrest on 3 December 2002 and his first conviction on 12 January 2004. Altogether, the author was kept in custody for a total of 22 months before his conviction on 1 October 2004 and that his and counsel's requests for release on bail were repeatedly denied by the Prosecutor's Office and by the courts. *In this regard, the Committee reaffirms its jurisprudence that pretrial detention should remain the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or tamper with evidence, influence witnesses or flee from the jurisdiction of the State party.*[8] The State party has argued that the author was charged with a particularly serious crime, and that there was a concern that he might obstruct investigations and abscond if released on bail. However, it has provided no information on what particular elements this concern was based and why it could not be addressed by fixing an appropriate amount of bail and other conditions of release. *The mere assumption by the State party that the author would interfere with the investigations or abscond if released on bail does not justify an exception to the rule in Article 9, paragraph 3, of the Covenant*. In these circumstances, the Committee finds that the author's right under Article 9, paragraph 3, was violated."

The analysis of these views by the HRC, as well as views on the case *Marinich v. Belarus* leads to the following conclusions:

[8] Communication No. 526/1993, *Hill v. Spain*, Views adopted on 2 April 1997, paragraph 12.3.

– an important role in the consideration by the Committee of the arbitrariness of arrest and detention is played by extent to which efforts to protect rights at the national level were sustained. Measures taken in the internal system – appeal of the detention with the court, requests for release on bail, appeals of the public – even if they are not successful, demonstrate the position of the individual and the state, which are taken into account in the subsequent consideration of the case by the Human Rights Committee;

– the burden of proof that the detention was *necessary* in the interests of the investigation and justice and that other measures for this would be ineffective, rests with the State and arguments of the State should be specific;

– the gravity of charges is not decisive for the Committee.

1.5. Does prosecutor have judicial powers?

In cases *Bandajevsky v. Belarus* and *Smantser v. Belarus* the Committee considered the problem of detention by a decision of an investigative authority and with prosecutor's sanction. Such a practice is legal for Belarus, but still raises questions in terms of respecting the state's obligation under of Article 9, paragraph 3, of the Covenant, according to which "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power".

In this regard, the Committee reaffirms its jurisprudence that "*it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with*. The Committee also considered that *as a matter of the law the public prosecutor could not be regarded as having the institutional objectivity and impartiality necessary to be considered an 'officer authorized to exercise judicial power'*[9] within the meaning of Article 9(3)". The Committee found that the author's rights under Article 9, paragraph 3, were violated.

Thus, the Committee recognized that the procedure of detention and prolongation of custody, established by internal legislation of Belarus, is inconsistent with the provisions of the Covenant. In these cases the Committee considered the matter even regardless the fact that the authors did not directly point to the violation. But these findings of the Committee set a precedent for all similar cases against Belarus, where non-judicial use of detention upon decisions of officials without judicial power is still in place; from 2010 range of these persons is not limited to prosecutors, on the contrary, it has been greatly expanded.

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[9] See Kulomin v. Hungary, Communication No. 521/1992, Views adopted on 22 March 1996, paragraph 11.3.

2. Consideration by the Human Rights Committee of allegations of torture and cruel, inhuman treatment and violations of the right to humane treatment in detention

Article 7 of the International Covenant on Civil and Political Rights: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

Article 10 of the International Covenant on Civil and Political Rights:

" 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status".

2.1. Issues of proof and provision of information to the Committee

In the case *Smantser v. Belarus* the author stated that he was deprived of food and water for the first 24 hours of his detention in violation of Article 7, and of Article 10, paragraph 1.

In respect of these assertions, the Committee noted that the author had not presented any further evidence in that regard and took note of the fact that the State party did not address that allegation. At the same time, the HRC noted that *author's claim was couched only in very general terms*. In these circumstances, the Committee considered that that part of the communication *had been insufficiently substantiated for purposes of admissibility*, and, thus, found it inadmissible under Article 2 of the Optional Protocol.

In the case *Bandajevsky v. Belarus*, the author claimed that conditions of his pre-trial detention were "identical to those of convicted prisoners". Even though the State party had not commented on this, the Committee noted that *the author's allegation remained vague and general*. Accordingly, and in the absence of any other pertinent information, the Committee concluded that the facts before it did not reveal any violation of the author's rights under Article 10, paragraph 2.

The author of that communication also claimed the lack of adequate medical care and the failure to provide him proper medical treatment during his detention, which, in his opinion, was a violation of Article 10, paragraph 1 of the Covenant. The Committee noted that the state provided

detailed information on the type of medical treatment, clinical examinations and hospitalizations the author received or underwent while in detention. The State Party also affirmed that neither the author nor his relatives or his lawyer had complained to the competent authorities or in court about these issues. That was not refuted by the author. In these circumstances, the Committee considered that there was no violation of Article 10, paragraph 1.

At the same time, the Committee found a violation of this norm in, as the author contended, conditions of detention in the Gomel detention centre, where he had been held from 13 July 1999 to 6 August 1999, being inappropriate for long stays, and that the centre had not been equipped with beds; that, in general, he had not have items of personal hygiene or adequate personal facilities. The State party had not refuted those allegations, and in view of that, the Committee recognized the importance of those circumstances and concluded that there was a violation of rights.

In the case *Marinich v. Belarus* the author gave a detailed description of the conditions in the detention centre, where he spent eight months (the size of the cell, the number of people it housed, ventilation, lighting, meals) and medical records, that noted the deterioration of his health during this period. In addition, the author described in detail the circumstances of his transfer to the penal colony, including the deprivation in this period of necessary medications.

The author also reported that in the penal colonies, where he was serving his sentence, he had not received the necessary medical treatment; that he suffered a stroke, and prompt treatment had not been provided after that; that afterwards he was declared a disabled person of the second group. The Committee was provided with medical reports in support of those arguments. The communication listed measures that had been undertaken in order to attract the attention of state bodies to the specified problems: petitions and complaints to the public prosecutor's office, request by the United Nations Working Group on Arbitrary Detention to visit the author in his place of detention, public campaign for the release of Mikhail Marinich, appeals from international organizations to stop his prosecution.

For that part of the communication, the Committee noted that: "*States parties are under an obligation to observe certain minimum standards of detention, which include provision of medical care and treatment for sick prisoners, in accordance with rule 22 of the Standard Minimum Rules for the Treatment of Prisoners. It is apparent from the author's account as well as from the medical reports provided that he was in pain, and that he was not able to obtain the necessary medication and to receive proper medical treatment from the prison authorities*. As the author stayed in prison for more than a year after his stroke and had serious health problems, in the absence

of any other information, the Committee finds that he was the victim of violation of Article 7 and Article 10, paragraph 1, of the Covenant",

Thus, on the basis of analysis of the aforementioned cases one can come to the following conclusions.

First, allegations of torture, cruel, inhuman and degrading treatment, and inhuman detention must be justified with specific facts and described in detail. Only in case full information is provided, the Committee may consider the issue on the merits. It is not enough to simply point out to the fact of abuse.

Second, most convincing for the Committee is documentary evidence of the facts specified in the communication, that can be presented not only in the form of medical reports, yet also petitions, complaints and appeals to the investigative and penalty authorities, as well as responses of government agencies. In this vein, most notable are measures taken to defend the violated rights at the national level. Furthermore, if such steps on the part of the individual were taken regularly and persistently, yet found no response from the government, the latter will be significantly restricted in its ability to challenge the author in his appeal to the HRC.

2.2 Consideration of allegations of torture and inhumane treatment in relation to the conduct of criminal proceedings

Koreba v. Belarus[10]

The author is Anna Koreba, the mother of 17-year-old Dmitry Koreba, who was arrested in September 2001 in the city of Gomel on suspicion of intentional homicide and on 5 April 2002 was sentenced to 12 years in prison. In the complaint to the Committee the author pointed to the use of threats and violence against her son in the course of the preliminary investigation in order to obtain a confession from him; violation of the rights of minors; the injustice of the trial. Although the author did not claim a violation of any specific provisions of the International Covenant on Civil and Political Rights, the communication appeared to raise issues under Article 2, paragraph 3; Article 7; Article 10, paragraph 2(b); Article 14, paragraphs 2, 3(e), (3)(g) and 4, of the Covenant.

The author described in detail the facts she knew about mistreatment of and non-procedural application of sanctions against her son while in detention at the initial stage of the preliminary investigation: him being kept for a day at the police station rather than at the detention centre; late night interrogations without his lawyer or legal representative; compulsion to drink strong alcohol during interrogation; beatings; and psychological abuse as a result of which Dmitry Koreba confessed guilt. Although he later retracted his

[10] Communication No. 1390/2005 *Koreba v. Belarus*, Views adopted on 25 October 2010.

confession in the presence of a legal representative and his lawyer, the court considered it evidence. The court described the allegations of ill-treatment as unfounded.

Having considered these statements, the Committee recalled that "*once a complaint about treatment contrary to Article 7 had been filed, a State party must investigate it promptly and impartially*[11]". Furthermore, the Committee recalls its jurisprudence that the wording, in Article 14, paragraph 3(g), that *no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion by the investigating authorities on the accused with a view to obtaining a confession of guilt*[12]. In cases of forced confessions, *the burden is on the State to prove that statements made by the accused have been given of their own free will*"[13]. The Committee found that the State had not provided sufficient information on measures taken by corresponding competent bodies to investigate allegations of the author's son. The Committee concluded that there had been violation of Article 2, paragraph 3, read in conjunction with Articles 7 and 14, paragraph 3 (g), of the Covenant.

Thus, it has been demonstrated in the present case that not only the fact of the ill-treatment, but the lack of proper investigation into allegations of such treatment may be considered a violation of Article 7 of the Covenant. It should be remembered that the defending party should *file a complaint* about this ill-treatment with the competent authorities during the defense process within the domestic legal system; and in case torture or ill-treatment used to extract confessions – to the court during the proceedings where this confessions appear. Then, even if it is impossible to obtain and submit to the Committee objective data on the use of treatment contrary to Article 7 of the Covenant, the very complaints to public authorities will be the source of information for the HRC and will make the author's claims grounded. Recognition by the Committee of the fact of the violation of Article 7 and obtaining a confession of guilt as a result of such violation may entail Committee's conclusion about the violation of the right to a fair trial, in cases where national courts take such confessions as evidence. In case such violations are ascer-

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11 See, for example: Communication No. 781/1997 *Aliev v. Ukraine*, Views adopted on 07 August 2003, paragraph 7.2. See also Human Rights Committee General Comment No. 20, Article 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment), 1992 (HRI/GEN/1/Rev.8), paragraph 14.

12 Communication No. 330/1988, *Berry v. Jamaica*, Views adopted on 4 July 1994, paragraph 11.7, Communication No. 1033/2001, *Singarasa v. Sri Lanka*, Views adopted on 21 July 2004, paragraph 7.4, and Communication No. 912/2000, *Deolall v. Guyana*, Views adopted on 1 November 2004, paragraph 5.1.

13 See, Human Rights Committee General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (article 14), U.N. Doc. CCPR/C/GC/32 (2007), paragraph 41.

tained, recommendations of the Committee in favour of the victims of the state get a very specific and stern form.

Thus, in the final part of the consideration on the *Koreba v. Belarus* case the HRC stated that "the State party is under an obligation to provide the author's son with an *effective remedy, including initiation and pursuit of criminal proceedings to establish responsibility for his ill-treatment, as well as his release and adequate compensation*".

In her communication on the case, the author also stated that her juvenile son was kept for 11 days in a temporary detention ward with adults, some of whom had committed serious crimes, and interrogated in the absence of his lawyer, legal representative or a social worker. The State party has not commented on these allegations.

The Committee recalled that *accused juvenile persons are to be separated from adults and to enjoy at least the same guarantees and protection as those accorded to adults under Article 14 of the Covenant*[14]. In addition, *juveniles need special protection in criminal proceedings. They should, in particular, be informed directly of the charges against them and, if appropriate, through their parents or legal guardians, be provided with appropriate assistance in the preparation and presentation of their defense*. Since in the present case, the author's son had not been separated from adults and had not benefited from the special guarantees prescribed for criminal investigation of juveniles, the Committee concluded that his rights under Article 10, paragraph 2(b), and Article 14, paragraph 4, of the Covenant had been violated.

3. Issues of Article 14 – the right to a fair trial

3.1. The scope of Article 14

Extension of the scope of Article 14 on the administrative process

Osiyuk v. Belarus[15]

Ivan Osiyuk, a pensioner who lives in his native settlement of Borisovka (Belarus), which is approximately one kilometre away from the settlement of Godyn (Ukraine), while getting back from Ukraine in June 2003 on his privately-owned car, crossed the national frontier between Belarus and Ukraine by a forest road without going through a frontier post. In this regard, he was arrested by the officers of Belarusian border control authorities. Afterwards Kobrin District Court found the author guilty of having committed an administrative offence under Article 184-3 of the Code on Administrative Offences (1984) for unlawfully crossing the national frontier and ordered him to pay

[14] See, Human Rights Committee General Comment No. 32, paragraphs 42 - 44.

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

14,000 roubles as fine. Moskovsky District Court of Brest found that the author had committed an administrative offence under Article 193-6 of the Code on Administrative Offences for moving the car across the customs frontier of the Republic of Belarus in evasion of customs control and ordered him to pay 700,000 roubles as fine, together with the seizure of the author's car.

The author claimed a violation by Belarus of his rights under Article 14 of the Covenant.

Article 14, paragraph 1, of the Covenant defines the scope of relations it applies to, pointing out that "in the determination of any *criminal charge* against him, or of his rights and obligations *in a suit at law* (emphasis added. – N. M.), everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

Despite the fact that the State did not contest the right of the author to have his communication, relating to the administrative process, considered; when deciding on the admissibility the Human Rights Committee set the task to determine the applicability of Article 14 of the Covenant to the present communication, i. e. whether sanctions against the author with regards to the illegal crossing of the state border and the movement of vehicles through the customs border were related to "any criminal charge" within the meaning of the Covenant.

In this regard the Committee noted that "criminal charges relate in principle to acts declared to be punishable under domestic criminal law. 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*. In this respect, the Committee notes that *the concept of a "criminal charge" bears an autonomous meaning, independent of the categorisations employed by the national legal system of the States parties, and has to be understood within the meaning of the Covenant*".

The Committee noted that "that the rules of law infringed by the author are directed towards everyone, (rather than a given group possessing a special status) as well as prescribe conduct of a certain kind and make the resultant requirement subject to a sanction that is punitive". And those, in Committee's view, sufficed to recognize that the offences in question were, in terms of Article 14 of the Covenant, criminal in nature. Reasoning from those facts, the Committee declared the communication admissible ratione materiae, insofar as the proceedings related to the movement of means of transport across the customs frontier, fell within the ambit of "the determination" of a "criminal charge" under Article 14, paragraph 1, of the Covenant.

The legal position of the Committee analysed here allows to make a general conclusion: Article 14 of the Covenant may apply not only to the legal relations related to the criminal process, but also to the administrative process,

depending on whether common for all rules of conduct are being used in this process and what is the severity of penalties for violation of these rules.

Issues of interference with privacy in the criminal process

In the case *Marinich v. Belarus* the author of the communication, among other things, claimed a violation of Article 17 of the Covenant, (the right to respect for private and family life, home, correspondence, honour and dignity). That claim was substantiated by the fact, that, despite his initial status of a witness (rather than that of a defendant) in the criminal process, illegal search of his and his relatives' home as well as the search of his personal belongings, tapping of his phone, surveillance of his car, and confiscation of his money and documents, took place.

The Committee considered that those allegations should be examined in connection with his allegations under Article 14, as they related to the criminal case initiated against him.

That is, the Committee, without dividing the periods of the author's different status in the criminal proceedings (witness and defendant), extended the scope of Article 14 onto the issues of Article 17 on the grounds that the restrictions under Article 17 of the Covenant had been associated with the criminal process against the author. In the end, those facts along with the other ones were considered a violation of Article 14, paragraph 1, of the Covenant.

3.2. Independence of the court

In the case *Bandajevsky v. Belarus,* for the first time in the history of all Belarusian cases dealt with by the Committee, there was raised the question of whether on a specific communication the lack of general institutional independence of the judiciary in Belarus could be recognized as a violation of the right to a consideration of the case by a competent, independent and impartial tribunal.

In the communication, the author claimed that, contrary to Article 14 of the Covenant courts in Belarus are not independent, as the President of the Republic of Belarus possesses the sole authority to appoint and dismiss judges; before their official appointment, judges pass through the trial period during which they have no guarantee that they will be eventually appointed. The author referred to the fact that the lack of independence of judges in Belarus confirms the report of the Special Rapporteur on the independence of judges and lawyers of the United Nations Commission on Human Rights (June 2000).

The State party had not commented on that. In the absence of further relevant information from the author to the effect that he was *personally affected by the alleged lack of independence of the courts that tried him*,

however, the Committee considered that the facts before it did not disclose a violation of Article, 14, paragraph 1, on that count.

Views on that case were adopted by the Committee on 28 March 2006. Yet in more recent cases, for example in the Views of 26 October 2011 on the case *Gryb v. Belarus*[16] and of 19 July 2012 on the case *Levinov v. Belarus*[17], the Committee reiterated its legal position, stating that a generalized statement about the lack of independence of the judicial system of the State party was not sufficiently substantiated for purposes of admissibility.

Thus, the practice of the Human Rights Committee adopted an approach according to which the claims about the lack of independence of the judiciary must be substantiated with specific facts that demonstrate in what way the court demonstrated the lack of independence in this specific case.

3.3. Is it possible to appeal to the Committee about the conclusions of the domestic courts with regard to the guilt?

In many communications, particularly on cases *Bandajevsky v. Belarus*, and *Smantser v. Belarus*, the authors raised questions that their guilt had not been proven in the court, the trial had been biased and incomplete, the court had considered only arguments of the prosecution, rejected motions by the defense, evaded the assessment of the evidence, and failed to respond to questions posed to him, etc.

In such cases the Committee consistently notes that such allegations mostly relate to the evaluation of facts and evidence and refers to its prior jurisprudence and reiterates "*that it is generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that these actions were clearly arbitrary or amounted to a denial of justice*[18]".

In this sense, some exception is the Committee's Views on *Koreba v. Belarus* case.

The author claimed that the trial of her son was unfair and that his guilt had not been established. On that Committee also reiterated the abovementioned legal approach. However, in that case, the Committee concluded that the principle of presumption of innocence with regards to the author's son had not been observed, in violation of Article 14, paragraph 2, of the Covenant.

HRC did not explain in its views what exactly had constituted the violation of this principle. But, given the content of Article 14, paragraph 2, of the Covenant, "everyone charged with a criminal offense shall have the right to be

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16 Communication No. 1316/2004 *Gryb v. Belarus*, Views adopted on 26 October 2011.

17 Communication No. 1812/2008, *Levinov v. Belarus*, Views adopted on 19 July 2012.

18 See in particular: Communication No. 541/1993 Errol Simms v. Jamaica, the decision on inadmissibility adopted on 3 April 1995, paragraph 6.2.

presumed innocent until proved guilty according to law", it is safe to assume that the Committee considered the guilt of author's son unproven *according to law* (that is, in a legal order, subject to the rules of procedure within the meaning of Article 14 of the Covenant).

It is important to understand what led the Committee to this conclusion. From the analysis of HRC's decision one could come to the following conclusions: first, the views noted that the author had indicated on many circumstances that, as she claimed, demonstrated a violation of the principle of the presumption of innocence with regards to her son. Indeed, the text details the specific arguments by the author against the lawfulness and validity of the verdict. The Committee also pointed to the lack of a clear reply from the Member States Parties on specific allegations by the author. Finally, in the present case the Committee found other violations of Article 14:

– violation of Article 2, paragraph 3, read in conjunction with Articles 7 and 14, paragraph 3 (g), of the Covenant, and namely, failure by the state to fulfil its obligation to conduct a proper investigation of claims about forced confessions obtained via torture and ill-treatment;

– violation of rights under Article 10, paragraph 2(b); and Article 14, paragraph 4, of the Covenant, of failing to ensure special guarantees prescribed for criminal investigation and detention of juveniles;

– violation of Article 14, paragraph 3(e), of the Covenant, (the principle of equality of arms), consisting in interrogating M.T., a secret informant, during the hearing and that interrogation had been conducted in the absence of the defendant, who had been denied the opportunity to ask witness questions, and that the State did not provide information on the causes of limitation of that right.

Thus, the aforementioned cases clearly demonstrate that, as a general rule, it is quite ineffective to raise the issue of unfairness of the trial with the Human Rights Committee due to the fact that the guilt as a result of it has not been proven. It seems however, that there might be reasonable chances of success in case of alleged shortcomings in the *procedure* of the trial from the point of view of guarantees contained in Article 14 from the perspective of violations of the right to defense, the adversarial principle (for example, when unequal approach of the court to the rights of the prosecution and the defense during the granting of evidence is proved), as well as the presumption of innocence (in case clearly inadmissible evidence is used for conviction).

For the use of the argument about the inadmissibility of evidence, of interest is an interpretation given by the European Court of Human Rights on Article 6, paragraph 2, of the European Convention on Human Rights (the norm that is similar to Article 14, paragraph 2, of the Covenant). The Court

considers the provision "*until guilt is proved according to law*" in the sense that *the charge should not be based on illegally obtained evidence*[19].

3.4. Ensuring the publicity of court proceedings

The issue of the obligation of the State Party to ensure public hearing in accordance with Article 14, paragraph 1, was considered by the Human Rights Committee in the case of *Marinich v. Belarus*.

The author submitted that although the hearings were declared open to the public, representatives of political parties and NGOs were effectively barred from the court room. The court building was allegedly surrounded by the police who prevented people from even approaching it. He adds that KGB officers were constantly present in the building and held consultations with the judge without witnesses during recesses. Two of them recorded the proceedings. The hearings were held in a small room which could seat only 12 people. Journalists allowed into the court room at the insistence of the defense and relatives were not permitted to record the hearings.

The Committee noted those claims, as well as the State Party's limiting itself in that regard to stating that the court trial was open to the public and conducted in accordance with the criminal procedure law. The Committee recalled its jurisprudence that "*the court must provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, e.g. potential public interest in the case, the duration of the oral hearing and the time the formal request for publicity has been made*" [20]. It also notes that the "State Party did not provide any arguments as to the measures taken to accommodate the interested public taking into account the role of the author as a public figure". On that ground, the Committee concluded that the facts alleged constitute a violation of Article 14, paragraph 1, of the Covenant.

3.5. The position of the state media in relation to the criminal justice process and the presumption of innocence

In the communication on the case *Marinich v. Belarus*, the author claimed that after his arrest he was interrogated at night without a lawyer. The interrogation was recorded with a hidden camera. Subsequently, some episodes of the interrogation were shown on Belarusian TV, accompanied with false and degrading comments about the author. He submitted that the State-con-

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[19] Judgments of the European Court of Human Rights: *Van Mechelen and Others v. the Netherlands*, 23 April 1997, *Reports of Judgments and Decisions* 1997-III; *Khan v. the United Kingdom*, № 35394/97, ECHR 2000-V; *Bykov v. Russia* [GC], № 4378/02, 10 March 2009, and *Lisica v. Croatia*, № 20100/06, 25 February 2010.

[20] Communication No. 215/1986, *Van Meurs v. The Netherlands*, Views adopted on 13 July 1990, para. 6.2.

trolled Belarusian TV aired the distorted information even before the investigation ended, thus the presumption of innocence was violated against him.

Taking into account that the State party did not contest these allegations, the Committee recalled that the accused person's right to be presumed innocent until proved guilty by a competent court is guaranteed by the Covenant. The Committee came to the following conclusion: *"The fact that, in the context of this case, the State media portrayed the author as guilty before trial is in itself a violation of Article 14, paragraph 2, of the Covenant*".

Subsequently, the rule that "the media should avoid news coverage undermining the presumption of innocence", was formulated by the Committee as a general practice in **General Comment No. 32: "Article 14: Right to equality before courts and tribunals and to a fair trial".**

3.6. On the right of the accused person to be tried in his presence, and to defend himself in person and to examine witnesses

In accordance with Article 14 of the Covenant, everyone has the right to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing (paragraph 3 (b)), to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing (paragraph 3 (d)), examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (paragraph 3 (e)) .

The issue of violation of this right became crucial during the consideration of the case of *Osiyuk v. Belarus*.

The author's statements were as follows: he received a summons to appear at the hearing that was to consider the charges against him of illegally moving his car across the border and the issue of confiscation of the car. However, after his claims that the judge assigned to his case was not impartial, the latter was replaced by another judge, and the author was not informed of the new date for the hearing, despite maintaining regular contact with the registry of the court. As a result the court decision on the imposition of fine and confiscation of the vehicle was taken in his absence. At the same time he took steps to ensure that numerous witnesses from his village of Borisovka were to testify on his behalf, particularly in relation to the fact that no one had any knowledge of where the national frontier between Belarus and Ukraine ran and of any rules about crossing the frontier; however these witnesses, like the author, were never heard at the trial. These allegations had not been challenged by the State Party.

When considering the case, the Committee recalled its jurisprudence, according to which the "effective exercise of the rights under Article 14 presupposes that the necessary steps should be taken to inform the accused

of the charges against him and notify him of the proceedings[21]. Judgment *in absentia* requires that, notwithstanding the absence of the accused, all due notifications have been made to inform him or the family of the date and place of his trial and to request his attendance".

The Committee noted that, as a result of not being informed of the date of the hearing, neither the author himself nor any witnesses on his behalf, were ever heard at the trial. In these circumstances, the Committee concluded that "*the State party failed to make sufficient efforts with a view to informing the author about the impending court proceedings, thus preventing him from preparing his defense or otherwise participating in the proceedings*. In the view of the Committee, therefore, the State party has violated the author's rights under Article 14, paragraphs 3 (b), (d) and (e), of the Covenant".

3.7. The right to appeal

Article 14, paragraph 5, of the International Covenant on Civil and Political Rights: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".

In the case of *Bandajevsky v. Belarus*, the author claimed that the verdict handed down by the Supreme Court of Belarus against him, had not been susceptible of cassation appeal and become executory immediately. The State party affirmed that the case had been examined by the Supreme Court under a supervisory procedure which had reviewed the first instance judgment, and that if the Supreme Court had detected violations of the law, the judgment would have been cancelled.

On that issue the Committee noted, however, that "the judgment stipulated that it could not be reviewed by a higher tribunal. The supervisory review invoked by the State party only applies to already executory decisions and thus constitutes an extraordinary mean of appeal which is dependent on the discretionary power of judge or prosecutor. When such review takes place, it is limited to issues of law only and does not permit any review of facts and evidence. The Committee recalled that even if a system of appeal may not be automatic, the right to appeal within the meaning of Article 14, paragraph 5, imposes on States parties a duty to substantially review conviction and sentence, both as to sufficiency of the evidence and of the law"[22]. In the circumstances, the Committee considered that the supervisory review cannot be characterized as an "appeal", for the purposes of Article 14, paragraph 5, and that this provision had been violated.

[21] General Comment No. 32, see note 6 above, paragraph 31.

[22] See *Aliboev v. Tajikistan*, Communication No. 985/2001, Views adopted on 18 October 2005; *Khalilov v. Tajikistan*, Communication No. 973/2001, Views adopted on 30 March 2005, *Domukovsky et al. v. Georgia*, Communications No. 623-627/1995, Views adopted on 6 April 1998, and *Saidova v. Tajikistan*, Communication No. 964/2001, Views adopted on 8 July 2004.

The value of this conclusion of the Committee consists not only in providing the legal assessment of a particular situation – Bandajevsky' deprivation of the right to appeal the verdict rendered against him. This legal position of the Committee will be applicable to other cases reviewed by the Supreme Court of the Republic of Belarus in the first instance, since the current Criminal Procedure Code and Civil Procedure Code contain provisions that judgment of the Supreme Court shall be final and not subject to appeal. Thus, as in the case of recognizing placement into custody by the decision of the prosecutor rather than the court to be inconsistent with the Covenant; in this situation the Committee actually evaluated the provision of domestic law as to its compliance with standards of the Covenant. In such cases, relying on the decisions made by the Committee, it is possible to speak about the violation of the right as a result of the application of the law, that is incompatible with the Covenant, and, while appealing to the HRC, it makes sense to ask the Committee to recognize the need to provide a remedy in the form of cancellation of such a law.

These are the main issues addressed by the Human Rights Committee while considering Belarusian cases that raised problems of observance of human rights in the implementation by the state of administrative and criminal prosecution.

When this Article was prepared, the Human Rights Committee adopted Views, which is just an example and proof of that thesis.

On 14 November 2012, the Committee considered Communication 2120/2011 submitted by Lyubov Kovaleva and Tatyana Kozyar on their behalf and on behalf of Vladislav Kovalev[23], who was convicted on 30 November 2011 by the Supreme Court of the Republic of Belarus for a range of offenses, including aiding and abetting terrorist activities (explosion in Minsk subway on 11 April 2011), to the death penalty and was executed in March 2012. The authors claimed that Mr. Kovalev was a victim of violations by Belarus of his rights under following Articles of the Covenant:

– Article 7 and Article 14, paragraph 3 (g), – use of physical and psychological pressure on the accused with the purpose to secure a confession of guilt, lack of proper investigation of allegations of torture;

– Article 14, paragraph 1, – lack of impartiality of court proceedings, violation of the principle of equality of arms;

– Article 14, paragraph 2, – violation of the presumption of innocence by means of statements affirming Kovalev's guilt made by officials and state media before his conviction by the court, as well as being handcuffed and kept in a cage during the court trial;

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[23] Communication No. 2120/2011 *Kovalev et al v. Belarus*, Views adopted on 29 October 2012.

– Article 14, paragraph 3 (b), – violation of the right to protection via restriction of the right to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;

– Article 14, paragraph 5, – violation of right to have his sentence and conviction reviewed by a higher tribunal;

– Article 6 – violation of right to life by having been sentenced to death after a trial conducted in violation of the fair trial guarantees set forth in Article 14 of the Covenant;

– as well as Article 7 – in relation to relatives of the accused who suffered severe mental stress over authorities' refusal to notify them in advance of the date, time and place of Mr. Kovalev's execution, hand over his body to relatives for burial or inform them of the location of the burial site.

The Committee considered these allegations and found violations of the Covenant by the Republic of Belarus with regards to almost all claims made by the authors of the communication, recognized the obligation of the State party to provide the authors with an effective remedy, including appropriate compensation for the anguish suffered, and disclosure of the burial site of Mr. Kovalev, as well as to prevent similar violations in the future, including by amending legislation. It should be noted that the communication was considered by the Committee within an unprecedentedly short period of time – 11 months from the date of its submission.

Without a doubt, this case deserves a separate thorough analysis. Now, it must be emphasized that the result of its consideration by the Committee was a direct consequence of the sturdy position of the applicants, aimed at protection of their rights, of courageous and professional work of their counsel and human rights defenders to protect victims of violations in the national system, but also an extremely competent approach in submitting and maintaining communications with an international body, based on the systemic work to study and make use of international practices and, in particular, the practice of the Committee with regards to the similar type of case considered in relation to Belarus.

Leonid Sudalenko
Head of the Gomel Centre for Strategic Litigation

SPECIFICS IN CONSIDERATION OF CASES INVOLVING THE EXERCISE BY CITIZENS OF THE REPUBLIC OF BELARUS OF THEIR RIGHT TO FREEDOM OF EXPRESSION AND FREEDOM OF PEACEFUL ASSEMBLY

This Article analyses almost all cases of Belarusian citizens that were considered – as of 1 October 2012 – at the international level (the Human Rights Committee) and have been related to the implementation by the citizens of the Republic of Belarus of rights to freedom of expression and freedom of peaceful assembly. The reader is invited to familiarize themselves with the process of consideration of said cases at the national level (the exhaustion of all available domestic remedies), as well as the procedure for consideration of cases by the Human Rights Committee.

The study of these cases will help to get an idea of the problems Belarusian citizens face in exercising their civil and political rights guaranteed not only by the Constitution of the Republic of Belarus, but also by international treaties our country is a party to. This Article shows how, as well as in what way the national law enforcement and judicial systems understand and apply in practice international obligations of their country; legal arguments by authors of complainants in the national judicial system and in their subsequent complaints to the Human Rights Committee is given for some cases. Here one can familiarize themselves with a brief overview of cases considered by the Human Rights Committee, that dealt with issues of violation of rights of Belarusian citizens guaranteed by the International Covenant on Civil and Political Rights (freedom of expression (Article 19) and freedom of peaceful assembly (Article 21)).

Those views of the Human Rights Committee that ascertained not only a violation of the rights of the individual, but also ways for subsequent rehabilitation, and that also contained proposals to the government to change the provisions of national law and enforcement practice, are given in full (case No. 1226/2003 *Viktor Korneenko v. Belarus* and the case No. 1784/2008 *Vladimir Schumilin v. Belarus*).

1. National level

Having become a party to the International Covenant on Civil and Political Rights, as well as having ratified in 1992 the Optional Protocol on the recognition of the competence of the Human Rights Committee, the Republic of

Belarus thereby recognized its competence with respect to adjudicate upon the presence or absence of a violation of the Covenant on complaints Belarusian citizens. Our country has also voluntarily committed to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant (Article 2).

In practice, this obligation of the Republic of Belarus should mean nothing else than adoption by the state of all required legislative and other measures that may be necessary for the strict implementation rights recognized in the Covenant. Republic of Belarus is also under obligation to ensure that any person whose rights or freedoms recognized in the Covenant are violated shall have an effective remedy. It should also be noted that under Article 61 of the Constitution of the Republic of Belarus every Belarusian citizen is entitled in accordance with the international instruments ratified by the Republic of Belarus, to appeal to international organizations for the protection of his rights and freedoms, if all available domestic remedies have been exhausted. This constitutional guarantee also imposes an obligation on the government to take active legislative and other measures as may be necessary for the strict implementation of the rights recognized in the Covenant.

Analysis of cases preceding the appeals of the Belarusian citizens with the Human Rights Committee to protect their rights and freedoms shows that officials of law enforcement bodies, judges of Belarusian courts of various instances commonly refuse to fulfil obligations as to strict observance of rights to freedom of expression and freedom of peaceful meetings, recognized under Articles 19 and 21 of the Covenant.

Among the most common are cases, when the authorities are banning peaceful assemblies of citizens, persecuting citizens administratively for the distribution of information about upcoming unauthorized peaceful assemblies or for participating in unauthorized peaceful assemblies by imposing large administrative fines or administrative arrests. As a consequence, a unique situation has emerged in the Republic of Belarus in the field of human rights and freedoms, which will be detailed below.

For example, in 2009, on the eve of the anniversary of the Chernobyl nuclear power plant disaster, a Gomel resident was giving out leaflets in the town of Narovlya (Gomel region) containing appeals to residents of the town to take part in the planned march, with the laying of wreaths at the monument to the resettled villages that had been affected by Chernobyl disaster. And since that individual did not have a permission from the local authorities to organize the march, he was arrested by the police and charged with violating the order of organization of mass events. Having reviewed the administrative offence report, the Narovlya district court of the Gomel region took the administrative action against him by way of 5-day arrest. The judge made the decision solely on the basis of national legislation, without making

a slightest attempt to justify the restriction of his rights by admissible restrictions.

In his complaints to higher courts that individual claimed that police officers who had detained him and the court that had convicted him had not explained why, in that particular case, his right to freedom of information and freedom of peaceful assembly had been restricted. Even if the restrictions on freedom of information and freedom of peaceful assembly are provided for by national law (it is forbidden to distribute any kind of information about the upcoming mass event until a permission is received to hold it – Article 8 of the Law «On Mass Events in the Republic of Belarus"), the police officers that had detained him, as well as the court had to substantiate which of the legitimate aims referred to in paragraph 3 (a) or (b) of Article 19 of the Covenant were to be achieved by restricting a citizen's right to freedom of information and freedom of peaceful assembly.

A judge of the Gomel Regional Court who considered the complaint of that individual, refused to give a legal evaluation of the actions of police officers and the decision of the first instance court in light of admissible restrictions on the right to freedom of information and the right to freedom of peaceful assembly, referred to in Article 19, paragraph 3 (a) or (b), and Article 21, of the Covenant. The judge did make a reference in his ruling to the Covenant yet only because of a necessitous statement of legal reasoning contained in author's complaint: "Since Mr. Tolchin was calling to holding an unsanctioned event, his arguments that his constitutional rights as well as norms of international law were violated, are unfounded". In such a way the judge of the Gomel Regional Court justified the restriction of rights while considering his appeal. Chairman of the Gomel Regional Court, where Mr. Tolchin filed his supervisory appeal in that regard, acted likewise.

As a result, there is a situation where a citizen, sentenced to five days in jail for distributing leaflets about the upcoming unsanctioned mass event, has exhausted all domestic remedies, but the Belarusian law-enforcement and judicial systems were unable to enforce in practice his right to freedom of information and freedom of peaceful assembly, as guaranteed by Articles 19 and 21 of the Covenant. The aforementioned fact has forced this citizen to file an individual communication to the Human Rights Committee (case No. 1920/2009 *Andrei Tolchin v. Belarus*).

The above case shows that human rights in modern Belarus are negligible as viewed by Belarusian law enforcement bodies and the judicial system. The situation is aggravated by the fact that the above case is likely to be the rule rather than the exception as to the behaviour of the Belarusian government not only in relation to human rights and international obligations undertaken in that regard, but also to the constitutional guarantees of civil and political rights of Belarusian citizens. In recent years the Republic of Belarus has not

only systematically and commonly restricted everyone's right to freedom of expression and freedom of peaceful assembly; these rights have actually being put into question in this country.

For example, in 2009 a group of 16 concerned citizens had intended to take to one of the central squares of the city of Gomel to conduct «The chain of concerned people», a civic event dedicated to the 10th anniversary of the 1999 disappearance without a trace of Belarusian opposition leaders Viktor Gonchar and Anatoly Krasovsky.

«Each member of the group that was going to the place of peaceful assembly held a folded A3 poster with portraits of the missing politicians. While moving along the sidewalk that group of people was blocked by a police van, several goons jumped out of it and forcibly pushed the whole group into the van. Later on at the police station each of the detainees had administrative reports on the violation of the established order of mass events made against them.

Zheleznodorozhny District Court of Gomel imposed large administrative fines – up to twice the country-average monthly salary at that time – onto each member of the group of people who intended to hold a peaceful assembly of citizens unauthorized by local authorities. Despite the legal arguments of each member of the group built with the use of the rules of international law, the court of first instance in any of those cases made no attempt to justify the restriction of citizens' rights by international law. The Gomel Regional Court and the Supreme Court, the citizens filed their appeals with, confirmed the findings of the police and the court of first instance: being purposed to hold a mass event without first obtaining a permission from the authorities, the citizens violated the permissive procedure for organizing and holding mass events provided for the Law «On Mass Events in the Republic of Belarus». In the case of one of the participants, Mr. Nepomnyashchikh, a judge of the Gomel Regional Court stated: «The arguments contained in the complaint about the contradiction of the court ruling to the norms of the Constitution and international law are farfetched and not objectively substantiated. Thus, in accordance with Article 35 of the Constitution the order of mass events is determined by law". In another case on the complaint of Mr. Sekerko, a judge of the Gomel Regional Court had to repeat only the legal arguments of the author: "[He] believes that by taking administrative action against him, the court violated the norms of international law, and restricted his rights.» The aforementioned fact of administrative prosecution of the group of citizens just for the intention to hold an unauthorized peaceful assebly is currently the subject of review by the UN Human Rights Committee (Communication No. 1999/2010 *Evzrezov et al. v. Belarus*).

Starting from 2008, in Gomel, a city of about 500 thousand residents, there has been designated the one and only permanent venue for public

events, that take place without the participation of authorities, and that is located almost on the outskirts of the city. In addition, the decision adopted by local authorities, imposes further obligations on the organizers of a peaceful assembly to make contracts with police departments for the protection of public order during the peaceful meeting, with medical institutions for medical care of participants of peaceful assembly and with the utilities service providers to provide cleaning services after the peaceful assembly. The enforcement practice pertaining to the aforementioned decision by the local authorities systematically leads to the violation of the right to freedom of peaceful assembly of citizens and freedom to express one's opinion.

From a communication to the Human Rights Committee (Communication No. 2142/2012 *Shumilina et al v. Belarus*):

"By decision of Gomel City Executive Committee of 02 April 2008 No. 299 'On Mass Events in the City of Gomel ', Gomel City Executive Committee decided:

1. Designate the permanent venue for public events in the city of Gomel, organized by political parties, trade unions and other organizations of the Republic of Belarus, registered in the prescribed manner, and the citizens, to be the site at the Palace of Culture of the private production unitary enterprise «Vipra» of the public association 'Belarusian Association of the Deaf', located at the address: ul. Yubilejnaja, 48.

2. In cases where the organization of mass events occurs without the participation of the governmental bodies, the organizers of mass events should attach the following contracts to their application for a mass gathering:

2.1. with the department of internal affairs of the administration of the city of Gomel district on the territory of which the event will be held –on the protection of public order during the event;

2.2. with the "Gomel central city clinic" – on medical care during the event;

2.3. with municipal road maintenance unitary enterprise «GorSAP" –on cleaning-up after the event.

The said decision of the local authorities was taken in accordance with Article 9 of the national law «On Mass Events in the Republic of Belarus», according to which the heads of local executives authorities are entitled to designate permanent location for peaceful meetings of citizens. Thus, starting from 2008, in Gomel, a city of about 500 thousand residents, there has been designated the one and only permanent venue for public events, that take place without the participation of authorities, and that is located almost on the outskirts of the city.

In addition, the decision adopted by local authorities, imposes further obligations on the organizers of a peaceful assembly to make contracts with police departments for the protection of public order during the peaceful meeting, with medical institutions for medical care of participants of peaceful

assembly and with the utilities service providers to provide cleaning services after the peaceful assembly.

The enforcement practice pertaining to the aforementioned decision by the local authorities systematically leads to the violation of the right to freedom of peaceful assembly of citizens and freedom to express one's opinion.

On 04 February 2011, we filed a request with the Gomel City Executive Committee seeking permission to hold public events in the form of pickets in different, most busy places in the city of Gomel. We planned to hold peaceful meetings of citizens on 23 February 23, 2011 to express our attitude to the political persecution of former presidential candidates, as well as members of their campaign staff. As is known, after 19 December 2010 Belarus presidential election almost all presidential candidates and their campaign staff became targets of criminal prosecution by the authorities.

By decision of the Gomel City Executive Committee No. 182 of February 17, 2011 «On the refusal to hold pickets on 23 February 2011" we were refused to hold mass events in the form of pickets, since we as organizers of peaceful assemblies of citizens failed to comply with requirements of the decision No. 299 by the Gomel City Executive Committee of 02 April 2008 "On Mass Events in the city of Gomel", and specifically:

– peaceful meetings of citizens were planned to be held in places, other than those designated for that;

– before holding the peaceful meeting of citizens, we did not make contracts with pertinent services as to the protection of public order during the event, on health care during events and to ensure cleanup after events;

In this regard, we would like to note that we do not understand, it is to what end our right to peaceful assembly of citizens and of expression is restricted, which could be necessary for one of the legitimate aims within the meaning of Articles 19 and 21 of the International Covenant on Civil and Political Rights.

In absence of any reasonable explanation justifying these conclusions, we believe that the ban by local authorities to hold peaceful assembly of citizens is not necessary in the interests of national security, public order, morality, health, and rights and freedoms of others.

We therefore conclude that, by refusing us to hold peaceful meeting of citizens and express our views on the issue of political prosecution of former presidential candidates, as well as members of their campaign staffs, the Republic of Belarus has violated our rights under Articles 19 and 21 of the International Covenant on Civil and Political Rights.

While considering our complaints, the Tsentralny district court of Gomel, and after that, higher courts, including the Supreme Court of the Republic of Belarus, also refused

to classify the refusal to conduct a peaceful assembly of citizens and have them express their opinions in accordance with the provisions of the International Covenant on Civil and Political Rights, although the arguments set forth in our complaints were relevant and important in so far as they relate to international obligations of the Republic of Belarus.

In particular, while assessing the provisions of international and national law, we brought it to notice of higher courts, that every international treaty in force the Republic of Belarus is a party to, must be fulfiled by it in good faith. In accordance with Articles 26 and 27 of the Vienna Convention "On the Law of Treaties", ratified by the Republic of Belarus of, a party to an international treaty may not invoke internal law as justification for failure to perform that treaty. According to Article 33 of the Law of the Republic of Belarus "On International Treaties of the Republic of Belarus", generally recognized principles of international law and the norms of international treaties of the Republic of Belarus that have entered into force, are part of the law in force on the territory of the Republic of Belarus.

The Universal Declaration of Human Rights proclaims the right of everyone to freedom of opinion and expression and the right of everyone to freedom of peaceful assembly (Articles 19 and 20). These rights are also reflected in the International Covenant on Civil and Political Rights (Articles 19 and 21), which recognizes the right of everyone to freedom of expression and the right to peaceful assembly. The exercise of these rights shall not be subject to any restrictions other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, health or morals or the protection of the rights and freedoms of others.

While assessing the state interference with our rights on the grounds of non-fulfilment on our part of the decision by local authorities on the order of holding events in the city, we come to the conclusion that in this particular case, use of the requirements contained in the decision of local authorities to designate the only place in town to conduct peaceful meetings of citizens and imposition of an obligation to make pertinent non-gratuitous contracts run counter to Articles 19 and 21 of the International Covenant on Civil and Political Rights, as restriction of the right to freedom of expression and the right to peaceful assembly is inadmissible.

According to Article 7 of the Constitution of the Republic of Belarus, the principle of the rule of law is established in the Republic of Belarus. The Republic of Belarus recognizes the supremacy of the generally accepted principles of international law, and ensures compliance of its legislation with those. By becoming a party to the International Covenant on Civil and Political Rights, the Republic of Belarus, has assumed the obligation under Article 2 of the Covenant to respect and ensure all the rights enshrined in it. It also

assumed obligations to adopt such legislative and other measures as may be necessary for the implementation of these rights.

We believe that till up to present the Republic of Belarus does not fulfil its obligations in respect to everyone's right to peaceful assembly within the meaning of Article 2, paragraph 2, of the International Covenant on Civil and Political Rights, since provisions of national law «On Mass Events in the Republic of Belarus» contain vague and ambiguous norms that can certainly be interpreted and are being interpreted in different ways. For example, according to Article 9 of the said law, the heads of local authorities are entitled to designate permanent venues for peaceful assemblies of citizens.

Imposing restrictions on the freedom of expression of citizens' opinion and beliefs and to freedom of peaceful assembly, the Gomel City Executive Committee in its decision failed to substantiate why these restrictions may be necessary to achieve a legitimate objective within the meaning of Articles 19 and 21 of the International Covenant on Civil and Political Rights.

Fulfiling this decision, any individual who wishes to express his opinion or belief in support of public interests while conducting peaceful meetings of citizens, shall not only obtain prior authorization from the city authorities 15 days before the event, but also make non-gratuitous contracts by pre-paying at their own expense for the services of police officers, healthcare, and public utilities.

From this we can conclude that if we followed the letter of the national law on peaceful assembly, and also began to carry out the decision of local authorities to hold peaceful assembly of citizens at the site, that has been designated to be the permanent venue for public events in the city of Gomel, our holding of peaceful meetings we have planned, would be meaningless, since their main goal was to express our views on the political persecution of former presidential candidates, as well as members of their campaign staffs, which seems to be ineffective if held in the thinly populated district on the outskirts of the city.

We believe that the decision taken by the local authorities has excessively restricted the very essence of rights as to the meaning of Articles 19 and 21 of the International Covenant on Civil and Political Rights. In the case No. 628/1995 *Tae Hoon Park v. Republic of Korea* the Human Rights Committee did not agree with the statement by the State party to give priority to national legislation over the rights of citizens, enshrined in the International Covenant on Civil and Political Rights. In that case, the Committee considered it incompatible with the Covenant that the State party gave priority to the application of national legislation over their obligations under the Covenant (paragraph 10.4).

We would also like to note that until now the Republic of Belarus in accordance with Article 4, paragraph 3, of the Covenant, has made no announce-

ment that it introduced a state of emergency and so it suspends certain rights enshrined in the Covenant. As "Viasna", a reputable human rights organization, noted on its websites: "over the past five years, local authorities in the Gomel region have refused pro-democracy activists to held all of over 70 applied-for events even at the only place in the city, which according to their own decision is a place for public statements of opposition http://spring96.org/ru/news/25005 «.

The situation is aggravated by the fact that at the present time amendments and supplements were introduced into the national law «On Mass Events in the Republic of Belarus», under which the fee-based conduct of public events was provided for at the legislative level. Each organizer of a peaceful assembly of citizens is required to pay at his own expense for the protection of public order, health-care service and cleaning-up of the area after the peaceful assembly. A citizen, who has had administrative action taken against him for violation of the order of organizing and conducting of mass events, may not be an organizer of another mass event within a year after that.

Consequently, the Republic of Belarus will not be able to continue to ensure that everyone shall has his right to freedom of expression and freedom of peaceful assembly within the meaning of Articles 19 and 21 of the International Covenant on Civil and Political Rights, as in violation of its obligations under Article 2 (paragraphs 2 and 3) of the Covenant at the level of national law it does not take any measures that are necessary for the implementation of the rights recognized in the Covenant.

Thus, we have exhausted all effective domestic remedies in the Republic of Belarus, and we remained the victims of violation of Articles 19 and 21 in conjunction with Article 2, paragraphs 2 and 3, of the International Covenant on Civil and Political Rights.

Being guided by rules set forth in the Optional Protocol to the International Covenant on Civil and Political Rights,

WE REQUEST:

1. To recognize the present complaint admissible and consider it on the merits, having found a violation by the Republic of Belarus of our rights guaranteed by Articles 19 and 21 in conjunction with Article 2, paragraphs 2 and 3, of the International Covenant on Civil and Political Rights.

2. To Recommend to the Government of the Republic of Belarus to bring the provisions of the national law "On Mass Events in the Republic of Belarus" and of the decision No. 299 of the Gomel City Executive Committee of 02 April 2008 "On Mass Events in the City of Gomel" in line with international obligations, namely in accordance with Articles 19 and 21 of the International Covenant on Civil and Political Rights.

The abovementioned individual complaints to the UN Human Rights Committee show in what particular way ordinary citizens are bringing legal domestic problems to the attention of international experts, thereby encouraging the authorities to respond in some way to the number of complaints from Belarus to international institutions, increasing each year.

Alexander Protsko v. Belarus (case No. 1919/2009)

Taking administrative action against this civic activist, the court of Bragin district of Gomel region motivated its ruling solely by national law, although the author claimed the violation of his rights to freedom of information and freedom of peaceful assembly as guaranteed by the International Covenant on Civil and Political Rights (Articles 19 and 21).

Considering the author's complaint, the Gomel Regional Court noted: "In his complaint Mr. Protsko indicated that he implemented his constitutional right to freedom of assembly, meetings, etc., which, in his opinion, does not require a special permit. Also, in his opinion, the court applied the substantive law incorrectly by not taking into account the norms of international law ratified by the Republic of Belarus". The Supreme Court commented on the legal arguments the author in that case in the following way: "The bodies in charge of the administrative process have not violated your rights under both national and international law".

The complaint is under consideration before the Human Rights Committee.

Kuznetsov et al v. Belarus (case No. 1976/2010)

Taking administrative action against this civic activist, the Tsentralny district court of Gomel motivated its ruling solely by national law, although the authors claimed the violation of their rights to of peaceful assembly, and consequently, freedom of expression as guaranteed by the International Covenant on Civil and Political Rights (Articles 19 and 21).

Considering the authors' claims, the Gomel Regional Court stated: "The arguments in the complaint about the contradiction of the incriminated offense to the norms of international law and the Constitution of the Republic of Belarus are farfetched and not objectively substantiated". The Supreme Court responded to the legal arguments of the authors in that case in the following way: "The Constitution of the Republic of Belarus and the International Covenant on Civil and Political Rights guarantee the right to hold public events, and the procedure for exercising this right is determined by the law 'On Mass Events in the Republic of Belarus'. Consequently, the administrative action that was taken against you, was justified". The complaint is under consideration before the Human Rights Committee.

Vasily Polyakov v. Belarus (case No. 2030/2011)

Taking administrative action against this civic activist, the Sovetsky district court of Gomel motivated its ruling solely by national law, although the author claimed the violation of his rights to freedom to impart information as guaranteed by the International Covenant on Civil and Political Rights (Article 19).

Considering the author's complaint, the Gomel Regional Court stated: "[He] believes that his legal rights and freedoms guaranteed by the Constitution of the Republic of Belarus and international legal acts were violated. Arguments about the violation of legal rights and freedoms of the citizen by starting administrative action cannot be considered reasonable, since the implementation of any of the rights and freedoms is being made by citizens only in accordance with applicable law". The Supreme Court commented on the legal arguments the author in that case in the following way: "The arguments of your complaint that there have been violation your rights provided for in Article 19, paragraph 2, of the International Covenant on Civil and Political Rights, which states that everyone has the right to freedom of expression, cannot be recognized as plausible. According to Article 19, paragraph 3, of the International Covenant on Civil and Political Rights, the exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law. Belarusian law provides for administrative liability for violation of media legislation, which is not inconsistent with international law and does not infringe upon your rights, provided for by both national and international law".

The complaint is under consideration before the Human Rights Committee.

Leonid Sudalenko and Anatoly Poplavny v. Belarus Communication No 2190/2012

When rejecting the complaint of civic activists against the decision of the Gomel City Executive Committee to place a ban on a mass event, the Gomel Tsentralny District Court in its ruling was to recall the following legal arguments presented by the authors of the Communication: "It should be noted that it is unclear to us why the restrictions on the rights to freedom of peaceful assembly of citizens and freedom of expression, imposed on the organizers of peaceful assembly of citizens in the form of disproportionate and additional duties such as conclusion of non-gratuitous contracts with the city special services, were accepted as proportionate and necessary. In the absence of any pertinent explanations from the State party in this connection, we consider that the restrictions of the exercise of the right to hold a peaceful assembly cannot be deemed necessary in a democratic society for the pro-

tection of public order (*ordre public*) or for respect of the rights or freedoms of others. Likewise we believe that designation by the State authorities of the only place in town to conduct peaceful meetings of citizens and imposition of additional and disproportionate obligations to conclude non-gratuitous contracts with city services does not only question but also puts unacceptable restrictions on the right of an individual to peaceful assembly and to freedom of expression. We therefore conclude that, in this particular case, our rights under Articles 23, 33 and 35 of the Constitution of the Republic of Belarus, and Articles 19 and 21 of the International Covenant on Civil and Political Rights have been violated.

Taking into account the fact that peaceful assembly of citizens is a foundation stone of any democratic society, and the protection of freedom of assembly is a necessary requirement for creating a tolerant society, in which groups with different beliefs, norms of conduct or principles can live together, we consider the decisions of the Gomel City Executive Committee No 299 "On Mass Events in the City of Gomel" of 2 April 2008, and No 919 "On the Ban to Conduct Pickets" of 17 August 2011 as inadmissible restriction of our rights to freedom of expression and freedom of peaceful assembly within the meaning of Articles 23, 33 and 35 of the Constitution of the Republic of Belarus, as well as Articles 19 and 21 of the International Covenant on Civil and Political Rights."

The Civil Division of the Gomel Regional Court examining of the authors' appeal repeated the above legal arguments presented by the authors, pointing out that "the appellants' arguments set out in their cassation petition are unfounded, as the decision to ban the mass events is in compliance with the law of the Republic of Belarus "On Mass Events".

The Chairman of the Gomel Regional Court and the Chairman of the Supreme Court of the Republic of Belarus, that were addressed by the authors with a request for a supervisory review for case in question, failed to provide their assessment of the authors' legal arguments with reference to international legal provisions. The Communication is now being examined by the Human Rights Committee.

2. The Views of the Human Rights Committee

To date there have been a sufficient number of cases considered by the Human Rights Committee, in which the Committee had found violations of the rights of Belarusian citizens in connection with both the right to the freedom of expression and of the right to freedom of peaceful assembly. It should also be noted that among those there are cases, in which the Committee does not only reveal particular violations of the right to freedom of expression and freedom of peaceful assembly, but also recommends that the Government of Belarus should change provisions of the national law re-

sulting in such systemic violations of civil and political rights guaranteed by the International Covenant (Communication 1226/2003 Viktor Korneenko v. Belarus, Communication No 1784/2008 Vladimir Shumilin v. Belarus).

Viktor Korneenko v. Belarus
Communication No 1226/2003

The substantive issue of the case relates to election monitoring by observers representing civil society. The author of the Communication was personally fined and computer equipment was confiscated from the association chaired by the author, precisely because the equipment was used by the association in activities that are protected by Article 19 of the Covenant. Thus the author's exercise, in association with others, of the right to seek, receive and impart information and ideas provoked sanctions, i.e. actual intervention on the part of the State.

After such "interference" with the rights of an individual and of organization the State party was entrusted with the duty to clarify why the limitation of the rights of the author and of the public association in this case was necessary for purposes of respect of the rights or reputation of others, protection of national security, public order, the defense of the health and morals of the population.

The State party in its observations to the Committee basically recalled the chronology of the case; the State party also confirmed that there were well-founded reasons for holding the author administratively responsible under national law, namely under the Presidential Decree No 8.

The Committee also noted in this case 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 recalled 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. 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".

The Committee observed 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 recalled 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. The Committee considered 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.

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 concluded 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 and among others those under Article 19, paragraph 2. The Committee in its Views concerning provision of the author with an effective remedy obliged the State party to ensure that the impugned provisions of the Presidential Decree No 8 are made compatible with Articles 19, 22 and 25 of the Covenant.

There is one more specific point that is adding to a particular character of the above case. Early in 2012 the Government of Belarus submitted with regard to the Communication in question and 60 other Communications of Belarusian citizens that upon becoming a State party to the Optional Protocol, it had 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 the admissibility of their communications, in particular Articles 2 and 5 of the Optional Protocol.

Here the State party also maintained that under the Optional Protocol State parties have no obligation to recognize the Committee's rules of procedure and its interpretation of the Covenant's provisions, which "could only be efficient when done in accordance with the Vienna Convention on the Law of Treaties". It further submitted that, "in relation to the complaint 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, case law are not subject to the Optional Protocol".

The State party further noted that "any communication registered in violation of the provisions of the Optional Protocol to the International Covenant on Civil and Political Rights will be viewed by the State Party as incompatible with the Optional Protocol and will be rejected without comment on the admissibility or merits". The State party further maintained that decisions taken by the Committee on such "declined communications" will be considered by its authorities as invalid.

In his comments to the above observations of the State party the author argued 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. He adds that the Republic of Belarus undertook 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. Therefore, the State party is obliged not only to give effect to the Committee's Views but also to accept the Committee's standards, practices, methods of work and jurisprudence.

The Committee recalled 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 observed 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 Article 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 (Article 5, paragraphs 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. 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 (paragraph 8.2 of the Views).

This case is the first Belarusian case, in which the Human Rights Committee has given its assessment to such statement by the Government of Belarus: failure by the State party to accept the Committee's standards, prac-

tices, methods of work and jurisprudence is a violation of Article 1 of the Optional Protocol to the Covenant.

Vladimir Shumilin v. Belarus
Communication No. 1784/2008

This communication concerns the right of a Belarusian citizen to impart information on the upcoming "unauthorized" peaceful assembly of citizens. Administrative proceedings were instituted against the author for dissemination of information about the upcoming mass event when the official permission authorizing the event had not been yet received.

After such "interference" with the rights of an individual the State party was entrusted with the duty to clarify why the limitation of the author's right in this case was necessary for purposes of respect of the rights or reputation of others, protection of national security, public order, the defense of the health and morals of the population.

The State party in its observations to the Committee basically recalled the chronology of the case; the State party also challenged the admissibility of the communication, since that author had not exhausted all domestic remedies (the author could have introduced a request for a supervisory review of the decision of the Court with the Chairman of the Supreme Court or the Prosecutor General, but failed to do so).

The State party next contends that the author's affirmation that the decision to have his administrative liability engaged was not justified under Article 19, paragraph 3 of the Covenant, is groundless. The law on mass events regulates the organization and conduct of assemblies, meetings, demonstrations, street rallies, pickets, etc. Its preamble makes it clear that the aim of creating such a framework is to set up the conditions for the realization of the constitutional rights and freedoms of the citizens and the protection of the public safety and public order, when such events are conducted on the streets, squares, or other public area. The author has breached the limitations under Article 23.34 of the Code of Administrative Offences and Article 8 of the Law on Mass Events, which are necessary for the protection of the public safety and order during the conduct of gatherings, meetings, street rallies, etc.

The State party adds that the right to freely express an opinion is guaranteed by Article 19 of the Covenant to all citizens of the States parties to the Covenant. It explains that, as a party to the Covenant, it fully recognizes and complies with its obligations thereon. Article 33 of the Constitution of Belarus guarantees the freedom of opinion and beliefs and their free expression. Even if the right to freedom of expression is considered as one of the main human rights, it is not absolute. Article 19 is not included in the list of Articles, which cannot be derogated at any circumstances, contained in Ar-

ticle 4 of the Covenant. Thus, the exercise of these rights can be restricted by the State, provided that the limitations are provided by law, have a legitimate aim, and are necessary in a democratic society.

Pursuant to Article 23 of the Constitution of Belarus, limitations of rights and freedoms are permitted only if they are provided by law and are in the interest of national security, public order, protection of morals and health of the population, and the rights and freedoms of others. Similarly, Article 19, paragraph 3, of the Covenant provides that the rights set up in paragraph 2 of the same provision imply special obligations and particular responsibility. The exercise of these rights can therefore be limited, but the limitations must be provided by law and be necessary for the respect of the rights and reputation of others, the protection of the public order, health or morals of the population.

The author reiterated that, according to him, supervisory review appeals do not constitute an effective remedy, due to the fact that their examination is left at the discretion of a single official, and if an appeal is granted, it would not lead to an examination of elements of facts and evidence. The author noted that the Committee has dealt with this issue on several occasions, and has concluded that it is not necessary to appeal under the supervisory review proceedings for purposes of Article 5, paragraph 2 (b) of the Optional Protocol. The author also noted that the existing law does not allow individuals to file complaints to the Constitutional Court. The author also disagreed with the State party's rejection of his contention that his administrative case was not grounded under any of the permissible restrictions listed in paragraph 3 of Article 19 of the Covenant, and he explained that the court's decision in the case did not contain such argumentation. The judges in his case only referred to the national laws in their decisions, and ignored completely the State party's obligations under international law. With reference to the Committee's case-law, the author noted that the Committee in one of its cases had decided that giving a priority to the application of national law over the Covenant's provisions was incompatible with the State party's obligations under the Covenant.

The Committee recalled 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. Any restrictions to freedom of expression must conform to the strict tests of necessity and proportionality and "must be directly related to the specific need on which they are predicated".

The Committee recalled that it is for the State party to show that the restriction 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. In light of the refusal of the Gomel Regional Court to examine the issue on whether the restriction of the author's right to impart information was necessary, in the absence of any other pertinent information on file to justify its authorities decision under Article 19, paragraph 3, the Committee considers that the limitations of the author's right in the present case were incompatible with the requirements of this provision of the Covenant. It therefore concluded that the author is a victim of a violation by the State party of his rights under Article 19, paragraph 2, of the Covenant.

By submitting its considerations with regards to providing author with an effective remedy the Committee entrusted the State party with an obligation to review its legislation, in particular the Law on Mass Events, and its application, to ensure its conformity with the requirements of Article 19, of the Covenant. The above case is the first Belarusian case in which the Human Rights Committee has stated its position on the exhaustion in an administrative case of such a domestic remedy as submission of a request for a supervisory review of a court's decision not only to the Prosecutor's Office, but also to the Chairman of the Supreme Court.

The case under consideration is also of interest due to the fact that the Committee for the first time in its Views suggested that the Government of Belarus should review its legislation and its application in the area of ensuring the right of an individual to freedom of expression and freedom of peaceful assembly of citizens.

Vladimir Laptsevich v. Belarus
Communication No.780/1997

The facts as presented by the author. The author distributed leaflets devoted to the anniversary of the proclamation of independence of the People's Republic of Belarus. While distributing the leaflets, the author was approached by militia officers who confiscated the 37 copies of the leaflet still in the author's possession and subsequently charged the author under Article 172(3) of the Code of Administrative Offences for disseminating leaflets not bearing the required publication data. In accordance with the charge, the author was subsequently fined 390 000 roubles by the Administrative Commission.

Facts as presented by the State. When making comments on the author's communication to the Human Rights Committee the State party noted that it was not disputed by the author that he distributed printed leaflets not containing all the publication data required under the Press Act. By doing so, he committed an offence under Article 172(3) of the Administrative Offences

Code. The State party points out that the exceptions from the publication data requirements for print runs less than 300 do not apply to leaflets. In conclusion, the State party asserted that the Belorussian legislation at issue and the enforcement of it is in full conformity with the State party's obligation under Article 19 of the Covenant.

The view of the Human Rights Committee. When considering the case in question the Committee noted that under the Belarusian law, publishers of periodicals are required to include certain publication data, including index and registration numbers which can only be obtained from the administrative authorities. In the view of the Committee, by imposing these requirements on a leaflet with a print run as low as 200, the State party has established such obstacles as to restrict the author's freedom to *impart* information, protected by Article 19, paragraph 2. Even if the sanctions imposed on the author were permitted under domestic law, the State party must show that they were necessary for one of the legitimate aims set out in Article 19, paragraph 3. The right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification.

Alexandr Dergachev v. Belarus
Communication No. 921/2000

The facts as presented by the author. In 1999, the author, a member of Belarus People's Front, a political party in Belarus Republic, carried a poster during a picket he had organized. The poster carried an inscription to the effect that: "Followers of the present regime! You have led the people to poverty for five years. Stop listening to lies! Join the struggle led by the Belarus People's Front for you!" For doing this the author was tried in the Smorgon district court. The court considered the inscription on the poster as amounting to a call for insubordination against the existing government and/or to the destruction of the constitutional order of the Byelorussian Republic. It ruled accordingly that the poster constituted an administrative offence under the Belarus Code of Administrative Offences (Article 167, paragraph 2). Accordingly, the author was convicted and fined 5 million Belarussian roubles. It also ordered confiscation of the poster.

Facts as presented by the State. Providing comments on the communication of the author to the Human Rights Committee the State party advised that the Chairman of the Supreme Court of the Republic of Belarus cancelled all determinations earlier adopted regarding the author and closed his case. Accordingly, the State party submitted that there is no basis for further consideration of the communication.

The view of the Human Rights Committee. The State party, when pursuing legal administrative action against the author, did not advance that any of

the restrictions set out in Article 19, paragraph 3, of the Covenant were applicable. The Committee therefore considered that the conviction of the author for expression of his views amounted to a violation of his rights under Article 19 of the Covenant.

Leonid Svetik v. Belarus
Communication No. 927/2000

The facts as presented by the author. The national newspaper *Narodnaya Volya* (People's Will) published a declaration, criticizing the policy of the authorities in power. The declaration was written and signed by representatives of hundreds of Belarusian regional political and non-governmental organizations (NGOs), including the author, who lived in Krichev. The declaration contained an appeal not to take part in the forthcoming local elections as a protest against the electoral law. Subsequently administrative action was brought against the author for calling the elections to be boycotted.

Facts as presented by the State. Providing comments on the communication of the author to the Human Rights Committee the State party explains that at the time of the author's sentence, the applicable legislation provided an administrative sanction for public appeals calling for the boycott of elections (art. 167-3, the Code for Administrative Offences). The impugned newspaper Article contained such an appeal; this was not contested by the author in court. According to the State party, the legislation was fully in conformity with Article 19, paragraph 3, of the Covenant, which stipulates that the exercise of the rights protected by Article 19, paragraph 2, of the Covenant is subject to limitations, which must be provided by law. The State party adds that, contrary to the previously applicable electoral legislation, Article 49 of the Belarusian Electoral Code does not contain a direct clause governing the responsibility of individuals who call for the boycott of elections and appropriate modifications were introduced to the Code for Administrative Offences. The State party further notes that Article 38 of the Code provides that if an individual, who was subject to an administrative penalty, had not committed any new administrative offence within one year after purging the previous penalty, he is considered as not having been subjected to the administrative penalty. For the State party, there is no ground to annul the Court decision with regard to Mr. Svetik, as he is considered a person who had not been subjected to administrative penalty. Accordingly, the administrative penalty imposed on Mr. Svetik had no negative consequences for him.

The view of the Human Rights Committee. In the Views adopted by the Committee concerning the author's communication the Committee noted that the declaration signed by the author did not affect the possibility of voters to freely decide whether or not participate in the particular election. The Committee concluded that in the circumstances of the present case the

limitation of the liberty of expression did not legitimately serve one of the reasons enumerated in Article 19, paragraph 3, of the Covenant and that the author's rights under Article 19, paragraph 2, of the Covenant had been violated.

Vladimir Shchetko v. Belarus
Communication No.1009/2001

The facts as presented by the author. By decision of the Pervomaisky District Court in Bobruisk the authors were fined 10,000 Belarusian roubles each. This administrative sanction was imposed on them, since they had distributed leaflets calling for the boycott of the Parliamentary elections. Administrative proceedings were instituted against the author and his son based on the provisions of the Code for Administrative Offences that prohibit public calls for the boycott of elections.

Facts as presented by the State. In the present case, the State party has merely argued that the restrictions of the authors' rights were provided for under law, without presenting any justification whatsoever for these restrictions.

The view of the Human Rights Committee. The Committee recalled that pursuant to Article 19 only such limitations are permissible as are provided for by law and that are necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals. The Committee reiterated in this context that the right to freedom of expression is of paramount importance in any democratic society, and that any restrictions on its exercise must meet strict tests of justification. The Committee recalled that under Article 25 (b), every citizen has the right to vote, and that in order to protect this right, States parties to the Covenant should prohibit any intimidation or coercion of voters. Any situation in which voters are subject to intimidation and coercion must, however, be distinguished from a situation in which voters are encouraged to boycott an election without any form of intimidation. The materials before the Committee did not reveal that the authors' acts in any way affected the possibility of voters freely to decide whether or not to participate in the general election in question. The Committee therefore concluded that the authors' rights under Article 19, paragraph 2, of the Covenant, had been violated.

Vladimir Velichkin v. Belarus
Communication No.1022/2001

The facts as presented by the author. The author claimed that his right under Article 19, paragraph 2 on the freedom to impart information had been violated when he was distributing leaflets of the Universal Declara-

tion of Human Rights (UDHR) in the centre of Brest. He was arrested and afterwards was subjected to administrative fine. From the material before the Committee, it transpires that the author's activities were qualified by the courts as "participation in an unauthorized meeting" and not as "imparting of information".

Facts as presented by the State. The State party observes in its comment the Brest City Council authorized the author to organize this meeting at the Stroitel Stadium. Notwithstanding, in violation of the City administration's decision, Mr. Velichkin unlawfully organized a meeting ("picket") on one of the Brest main streets (Prospect Masherova). He refused to comply with numerous police demands to interrupt the meeting. In light of the above, the domestic courts correctly assessed that the author's acts revealed the elements of the administrative infraction of Articles 167-1 (breach of the order for organization and conduct of assemblies, meetings, street parades and demonstrations) and 166 (insubordination to a lawful instruction or request of a militia officer while he executes his duty to protect the public order) of the Code for Administrative Offences.

The view of the Human Rights Committee. In the Committee's opinion, the above action of the authorities, irrespective of its legal qualification, amounts to a de facto limitation of the author's rights under Article 19, paragraph 2, of the Covenant. In the present case, however, the State party has not invoked any specific ground, on which the restrictions had been imposed on the author's activity which, whether or not it took place within the context of a meeting, obviously did not pose a threat to public order, which would have been necessary within the meaning of Article 19, paragraph 3, of the Covenant. A dissenting opinion of one of the Committee members on this case could be on interest, according to which in this case the author's rights, namely, the right to organize a peaceful assembly, had been violated under Article 21 of the Covenant, stating that the government may impose reasonable restrictions on peaceful assembly in the interests of public safety, public order and the protection of the rights and freedoms of others. In the given case, however, Belarus has not attempted to provide any explanation as to the ban by the Brest authorities of all public protests and gatherings, even those not crowded, in the centre of the city.

Vladimir Katsora v. Belarus
Communication No.1377/2005

The facts as presented by the author. The author, who is a member of a political party, was prosecuted by the court in Zhlobin and was ordered to pay fine for transporting leaflets that had a logo of a coalition that had not been duly registered with the Ministry of Justice. The Zhlobin District Court also passed a decision on destruction of fourteen thousand leaflets "Five Steps

to a Better Life". The court found that the author, by transporting leaflets bearing a logo of a public association "V-Plus" that had not been duly registered as a public association in the Integrated State Register of the Ministry of Justice, was engaging in activities of an unregistered public association.

Facts as presented by the State. The State party claimed that the courts' decision was based on national law in force at that time. The leaflets seized from the author had a logo of the coalition "V-Plus" that, according to the information received from the Ministry of Justice, had not been duly registered as a public association in the Integrated State Register.

The view of the Human Rights Committee. The Committee considered, that even if the sanctions imposed on the author were permitted under national law, the State party has not advanced any argument as to why they were necessary for one of the legitimate purposes set out in Article 19, paragraph 3, of the Covenant, and why the breach of the requirement to register the V-Plus electoral block in the Ministry of Justice involved not only pecuniary sanctions, but also the seizure and destruction of the leaflets. The Committee concluded that in the absence of any pertinent explanations from the State party, the restrictions to the exercise of the author's right to impart information, 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. The Committee therefore found that the author's rights under Article 19, paragraph 2, of the Covenant had been violated.

Viktor Korneenko and Alexandr Milinkevich v. Belarus Communication No.1553/2007

The facts as presented by the authors. Mr. Viktor Korneenko being a member of the electoral headquarters of a presidential candidate Mr. Milinkevich during the presidential campaign of 2006, was transporting one quarter of the official circulation (twenty eight thousand) of electoral leaflets by his car from Minsk to Gomel. Mr. Korneenko had hard copies of all the required documents for the production and transportation of the electoral materials in question. His car was stopped in Zhlobin and searched by the traffic police and the booklets were seized. The Court not only ordered the author to pay administrative fine but also ordered destruction of all the leaflets' (28 thousand).

Facts as presented by the State. The State party confirmed that the Zhlobin District Court of the Gomel Region fined Mr. Korneenko under Article 167-3 of the Code for Administrative Offences for having breached the electoral legislation. He was found guilty of having transported, for the purpose of their dissemination, twenty eight thousand leaflets which did not comply with the requirements of Article 45 of the Electoral Code. According to the State party, the first instance court decision to have the seized leaflets destroyed as con-

stituting the object of the offence was grounded. The presidential elections of 2006 complied with the criteria for the conduct of democratic elections. The elections took place within the determined deadlines, i.e. their periodicity was respected, and they were universal. The right to electoral equality was respected. The ballot was secret; the ballot papers were counted by members of the electoral commissions. All individuals who have presented the required number of supporting signatures were registered as candidates. All candidates received equal access to public mass media.

The view of the Human Rights Committee. The Committee noted on the authors' claim that by seizing and destroying without justification, shortly before Election Day, one quarter of the campaign materials of Mr. Milinkevich, the State party has violated both Mr. Korneenko and Mr. Milinkevich's right of freedom of expression pursuant to Article 19 of the Covenant. The Committee recalled, that the right to freedom of expression is not absolute and that its enjoyment may be subject to limitations pursuant to Article 19 of the Covenant. However, only such limitations are permissible as are provided for by law and that are necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. The Committee reiterated in this context that the right to freedom of expression is of paramount importance in any democratic society, and that any restrictions on its exercise must meet strict tests of justification.

Elena Zalesskaya v. Belarus
Communication No.1604/2007

The facts as presented by the authors. The author, together with other persons, distributed copies of newspapers "Tovarishch" ("Comrade") and "Narodnaya Volya" ("Peoples' Will") to passers-by on a sidewalk in Vitebsk city. They were accused of violation of the procedure for organizing and conducting street marches and fined.

Facts as presented by the State. The State party submitted that a report on the commission of an administrative offence under the Article 167, part 1, of the Belarus Code for Administrative Offences was drawn up in relation to the author. According to the report the author organized an unauthorized mass event - a street march of a group of individuals moving from Liberty Square to Lenin Street in Vitebsk with the intent of publicly expressing their sociopolitical opinion and distributing printed materials in the form of newspapers "Narodnaya Volya" ("Peoples' Will") and "Tovarishch" ("Comrade"). The State party further states that it was repeatedly explained to the author that the distribution of printed materials during the street march is an offence, whereas legal norms, as well as the evaluation of facts of a case, are matters of the sovereign rights of each state.

The view of the Human Rights Committee. The Committee noted that administrative prosecution of the author, irrespective of the legal qualification of her actions by the authorities, amounts to a *de facto* limitation of the author's rights to impart information, since the State Party failed to invoke any specific grounds for restrictions within the meaning of Article 19, paragraph 3, of the Covenant. And since the author was accused of violating the established procedure for organizing or conducting a mass event, the Human Rights Committee further stated on this case, that when prosecuting the author for violating the law on peaceful assembly of citizens, the State party had to provide specific grounds on which the restrictions imposed on the author's right would be necessary within the meaning of valid criteria set out in Article 21 of the Covenant.

Leonid Sudalenko v. Belarus
Communication No.1750/2008

The facts as presented by the authors. In 2004, the District Electoral Commission of the Khoyniki electoral constituency No. 49 refused to register the author as a candidate for elections to the House of Representatives of the National Assembly (Parliament). Despite the refusal to register him as a candidate, the author continued his "propaganda and information work" among his supporters in order to inform them about the reasons for the non-registration of his candidacy and his opinion about the upcoming political events in the country (the Referendum of 2004). On his way to the town of Khoyniki, the author's private vehicle was stopped and searched by traffic police under the pretext that his car had been stolen and was under investigation. The author was taken to the Khoyniki District Interior Department, at which point the following print materials were seized from him: (1) a leaflet entitled "Dear Compatriots!" (479 copies); (2) photocopy of an Article from the newspaper "Narodnaya Volya" (The People's Will) (479 copies) and (3) a leaflet entitled "Five steps to a Better Life" (479 copies). On 10 October 2004, the author, together with the head of his initiative group, Mr. N.I., was detained by police officers in the town of Khoyniki, while he was distributing the print materials. This time the author was again taken to the Khoyniki District Interior Department, where another 310 copies each of the print materials listed in paragraph 2.3 above were seized from the author, together with 310 copies of the newspaper "Nedelya" (The Week). Subsequently the Khoyniki District Court ordered the author to pay an administrative fine for illegal dissemination of mass media products.

Facts as presented by the State. The State party confirms that the Khoyniki District Court of the Gomel region found the author guilty of having committed an administrative offence under Article 172-1, part 8, of the Code for Administrative Offences and ordered him to pay 144,000 roubles (6 base

amounts) as a fine. The administrative report also documents that in violation of the Law on Press and Other Mass Media, the author illegally distributed copies of newspapers and leaflets. Furthermore, the author did not deny that he was engaged in the production and distribution of the print materials in question. Therefore, on the basis of the evidence before him, the judge's decision in finding the author guilty of having committed an administrative offence was well-founded. Pursuant to Articles 28 and 244 of the same Code, items constituting a direct object of the administrative offence can be seized and then confiscated. Thus, the author's delivery to the police station with the purpose of drawing up an administrative report, as well as the seizure and subsequent confiscation of the print materials constituting a direct object of the administrative offence were lawful and grounded.

The view of the Human Rights Committee. In this case the Committee recalled its general comment No. 34 (2011) on freedoms of opinion and expression, according to which 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. 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."

Sergei Belyazeka v. Belarus
Communication No.1772/2008

The facts as presented by the authors. The author, together with 30 other inhabitants of Vitebsk whose relatives perished in the Stalinist camps in Soviet Russia, took part in a commemoration service. The commemoration was intended to include a visit to the location in the proximity of Polyai village where some of the victims of political repressions had been executed, as well as two cemeteries close to Voroni and Kopti villages, the laying of wreaths and the erection of a cross. When the participants arrived at the parking lot next to the venue for the commemoration in Polyai village, police officers demanded that the commemoration be stopped, as in the opinion of the Deputy Head of the Vitebsk District Interior Department, it was an unauthorized mass event, i.e. a "picket". The author, together with the other participants, was transported to the Vitebsk District Interior Department, where an administrative protocol in relation to the author was drawn up. He was accused of committing an administrative offence under Article 23.34, part 3, of the Code for Administrative Offences (violation of the established procedure for organizing or conducting a mass event or a "picket").

Facts as presented by the State. The State party states that the court had valid reasons for determining that the author took part in a public expression

of personal and other interests at the parking lot on the Vitebsk–Liozno motorway in the proximity of Polyai village, without regard for the procedure for conducting mass events established by the Law on Mass Events. His participation in the said mass event was corroborated by witness statements and the video recording of the event. The State party also submits that the conduct of the said mass event had not been authorized by either the head or deputy head of the local executive body. It adds that the Law on Mass Events aims at creating the conditions for the exercise of the constitutional rights and freedoms of citizens, and compliance with the Law serves as a guarantee for the protection of public safety and order in the course of such mass events. The State party concludes that the author's claims, alleging a violation of his constitutional rights and the international obligations of Belarus, are unfounded.

The view of the Human Rights Committee. In this case the Committee notes the author's claim that, by breaking up the commemoration to honour the victims of the Stalinist repressions in Soviet Russia, the State party's authorities violated his right to freedom of expression under Article 19, paragraph 2 and Article 21 of the Covenant, since he was taken away from the commemoration and subsequently fined 620,000 Belarusian roubles for publicly expressing personal and other interests during the unauthorized "picket". It further notes the State party's contention that the author was subjected to administrative liability under Article 23.34, part 3, of the Code for Administrative Offences for having breached the procedure for organizing and holding mass events. The Committee observes that, in the present case, the State party has argued that the provisions of the Law on Mass Events are aimed at creating the conditions for the exercise of the constitutional rights and freedoms of citizens and the protection of public safety and public order in the course of such mass events. The Committee also observes that the author has argued that Article 23.34 of the Code for Administrative Offences does not apply to him, since it does not provide for administrative liability for mere participation in a mass event. In this regard, the Committee notes that the author and the State party disagree on whether the commemoration in question constituted a "mass event" that was subject to the "procedure for holding mass events" established by the Law on Mass Events, whether Article 23.34 of the Code for Administrative Offences proscribes mere participation in a mass event and whether the author displayed any flags, or other symbols or propaganda materials. However, even if the sanctions imposed on the author were permitted under national law, the Committee notes that the State party did not advance any argument as to why they were necessary for one of the legitimate purposes set out in Article 19, paragraph 3, of the Covenant, and what dangers would have been created by the author's publicly expressing his negative attitude to the Stalinist repressions in Soviet Russia. The Committee concludes that in the absence of any pertinent explanations

from the State party, the restrictions on the exercise of the author's right to freedom of expression cannot be deemed necessary for the protection of national security or of public order (*ordre public*) or for respect for the rights or reputations of others. The Committee therefore finds that the author's rights under Article 19, paragraph 2, of the Covenant have been violated in the present case. In this context, the Committee recalls that the rights and freedoms set forth in Article 21 of the Covenant are not absolute but may be subject to limitations in certain situations. The second sentence of Article 21 of the Covenant requires that no restrictions may be placed on the exercise of the right to peaceful assembly other than those imposed (1) in conformity with the law and (2) which are necessary in a democratic society in 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. In the present case, the Committee must consider whether the restrictions imposed on the author's 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 the State party's assertion that the restrictions were in accordance with the law. However, the State party has not provided any information as to how, in practice, commemorating the victims of the Stalinist repressions 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 case, the State party has also violated the author's right under Article 21 of the Covenant.

Maria Tulzhenkova v. Belarus (Communication No 1838/2008)

Facts as presented by the author. The author was distributing leaflets with information about an upcoming peaceful gathering in Gomel. She was arrested by militia and a report that she had committed an administrative offence under Article 23.34, part 1, of the Belarus Code of Administrative Offences was drawn up. This provision establishes administrative liability for violation of the procedure for organizing or holding gatherings, meetings, demonstrations, street marches and other mass events. The author submits that the organization of mass events is regulated by the Law on Mass Events in the Republic of Belarus. According to Article 8 of the Law, before permission to hold the mass event is received, its organizer(s) and also other persons do not have the right to announce in mass media the date, place and time of its holding, prepare and distribute leaflets, posters and other materials for this purpose. Since the author was distributing leaflets with information about an upcoming peaceful gathering for which she did not yet have

permission, militia officers considered that she had breached the law. The Central District Court of Gomel found the author guilty of having committed an administrative offence under Article 23.34, part 1, of the Code on Administrative Offences and imposed a fine of 350'000 Belarusian roubles. The court specifically stated that the author was advertising a mass event before the permission to hold said event was received from the authorities, thus breaching the order for organizing and holding mass events.

Facts as presented by the State. The State reports that Ms. Tulzhenkova was brought to administrative responsibility under Article 23.34, part 1, of the Belarus Code of Administrative Offences for breaching the order for organizing and holding mass events. According to Article 8 of the Law on Mass Events, before permission to hold the mass event is received, its organizer(s) and also other persons do not have the right to announce in mass media the date, place and time of its holding, prepare and distribute leaflets, posters and other materials for this purpose. At the time of distribution by Ms. Tulzhenkova of leaflets calling for the holding of a mass event on 25 March 2008, no permission to hold the mass event in question had been received. Thus, Ms. Tulzhenkova was administratively sanctioned in accordance with the requirements of national legislation.

The view of the Human Rights Committee. The Committee notes the author's claims that the administrative sanction imposed on her for distributing leaflets containing information about an upcoming peaceful gathering before permission to hold the event in question had been granted, as required under the domestic law, constitutes an unjustified restriction on her freedom to impart information, as protected by Article 19, paragraph 2, of the Covenant. The Committee observes that, in the present case, the State party has argued that the provisions of the Law on Mass Events are aimed at creating conditions for the realization of citizens' constitutional rights and freedoms and the protection of public safety and public order during the holding of such events on streets, squares and other public locations. However, the State party has not supplied any specific indication of what dangers would have been created by the early distribution of the information contained in the author's leaflet. The Committee considers that, in the circumstances of the case, the State party has not shown how the fine imposed on the author was justified under any of the criteria set out in Article 19, paragraph 3.

Mechislav Grib v. Belarus (Communication No 1875/2008)

Facts as presented by the author. The author complained about the refusal of the Belarusian authorities to issue an attorney license to him, on the grounds that he was fined for participating in a peaceful rally.

Facts as presented by the State. The State party explains that the administrative offense meant a certain behavior incompatible with the functions of a lawyer and contradicting to the requirements of Paragraph 2 of Article 18 of the Law on the Legal Profession and the lawyers ethics norms, which require lawyers to act within the law and always to follow the highest professional standards.

The view of the Human Rights Committee. The Committee in the case reminded that freedom of opinion and freedom of expression are necessary conditions for the full development of personality, and they are the cornerstone of every free and democratic society. Rights and freedoms provided for in Articles 19 and 21 of the Covenant, are not absolute and can be, under certain circumstances, subject to some limitations. According to Paragraph 3 of Article 19, such restrictions must be established by law and be necessary for respect of the rights and reputations of other individuals and for the protection of the interests of national security or public safety, public order, the protection of public health or morals national. Analogically the second sentence of Article 21 of the Covenant requires that no restrictions may be placed on the exercise of the right to peaceful assembly, other than those in conformity with the law which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. The Committee observes that in this case, the State party limited explanations to the effect that the fine was imposed on the author in accordance with the provisions of the Code for Administrative Offense, which subsequently led to refusal to issue a license to him in compliance with the provisions of the Law on Advocacy. The Committee notes that at the same time, the State party has not submitted any explanation as to how the refusal to issue the attorney license to the author is reasonable and necessary for the purposes of Paragraph 3 of Article 19 and/or the second sentence of Article 21 of the Covenant. Under the circumstances of this case and in the absence of any other information on this subject, the Committee considers that, in this case the author's rights under Paragraph 2 of Article 19 and Article 21 of the Covenant were violated.

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There is a unique situation now in Belarus: national law enforcement and judicial systems are neglecting the country's obligations on the international level in terms of providing everyone's right to freedom of peaceful assembly and to freedom of expression as guaranteed by the International Covenant on Civil and Political Rights. It is the rejection of law enforcement and in the first hand of the judicial system to stand up for the rights and freedoms of

its citizens encourages potential victims to appeal to the UN Committee on Human Rights to protect their rights.

Now there are more than ten individual citizens communications only from Gomel region are registered and pending at the UN Human Rights Committee on the violation of the right to freedom of expression and peaceful assembly (communications № 1785/2008 Oleshkevich v. Belarus, 1836/2008 Katsora v. Belarus, 1851/2008 Sekerko v. Belarus, 1919/2009 Protsko v. Belarus, 1976/2010 Kuznetsov and others v. Belarus, 1982/2010 Mikhalchenko v. Belarus, 2019/2010 Poplavny v. Belarus, 2103/2011 Poliakov v. Belarus, 2114/2011 Sudalenko v. Belarus, 2156/2012 Nepomnyashchikh v. Belarus, 2168/2012 Koreshkov v. Belarus, 2190/2012 Sudalenko and Poplavny v. Belarus).

More than 30 similar communications from Gomel region have been submitted to the UN Human Rights Committee and pending registration.

Roman Kisliak

INDIVIDUAL COMMUNICATIONS AS A METHOD TO PROMOTE POSITIVE CHANGES IN THE AREA OF HUMAN RIGHTS (INGA ABRAMOVA V. REPUBLIC OF BELARUS)

The implementation of changes for the better respect for and observance of human rights in the country – it is always a rather difficult task, addressed by many human rights organizations and institutions. This problem can be solved by means of a wide spectrum of activities: submitting communications to the UN Committees alternative to official regular state reports, collecting and monitoring of violations facts, lobbying for policy statements adoption by international organizations, initiating legislation changes within the state, etc. Along with these activities involving efforts of many people and organizations, there is a procedure that allows one individual to not only raise specific problem in the system, but often to have it solved. This procedure is consideration of individual communications (complaints) by international institutions set up to monitor compliance of international conventions by governments.

Such a procedure is provided by the European Convention on Human Rights and Fundamental Freedoms (European Court of Human Rights) within the Council of Europe. Similar procedures[1] for hearing individual complaints are provided for by individual UN conventions for human rights protection: the Optional Protocol to the International Covenant on Civil and Political Rights (the Human Rights Committee), Article 14 of the Convention on the Elimination of All Forms of Racial Discrimination (the Committee on the Elimination of Racial Discrimination), Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Committee against Torture), the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (the Committee on the Elimination of Discrimination against Women), the Optional Protocol to the Convention on the Rights of Persons with Disabilities (the Committee on the Rights of Persons with Disabilities), Article 31 of the International Convention for the Protection of All Persons from Enforced Disappearance (the Committee on Enforced Disappearances), the Third Optional Protocol to the Convention on the Rights of the Child (the Committee on the Rights of the Child), Article 77 of the Convention on the Rights of All Migrant Workers and Members of their Families (the Committee on Migrants Workers), the Op-

[1] There had been a total of eight procedures adopted when this article was written, five of them were actually operational, whereas the others didn't come into legal force, since they hadn't been ratified by a sufficient number of states.

tional Protocol to the International Covenant on Economic, Social and Cultural Rights (Committee on Economic, Social and Cultural Rights). For Belarusians to complain against violations of their rights by the Belarusian State on the moment of publication of this Article only two procedures have been available to address two bodies, respectively: the Human Rights Committee and The Committee on the Elimination of Discrimination against Women.

Under such a procedure one individual can stand against the entire state. For the first time in international law individuals in their procedural capability was compared to a procedural capabilities of the state, which had violated the rights of the individual. Individual and the state, after the institution of proceedings following the individual communication become equal parties, as in the court lawsuit, according to the principle *audiatur et altera pars*[2]. This is necessary, first of all, in order to ensure hearing of the communications in conditions as close as possible to the lawsuit in court: in an unbiased way.

The above mentioned committees examine individual communications several years. First of all, this is due to the fact that the committees are not permanent bodies, they are summoned on a three-week sessions, three times a year. The duration of the examination is also due to the written communications within the case. In the Convention bodies usually there is no oral hearing for such complaints[3]. The whole communication procedure is held by means of the exchange of written messages (notes, comments, objections) and it might take from six months to several years. After the communication is completed the relevant body may proceed with the consideration of the case based on all the information received from the parties. If the Committee on the Elimination of Discrimination against Women begins to hear the case after a short time after the communication is completed and approximately two years can pass from the registration of the communication till the decision has been taken. Whereas, the Human Rights Committee has significant delays in hearing the cases because of the large quantity of complaints received. On average, it takes 4-5 years to process a case, although there cases reviewed for a longer period (of up to 9 years) and shorter consideration - so-called priority cases (about 2 years)[4].

Chances of an individual to have his rights restored as a result of an individual communication can be illustrated on the following example. The "European March" campaign was to be held in Minsk in October 2007. Young people from different regions were hanging blue ribbons in order to draw public attention to the march. When hanging the blue ribbons two social ac-

[2] Let us also hear the opposite side (Latin).

[3] Such hearings are held on the most important cases before the Grand Chamber of the European Court of Human Rights. There was the only case of oral examination of the case against Kazakhstan in the UN Committee against Torture in 2012.

[4] An exceptional case: case examination within the period of less than one year – Communication 2120/2011 Vladislav Kovalev and others v. Belarus (see Annex 9).

tivist – Yury Bakur and Inga Abramova – were arrested in the city of Brest on October 10th 2007. Since hanging blue ribbons is considered neither a crime nor administrative offense in Belarus, militiamen accused the young people of allegedly "using swear words" and put them in the temporary detention facility for administrative detention. The next day the court imposed upon them a sanction in the form of, respectively, 10 and 5 days of administrative arrest to be served in the detention centre of the Brest Lenin District Interior Department.

The fact that the conditions in such facilities are rather creepy can be known only to those who get there to serve their penalty.

In all previous years only "minor hooligans" were kept there as a result of drunken family conflicts who were reported by their wives or mothers, or suspects in criminal cases who then are released under a written pledge not to leave town or transferred to investigative detention facilities. However, since 2005 (starting from the prosecution of the Union of Poles in Belarus) public activists start getting there more and more often before the election or mass events. Such phenomena were called "snatches" or "preventive detentions". In fact, such arbitrary detentions (in the violation of paragraph 1 of Article 9 of the ICCPR), followed by accusations of "using swear words", which in fact did not take place, but which was proved by means of evidence by police officers and their invited civilians. The administrative cases were staged in order to isolate activists in detention facilities in order to reduce the number of active protesters in the forthcoming actions. Such instructions must have been given by higher authorities to the local militia officers, and if there were no specific lists of persons subject to such internment, militia officers correspondingly falsely accused the first person they could catch so to speak for the sake of appearance, to demonstrate their "work" to the bosses. Since 2005, community activists were getting to detention facilities more and more often. And if the "family hooligans" and suspects in criminal cases, as a rule, did not make the information on the conditions in detention centres available to the general public, the activists, among those were also young journalists, did not keep silent.

Inga Abramova at the time of detention for 5 days of administrative arrest was only a yesterday schoolgirl who was just starting her journalist career. For her, the conditions in detention and treatment by its staff were a real shock. While she was kept there, she was writing an essay about what happened to her after the arrest and till the release. Upon her release this essay called "The Five Days" was published in the local newspaper "Brest Courier". Article provoked big public response. Sincerity and honesty of the story made a member of the Belarusian Parliament to send a parliamentary inquiry to the Minister of Interior: why are there such severe conditions of detention for individuals serving such small serving offense?: Also it became apparent

that in the vast majority of the Belarusian Interior Ministry detention centres staff are exclusively male. Therefore the harsh conditions of detention as they are for women are even more unbearable. It turned out that this problem has never been raised either at the Ministry of Interior nor in society. Inga Abramova filed an appeal against her rights violations, along with her complaint were submitted by other activists in Brest, including other girls. Proceedings of such complaints coincided in time with investigation at the Interior Ministry of the inquiry of the deputy. Results of these proceedings were published by the activists in local and national media.

From the resolution on the case: "The author submits that the cells were cold; the heaters were turned off although the outside temperature was as low as 1° C. She claims that detention in such conditions amounted to torture. The cell was equipped with a washstand with one cold water tap and a toilet bowl. The toilet was located inside the cell and was separated from the rest of the cell only on one side by a small screen of 50 by 50 centimetres. Thus, if a cellmate was sitting on a bed situated opposite the toilet, she could see anyone using the toilet. Male prison staff periodically watched the prisoners through the door peephole. Since the screen did not obstruct the view of the toilet from the door, they could observe the author using the toilet. It was unpleasant and embarrassing for her to use the toilet in such circumstances. She claims that having to use the toilet without a proper separation between it and the rest of the cell amounted to degrading treatment.

She adds that the bedding provided was dirty and the cells were full of spiders. Her cell was full of smoke as her cellmates were smokers and the ventilation did not disperse the tobacco smell. The lighting was also poor, the window was small and the glass was so dirty that the daylight did not penetrate. She saw daylight only once during her five-day detention, when she was allowed a 15-minute walk outside. The light provided by the light bulb in the cell was not sufficient to read by and she had to get up and stand next to it to be able to read. The light was switched on around the clock, which prevented her from sleeping. She was fed only twice a day…After the first night spent in the cold cell, she developed severe back pain. At her request, an ambulance team intervened and provided her with medical aid. She also had headaches and fever. The author claims that she has had many health problems since her detention in such conditions.

Before her admission to the temporary detention facility, she was taken to a railway station for a body search. There were no female staff at the detention facility to perform the search. At the time of her admission to the detention facility, one of the guards allegedly poked her with his finger on the pretext of checking whether she was wearing a belt . She said, "Hands off". After a moment, he poked her buttock with his finger. In response to her second "Hands off", he said that she should be grateful that they were

not undressing her. Another security guard allegedly threatened to strip her naked.

The guards made frequent humiliating comments about the author. For example, when they saw her standing next to the light bulb reading, one of the guards commented that she needed "to see a psychiatrist". On several occasions, the guards "joked" that she would be "taken outside and shot". Furthermore, instead of calling her by her name, they called her "the fourth", as that was the number of the bed she was occupying in her cell. At one point, a prison guard threw a dead rat into the cell that she was sharing. When she and her cellmates jumped on their beds screaming in fear, the guard was laughing.

Simultaneously with the appeal of some women sent a request to Ministry of Interior with the question why not there are no female staff in detention centres, despite the fact that the minimum UN standards for the Treatment of Prisoners prescribe that the male staff is only allowed to enter "female" blocks of the detention facilities only accompanied by female staff. The answer they received was: "This is not provided by the Personnel Regulation of the centre". Thus, it became apparent that the lack of female staff at detention facilities - is the result of the stereotype of militia senior staff, who are mostly men. "The women problem" had been simply ignored by respective militia staff for many years until it has been mentioned by Inga Abramova (and some other women) first to the national institutions, and then on the international level, by submitting an individual communication to the Committee on the Elimination of Discrimination against Women within the framework of the Optional Protocol to the International Convention on the Elimination of All Forms of Discrimination against Women.

"STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS

Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

Paragraph 53:

(1) In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution.

(2) No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.

(3) Women prisoners shall be attended and supervised only by women officers. This does not, however, preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women."

The peculiarity of this case is that Inga Abramova raised the question of violation of her civil rights (usually the right of prisoners to humane conditions of detention and the right not to be subject to torture and other cruel inhuman treatment and punishment) by recognition of her discrimination as of a woman.

If earlier it was so-called "soft" international law, after consideration of this case this rule has become "hard" law as a guarantee of the absence of violations in line with the Women's Convention. In fact, the norm of UN Standard Minimum Rules for the Treatment of Prisoners has become the norm of contractual law, as it was interpreted by means of the norm prohibiting discrimination against women under the Convention.

Thus, all parties to the International Convention on the Elimination of All Forms of Discrimination against Women must bring all the conditions of detention of women in line with the requirement of the paragraph Standard Minimum Rules to prevent discrimination of women violating of the above mentioned Convention.

As for positive changes in the system, they took place even before the decision on the case was taken: state bodies officials finally could identify the problem, and in 2010 at the detention centre, where Inga Abramova was held two female militia members of staff were employed. Although officially Belarus refuses to admit the problem exists, in fact, the governmental authorities recognized the problem and took certain steps to resolve it, at least, with respect to this particular detention centre[5].

It should be noted that the Committee on the Elimination of Discrimination against Women took a very serious approach to this problem, and developed a number of recommendations to bring the situation at detention of women at MoI detention facilities in compliance with the norms.

Abstract from the decision on the case No 23/2009 *Inga Abramova v. Belarus*:

"7.9 Acting under Article 7, paragraph 1, of the Optional Protocol to the Convention, and in the light of all the above considerations, the Committee is of the view that the State party has failed to fulfil its obligations under Articles 2 (a), (b), (d), (e) and (f), 3 and 5 (a), read in conjunction with Article 1 of the Convention, and with general recommendation No. 19 (1992) of the Committee, and makes the following recommendations to the State party:

Concerning the author of the communication :

Provide appropriate reparation, including adequate compensation, to the author, commensurate with the gravity of the violations of her rights;

General:

[5] Temporary detention facility of Leninsky Department of the Interior of the city of Brest.

(a) Take measures to ensure the physical and psychological safety of women detainees in all detention facilities, including adequate accommodation and materials required to meet women's specific hygiene needs;

(b) Ensure access to gender-specific health care for women detainees;

(c) Ensure that allegations by women detainees about discriminatory, cruel, inhuman or degrading treatment are effectively investigated and perpetrators prosecuted and adequately punished;

(d) Provide safeguards to protect women detainees from all forms of abuse, including gender-specific abuse, and ensure that women detainees are searched and supervised by properly trained women staff;

(e) Ensure that personnel assigned to work with female detainees receive training relating to the gender-specific needs and human rights of women detainees in line with the Convention as well as the United Nations Rules for the Treatment of Women Prisoners and Non -custodial Measures for Women Offenders (the Bangkok Rules);

(f) Formulate policies and comprehensive programs that ensure the needs of women prisoners are met, in respect of their dignity and fundamental human rights."

At the moment the follow-up procedure is underway. The communication between the author and the state is in process regarding the implementation of the Committee's recommendations.

Inga Abramova requested information on the presence of female staff in other detention facilities.

Observers point out the increase of the number of female staff in detention centres over 2010. If previously only male staff could escort prisoners in pre-trial detention facilities, now it is also allowed to female supervisors. Unfortunately, this information has not yet been officially confirmed due to the fact that the system is closed for the public.

Thus, the single complaint alone has led to the realization of necessity of reforms in conditions of detention of women in penitentiary institutions in this country. And although it is not clear how the system in Belarus will be reformed in reality, it is clear that the changes are underway. So far the most important achievement is that de facto (not de jure) the problem was recognized and certain steps have been done to correct these deficiencies in detention of women.

This case demonstrates a possibility to change the system through individual appeal. Obviously, this way to implement reforms in human rights area requires minimum resources and efforts. One complaint (well prepared and for the most interesting case) to the relevant authority may change the situation.

For the sake of fairness it should be noted that not all problems in the field of human rights in Belarus can be solved by individual communications to UN committees. Within strategic litigation it is possible[6] to resolve problems that, on the one hand, do not affect the interest of retention of power and safety of the present government, on the other hand, does not require much pressure on the authorities to change *the status quo*. It is, apparently, the fact that the declaration by the government of the thesis that there are no problems in Belarus with the observance of the rights of children and women, that helped in this case and lead to positive changes. Despite the fact that most of the problems in the area of human rights cannot be eliminated only by means of individual complaints to UN committees, there are still many issues where a well prepared complaint sent to the UN would be sufficient to resolve the case.

[6] It refers to Belarus

ANNEXES

Annex 1

STATISTICAL REVIEW OF INDIVIDUAL COMMUNICATIONS REPORTED TO THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS*

23 April 2012

	Living cases				Views		
States parties	Pending	Admissible	Inadmissible	Discontinued	Violation (1)	No violation (2)	**Total**
Albania	0	0	0	0	0	0	0
Algeria	25	0	1	1	15	0	42
Andorra	0	0	0	0	0	0	0
Angola	0	0	0	1	2	0	3
Argentina	2	0	5	0	4	0	11
Armenia	0	0	1	0	0	0	1
Australia	24	0	32	43	28	6	133
Austria	3	0	10	1	5	6	25
Azerbaijan	2	0	0	0	1	0	3
Barbados	0	0	3	2	0	0	5
Belarus	81	0	8	9	29	2	129
Belgium	1	0	2	0	1	3	7
Benin	1	0	0	0	0	0	1
Bolivia	0	0	0	0	2	0	2
Bosnia & Herzegovina	15	0	1	0	0	0	16
Brazil	0	0	0	0	0	0	0
Bulgaria	3	0	3	0	0	0	6
Burkina Faso	0	0	0	0	1	0	1
Cameroon	3	0	0	0	7	0	10
Canada	17	0	82	37	17	12	165
Cap Verde	0	0	0	0	0	0	0
Central African Republic	0	0	0	0	2	0	2
Chad	0	0	0	0	0	0	0
Chile	0	0	7	2	0	0	9
Colombia	8	0	9	6	18	0	41

* The table contains the latest published information as of 23 April 2012. According to the HCHR as of 21 January 2013, there was the total of 2,233 cases registered at the Human Rights Committee, 145 out of them concerning Belarus.

Congo	0	0	0	0	0	0	0
Costa Rica	1	0	1	2	0	0	4
Côte d 'Ivoire	0	0	1	0	1	0	2
Croatia	1	0	1	0	2	0	4
Cyprus	0	0	4	1	0	0	5
Czech Republic	10	0	20	4	29	0	63
Democratic Republic of the Congo	3	0	4	3	15	0	25
Denmark	11	0	9	4	2	0	26
Djibouti	0	0	0	0	0	0	0
Dominican Republic	0	0	0	0	3	0	3
Ecuador	0	0	0	4	5	0	9
El Salvador	0	0	0	0	0	0	0
Equatorial Guinea	0	0	0	0	4	0	4
Estonia	1	0	0	2	1	3	7
Finland	1	0	15	3	5	9	33
France	4	0	45	11	9	12	81
Gambia	0	0	0	0	0	0	0
Georgia	0	0	0	2	5	0	7
Germany	0	0	17	1	1	1	20
Ghana	0	0	0	0	0	0	0
Greece	0	2	3	0	3	2	10
Guatemala	0	0	0	0	0	0	0
Guinea	0	0	0	0	0	0	0
Guyana[3]	0	0	0	2	10	0	12
Honduras	0	0	0	0	0	0	0
Hungary	0	0	5	2	3	1	11
Iceland	0	0	2	1	1	0	4
Ireland	0	0	3	0	1	1	5
Italy	0	0	10	3	1	1	15
Jamaica[1]	0	0	39	18	100	20	177
Kazakhstan	10	0	0	0	1	0	11
Kyrgyzstan	5	0	2	0	14	0	21
Latvia	1	0	1	2	2	1	7
Lesotho	0	0	0	0	0	0	0
Libyan Arab Jamahiriya	8	0	1	0	11	0	20
Liechtenstein	0	0	0	0	0	0	0
Lithuania	3	0	1	1	2	0	7
Luxembourg	0	0	0	0	0	0	0
Madagascar	0	0	0	2	4	0	6
Malawi	0	0	0	0	0	0	0
Maldives	0	0	0	0	0	0	0
Mali	0	0	0	0	0	0	0

Malta	0	0	0	0	0	0	0
Mauritius	0	1	4	1	1	0	7
Mexico	0	0	0	0	0	0	0
Moldova	0	0	0	0	0	0	0
Mongolia	0	0	0	0	0	0	0
Montenegro	0	0	0	0	0	0	0
Namibia	0	0	1	0	2	0	3
Nepal	8	1	0	0	3	0	12
Netherlands	6	0	61	3	9	20	99
New Zealand	2	0	10	8	4	8	32
Nicaragua	0	0	1	3	1	0	5
Niger	0	0	0	0	0	0	0
Norway	2	0	9	0	3	3	17
Panama	0	0	4	7	2	0	13
Paraguay	0	0	0	0	3	0	3
Peru	0	0	0	4	15	1	20
Philippines	0	0	2	10	12	2	26
Poland	0	0	4	2	1	2	9
Portugal	0	0	3	1	2	1	7
Republic of Korea	3	0	1	1	119	2	126
Romania	0	0	0	0	1	1	2
Russian Federation	25	1	16	7	15	3	67
Saint Vincent & the Grenadines	0	0	0	0	1	0	1
San Marino	0	0	0	0	0	0	0
Senegal	0	0	0	0	1	0	1
Serbia[4]	0	0	1	0	2	0	3
Seychelles	0	0	0	0	0	0	0
Sierra Leone	0	0	0	0	3	0	3
Slovak Republic	2	0	4	0	1	0	7
Slovenia	0	0	0	0	0	0	0
Somalia	0	0	0	0	0	0	0
South Africa	0	0	0	0	1	1	2
Spain	7	0	70	7	22	13	119
Sri Lanka	1	0	5	0	14	0	20
Suriname	0	0	0	0	8	0	8
Sweden	1	0	5	2	2	6	16
Tajikistan	3	0	2	2	22	0	29
The former Yugoslav Republic of Macedonia	0	0	0	1	0	0	1
Togo	0	0	0	0	4	1	5
Trinidad and Tobago[2]	0	0	15	8	22	3	48
Tunisia	1	0	0	0	0	0	1

Turkey	0	0	0	0	2	0	2
Turkmenistan	4	0	0	1	4	0	9
Uganda	0	0	0	0	0	0	0
Ukraine	4	0	2	5	4	1	16
Uruguay	2	0	6	28	49	1	86
Uzbekistan	6	0	3	43	32	3	87
Venezuela	2	0	1	0	1	0	4
Zambia	2	0	4	3	9	0	18
115	325	5	582	317	764	152	**2145***
	330		**582**	**317**	**916**		

330 living cases/cas ouverts/casos vivos

(1) Disclose a Violation / Le Comité a determiné qu'il y a eu violation / El Comité determinó que hubo violación

(2) Disclose No Violation / Le Comité a determiné qu'il n'y a pas eu violation / El Comité determinó que no hubo violación

* 2034 registered communications with respect to 84 countries. / 2034 communications enregistrées relatives à 84 pays. / 2034 comunicaciones

Notes

[1] Denunciation by Jamaica took effect on 23 January 1998.

[2] Denunciation by Trinidad and Tobago of the Optional Protocol took effect on 27 June 2000.

[3] The Government of Guyana had initially acceded to the Optional Protocol on 10 May 1993. On 5 January 1999, the Government of Guyana notified the Secretary-General that it had decided to denounce the said Optional Protocol with effect from 5 April 1999. On that same date, the Government of Guyana re-acceded to the Optional Protocol with a reservation.

[4] The Republic of Serbia succeeded the Republic of Serbia and Montenegro, after the declaration of independence of Montenegro on 3 June 2006.

Annex 2

LIST OF CASES WITH REGARDS TO THE REPUBLIC OF BELARUS CONSIDERED BY THE HUMAN RIGHTS COMMITTEE

Cases v. Belarus

	Case No	No in Belarus	Committee Session	Victim's Name	Final Decision	Violation Confirmed	Articles of the Covenant allegedly violated
1	780/1997	BLR(01)	68	Laptsevich v. Belarus	views	yes	19(2)
2	921/2000	BLR(06)	74	Dergachev	views	yes	2,14,19
3	886/1999	BLR(04)	77	Schedko	views	yes	6,7,14
4	887/1999	BLR(05)	77	Staselovich	views	yes	6,7,14
5	814/1998	BLR(02)	78	Pastukhov	views	yes	14(1), 25(c)
6	927/2000	BLR(07)	81	Svetik	views	yes	14(3g), 19
7	1207/2003	BLR(21)	84	Malakhovsky & Pikul	views	yes	18(1,3), 22(1,2)
8	1039/2001	BLR(11)	85	Zvozskov et al.	views	yes	2(1),22(1,2),26
9	1274/2004	BLR(24)	86	Korneenko	views	yes	14(1),22(1,2),26
10	1009/2001	BLR(09)	87	Shchetko	views	yes	19(2,3),25
11	1022/2001	BLR(10)	87	Velichkin	views	yes	19(2)
12	1047/2002	BLR(12)	88	Sinitsin	views	yes	25(b) в связи с 2
13	1100/2002	BLR(13)	88	Bandajevski	views	yes	9,10,14,19
14	1342/2005	BLR(28)	88	Gavrilin	views	no	2 (1,2), 9 (1,4), 11, 14, 15 (1), 26
15	1296/2004	BLR(25)	90	Belyatsky et al.	views	yes	14(1),22(1,2),26
16	1178/2003	BLR(20)	94	Smantser	views	yes	7,10(1),9(1,2,3,4), 14(1,2,3b,3c,3d)
17	1553/2007	BLR(37)	95	Korneenko & Milinkevich	views	yes	14(1),19,25,26
18	1311/2004	BLR(26)	96	Osiyuk Ivan	views	yes	14(3b,3d,3e)
19	1392/2005	BLR(34)	97	Loukyanchik	views	yes	2,14(1),25(b)
20	1502/2006	BLR(35)	99	Marinich	views	yes	7,9(1), 10, 14(1,2,3a,3b), 15, 17, 19, 22
21	1377/2005	BLR(32)	99	Katsora	views	yes	14(1),19(1,2),26
22	1354/2005	BLR(30)	100	Sudalenko	views	yes	2,14(1),25(a,b),26
23	1383/2005	BLR(32)	100	Katsora et al.	views	yes	14(1),22,26
24	1390/2005	BLR(33)	100	Koreba	views	yes	2(3), 7, 10(2b), 14(2,3e,3g,4)

25	1604/2007	BLR(39)	101	Zalesskaya	views	yes	19(2,3), 21, 26
26	1812/2008	BLR(52)	102	Levinov	views	no	7, 10, 9(3), 14(1,2,3b), 19, 26
27	1316/2004	BLR(27)	103	Gryb	views	yes	2, 14, 19, 21, 26
28	1838/2008	BLR(59)	103	Tulzhenkova	views	yes	19(2)
29	1772/2008	BLR(45)	104	Belyazeka	views	yes	19(2),21
30	1820/2008	BLR(54)	104	Krasovskaya et al.	views	yes	2(3),6,7
31	1750/2008	BLR(44)	104	Sudalenko	views	yes	19(2)
32	1226/2003	BLR(22)	105	Korneenko	views	yes	19,22,25
33	1784/2008	BLR(47)	105	Shumilin	views	yes	19(2)
34	1790/2008	BLR(50)	105	Govsha, Syritsa & Mezyak	views	yes	19, 21
35	1867/2009, 1936, 1975, 1977-1981, 2010/2010	BLR(63, 74, 80, 82-86,101)	105	Levinov	views	yes	19(2)
36	2120/2011	BLR(125)	106	Kovalev et al.	views	yes	6, 7, 9(3), 14(1,2,3b,3g,5)
37	1836/2008	BLR(57)	106	Katsora	views	yes	2,19,21
38	1830/2008	BLR(55)	106	Pivonos	views	yes	19(2),21
			views:	38			
					decisions		**Inadmissible**
1	1161/2003	BLR(19)	91	Kharkhal v. Belarus	decision		6(1),14(5)
2	1358/2005	BLR(30)	92	Korneenko	decision		14(1),25,26
3	1537/2006	BLR(36)	97	Gerash-chenko	decision		14,26
4	1994/2010	BLR(98)	101	I.S.	decision		8(3a), 14(1)
5	1814/2008	BLR(53)	102	P.L.	decision		2,5,14(1),19,26
6	1749/2007	BLR(43)	103	V.S.	decision		18, 14(1)
7	1634/2007	BLR(42)	104	Korneenko	decision		2,14,22
8	1606/2007	BLR(40)	104	E.I.	decision		2,7,9,14
9	2169/2012	BLR(136)	106	S.K.	decision		14,19
			decision:	9			

Valid as of 16.12.2012

Analysis was prepared by *Roman Kisliak*

38 Views (36:2)

46 Cases heard on the merit (44:2)

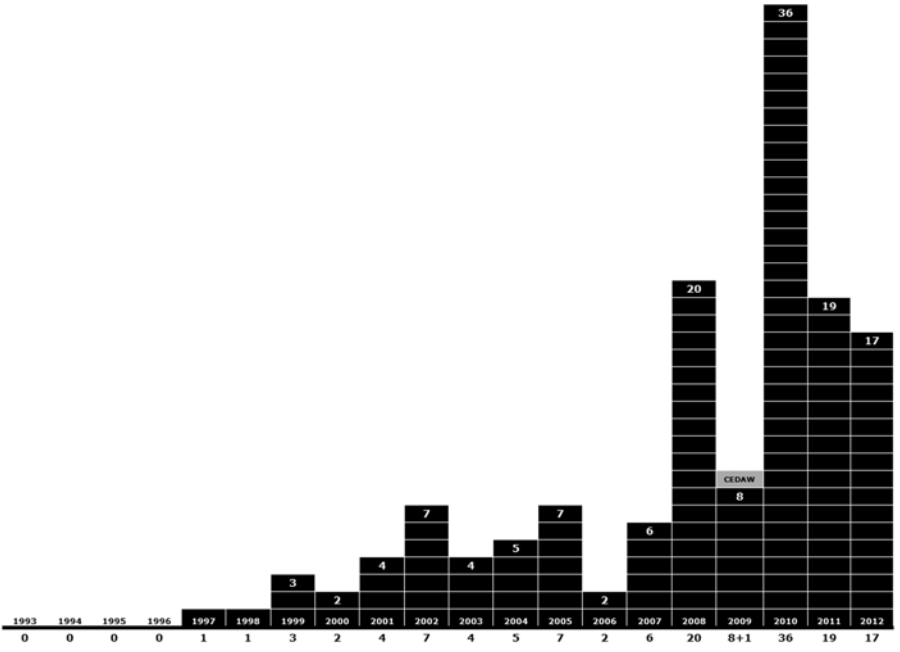
9 Decision of Inadmissibility

9 Cases dismissed

Annex 3

DYNAMICS OF CASES ON INDIVIDUAL COMMUNICATIONS AGAINST BELARUS REGISTERED AT THE UN BODIES, BY YEAR

(at the UN Human Rights Committee and the UN Committee on the Elimination of Discrimination against Women)



As of November 5, 2012 142 cases were registered at the HRC. 17 cases out of them were registered in 2012.

One case against Belarus was registered at the Committee on Elimination of Discrimination against Women (CEDAW).

The review was prepared
by *Roman Kisliak*,
human rights activist

Annex 4

NUMBER OF CASES AGAINST BELARUS REGISTERED AND HEARD AT THE HUMAN RIGHTS COMMITTEE, BY YEAR

(as of November 5th, 2012)[1]

Year	Cases registered	Cases heard[1]
1992	–	–
1993	–	–
1994	–	–
1995	–	–
1996	–	–
1997	1	–
1998	1	–
1999	3	–
2000	2	1
2001	4	–
2002	7	1
2003	4	3
2004	5	1
2005	7	2
2006	2	6
2007	6	2
2008	20	2
2009	8	4
2010	36	5
2011	19	7
2012	17	21
ВСЕГО	142	55

Heard on the merits (views)[2]: 46 cases
Considered as inadmissible (decisions): 9 cases
Discontinued with non-public decisions: 9 cases
Total completed (heard or dismissed): 64 cases
Total "living": 78 cases
TOTAL registered: 142 cases

The review was prepared by *Roman Kisliak*,
human rights activist

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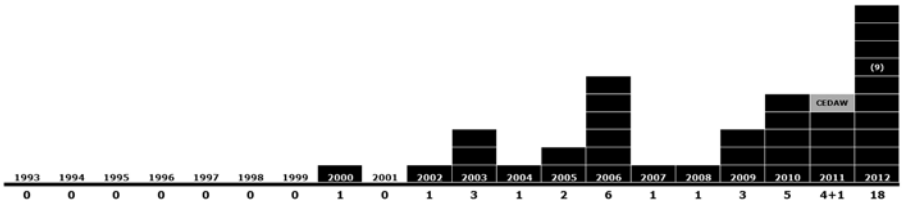
1 This column of the table contains only the cases for which final public solutions were delivered: on the merit (views) - 46, and on inadmissibility (decisions) - 9. The column does not include cases, in which non-public accepted decision passed by the Committee's: on admissibility and dismissal of case - 9. The data provided is of 19.09.2012.

2 On the 105th session nine cases were combined in one and considered together with Views being adopted jointly for Communication *Pavel Levinov v. Belarus*. Thus, the number of cases considered on the merit (46), and the number of Views adopted (38) differ.

Annex 5

DYNAMICS OF INDIVIDUAL COMMUNICATIONS AGAINST BELARUS HEARD ON THE MERITS BY UN COMMITTEES, BY YEAR

(at the UN Human Rights Committee and the UN Committee on the Elimination of Discrimination against Women)



Total examined 46 cases on the merits of the Committee on Human Rights (the two cases are not mouth-lished violations, the remaining 44 found violations of the Covenant) and one case in the Committee on Elimination of Discrimination against Women (found violations of the Convention).

In one case, which was considered in 2012, at the 105th session, 9 cases were combined one the same author (9 registered individual messages) 1867/2009, 1936/2010,1975/2010, 1977/2010, 1978/2010, 1979/2010, 1980/2010, 1981/2010 and 2010/2010 *Paul Levinova v. Belarus*.

9 cases declared inadmissible by the Committee on Human Rights in the disposition of public resolutions and 9 cases were dismissed without making public decisions (not shown in table).

The review was prepared
by *Roman Kisliak*, human rights activist

Annex 6

GENERAL COMMENT NO 31 [80]
NATURE OF THE GENERAL LEGAL OBLIGATION IMPOSED ON STATES PARTIES TO THE COVENANT

United Nations **CCPR**/C/21/Rev. 1/Add. 13

International Covenant on Civil and Political Rights

Distr.: General
27 May 2012
Russian
Original: English

Human Rights Committee
80th Session

General Comment No. 31 [80]
Nature of the General Legal Obligation
Imposed on States Parties to the Covenant

Adopted on 29 March 2004 (2187th meeting)

1. This General Comment replaces General Comment No 3, reflecting and developing its principles. The general non-discrimination provisions of Article 2, paragraph 1, have been addressed in General Comment 18 and General Comment 28, and this General Comment should be read together with them.

2. While Article 2 is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the 'rules concerning the basic rights of the human person' are erga omnes obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty. In this connection, the Committee reminds States Parties of the desirability of making the declaration contemplated in Article 41. It further reminds those States Parties already having made the declaration of the potential value of availing themselves of the procedure under that Article. However, the mere fact that a formal interstate mechanism for complaints to the Human Rights Committee exists in respect of States Parties that have made the declaration

under Article 41 does not mean that this procedure is the only method by which States Parties can assert their interest in the performance of other States Parties. On the contrary, the Article 41 procedure should be seen as supplementary to, not diminishing of, States Parties' interest in each others' discharge of their obligations. Accordingly, the Committee commends to States Parties the view that violations of Covenant rights by any State Party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.

3. Article 2 defines the scope of the legal obligations undertaken by States Parties to the Covenant. A general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction (see paragraph 10 below). Pursuant to the principle articulated in Article 26 of the Vienna Convention on the Law of Treaties, States Parties are required to give effect to the obligations under the Covenant in good faith.

4. The obligations of the Covenant in general and Article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in Article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although Article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States Parties with a federal structure of the terms of Article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'.

5. The Article 2, paragraph 1, obligation to respect and ensure the rights recognized by in the Covenant has immediate effect for all States parties. Article 2, paragraph 2, provides the overarching framework within which the rights specified in the Covenant are to be promoted and protected. The Committee has as a consequence previously indicated in its General Comment 24 that reservations to Article 2, would be incompatible with the Covenant when considered in the light of its objects and purposes.

6. The legal obligation under Article 2, paragraph 1, is both negative and positive in nature. States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.

7. Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large.

8. The Article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under Article 2 and the need to provide effective remedies in the event of breach under Article 2, paragraph 3. The Covenant itself envisages in some Articles certain areas where there are positive obligations on States Parties to address the activities of private per-

sons or entities. For example, the privacy-related guarantees of Article 17 must be protected by law. It is also implicit in Article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of Article 26.]

9. The beneficiaries of the rights recognized by the Covenant are individuals. Although, with the exception of Article 1, the Covenant does not mention he rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant, such as the freedom to manifest one's religion or belief (Article 18), the freedom of association (Article 22) or the rights of members of minorities (Article 27), may be enjoyed in community with others. The fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (Article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights.

10. States Parties are required by Article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

11. As implied in General Comment 2911 General Comment No.291 on States of Emergencies, (adopted on 24 July 2001, reproduced in Annual Report for 2001, A/56/40, Annex VI, paragraph 3) the Covenant applies also in

[1] General Comment No.29 on States of Emergencies, adopted on 24 July 2001, reproduced in Annual Report for 2001, A/56/40, Annex VI, paragraph 3.

situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

12. Moreover, the Article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.

13. Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, Article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by Article 2.

14. The requirement under Article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.

15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.

16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of Article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by Articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

17. In general, the purposes of the Covenant would be defeated without an obligation integral to Article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.

18. Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible

are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (Article 7), summary and arbitrary killing (Article 6) and enforced disappearance (Articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, Article 7).

Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20 (44)) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. Other impediments to the establishment of legal responsibility should also be removed, such as the defense of obedience to superior orders or unreasonably short periods of statutory limitation in cases where such limitations are applicable. States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law.

19. The Committee further takes the view that the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.

20. Even when the legal systems of States parties are formally endowed with the appropriate remedy, violations of Covenant rights still take place. This is presumably attributable to the failure of the remedies to function effectively in practice. Accordingly, States parties are requested to provide information on the obstacles to the effectiveness of existing remedies in their periodic reports.

Annex 7

GENERAL COMMENT NO 33
THE OBLIGATIONS OF STATES PARTIES UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

United Nations **CCPR**/C/GC/33*

International Covenant on Civil and Political Rights

Distr.: General
25 June 2009
Russian
Original: English

Human Rights Committee
Ninety-fourth session
Geneva, 13-31 October 2008

General Comment No 33
The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights

1. The Optional Protocol to the International Covenant on Civil and Political Rights was adopted and opened for signature, ratification or accession by the same act of the United Nations General Assembly, resolution 2200 A (XXI) of 16 December 1966, that adopted the Covenant itself. Both the Covenant and the Optional Protocol entered into force on 23 March 1976.

2. Although the Optional Protocol is organically related to the Covenant, it is not automatically in force for all States parties to the Covenant. Article 8 of the Optional Protocol provides that States parties to the Covenant may become parties to the Optional Protocol only by a separate expression of consent to be bound. A majority of States parties to the Covenant has also become party to the Optional Protocol.

3. The preamble to the Optional Protocol states that its purpose is "further to achieve the purposes" of the Covenant by enabling the Human Rights Committee, established in part IV of the Covenant, "to receive and consider, as

* Reissued for technical reasons.

provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant."

The Optional Protocol sets out a procedure, and imposes obligations on States parties to the Optional Protocol arising out of that procedure, in addition to their obligations under the Covenant.

4. Article 1 of the Optional Protocol provides that a State party to it recognizes 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 that State party of any of the rights set forth in the Covenant. It follows that States parties are obliged not to hinder access to the Committee and to prevent any retaliatory measures against any person who has addressed a communication to the Committee.

5. Article 2 of the Optional Protocol requires that individuals who submit communications to the Committee must have exhausted all available domestic remedies. In its response to a communication, a State party, where it considers that this condition has not been met, should specify the available and effective remedies that the author of the communication has failed to exhaust.

6. Although not a term found in the Optional Protocol or Covenant, the Human Rights Committee uses the description "author" to refer to an individual who has submitted a communication to the Committee under the Optional Protocol. The Committee uses the term "communication" contained in Article 1 of the Optional Protocol instead of such terms as "complaint" or "petition", although the latter term is reflected in the current administrative structure of the Office of the High Commissioner for Human Rights, where communications under the Optional Protocol are initially handled by a section known as the Petitions Team.

7. Terminology similarly reflects the nature of the role of the Human Rights Committee in receiving and considering a communication. Subject to the communication being found admissible, after considering the communication in the light of all written information made available to it by the individual author and by the State party concerned, "the Committee shall forward its views to the State party concerned and to the individual".1

8. The first obligation of a State Party, against which a claim has been made by an individual under the Optional Protocol, is to respond to it within the time limit of six months set out in Article 4 (2). Within that time limit, "the

[1] Optional Protocol, article 5(4).

receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by the State." The Committee's Rules of Procedure amplify these provisions, including the possibility in exceptional cases of treating separately questions of the admissibility and merits of the communication.2

9. In responding to a communication that appears to relate to a matter arising before the entry into force of the Optional Protocol for the State party (the ratione temporis rule), the State party should invoke that circumstance explicitly, including any comment on the possible "continuing effect" of a past violation.

10. In the experience of the Committee, States do not always respect their obligation. In failing to respond to a communication, or responding incompletely, a State which is the object of a communication puts itself at a disadvantage, because the Committee is then compelled to consider the communication in the absence of full information relating to the communication. In such circumstances, the Committee may conclude that the allegations contained in the communication are true, if they appear from all the circumstances to be substantiated.

11. While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.

12. The term used in Article 5, paragraph 4 of the Optional Protocol to describe the decisions of the Committee is "views".3 These decisions state the Committee's findings on the violations alleged by the author of a communication and, where a violation has been found, state a remedy for that violation.

13. The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.

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2 Rules of Procedure of the Human Rights Committee, Rule 97(2). UN Doc. CCPR/C/3/Rev.8, 22 September 2005.

3 In French the term is "constatations" and in Spanish "observaciones".

14. Under Article 2, paragraph 3 of the Covenant, each State party undertakes "to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by a person acting in an official capacity." This is the basis of the wording consistently used by the Committee in issuing its views in cases where a violation has been found:

"In accordance with Article 2, paragraph 3(a) of the Covenant, the State party is required to provide the author with an effective remedy. 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 in case a violation has been established. In this respect, 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."

15. The character of the views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations.4

16. The Committee decided, in 1997, under its rules of procedure, to appoint a member of the Committee as Special Rapporteur for the Follow-Up of Views.5 That member, through written representations, and frequently also through personal meetings with diplomatic representatives of the State party concerned, urges compliance with the Committee's views and discusses factors that may be impeding their implementation. In a number of cases this procedure has led to acceptance and implementation of the Committee's views where previously the transmission of those views had met with no response.

17. It is to be noted that failure by a State party to implement the views of the Committee in a given case becomes a matter of public record through the publication of the Committee's decisions inter alia in its annual reports to the General Assembly of the United Nations.

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4 Vienna Convention on the Law of Treaties, 1969, article 26.

5 Rules of Procedure of the Human Rights Committee, Rule 101.

18. Some States parties, to which the views of the Committee have been transmitted in relation to communications concerning them, have failed to accept the Committee's views, in whole or in part, or have attempted to re-open the case. In a number of those cases these responses have been made where the State party took no part in the procedures, having not carried out its obligation to respond to communications under Article 4, paragraph 2 of the Optional Protocol. In other cases, rejection of the Committee's views, in whole or in part, has come after the State party has participated in the procedure and where its arguments have been fully considered by the Committee. In all such cases, the Committee regards dialogue between the Committee and the State party as ongoing with a view to implementation. The Special Rapporteur for the Follow-up of Views conducts this dialogue, and regularly reports on progress to the Committee.

19. Measures may be requested by an author, or decided by the Committee on its own initiative, when an action taken or threatened by the State party would appear likely to cause irreparable harm to the author or the victim unless withdrawn or suspended pending full consideration of the communication by the Committee. Examples include the imposition of the death penalty and violation of the duty of non-refoulement. In order to be in a position to meet these needs under the Optional Protocol, the Committee established, under its rules of procedure, a procedure to request interim or provisional measures of protection in appropriate cases.6 Failure to implement such interim or provisional measures is incompatible with the obligation to respect in good faith the procedure of individual communication established under the Optional Protocol.

20. Most States do not have specific enabling legislation to receive the views of the Committee into their domestic legal order. The domestic law of some States parties does, however, provide for the payment of compensation to the victims of violations of human rights as found by international organs. In any case, States parties must use whatever means lie within their power in order to give effect to the views issued by the Committee.

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[6] Rules of Procedure of the Human Rights Committee, UN Doc. CCPR/C/3/Rev.8, 22 September 2005, Rule 92 (previously Rule 86):
"The Committee may, prior to forwarding its Views on the communication to the State party concerned, inform the State of its Views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its Views on interim measures does not imply a determination on the merits of the communication."

Annex 8

DECISION OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

on the complaint of Andrei Anatolyevich Khoroshenko for violation of his constitutional rights under Article 403, paragraph 5, Article 413, paragraph 4, and Article 415, paragraphs 1 and 5, of the Code of Criminal Procedure of Russian Federation

Saint Petersburg, June 28, 2012

The Constitutional Court of the Russian Federation presented by the Chairman of Court Mr. Zorkin, and the judges Mr. Aronovsky, Mr. Boytsov, Mr. Bondar, Mr. Gajiyev, Mr. Danilov, Ms. Zharkova, Mr. Zhilin, Mr. Kazantsev, Mr. Kleandrov, Mr. Knyazev, Mr. Kokotov, Ms. Krasavchikova, Mr. Mavrin, Mr. Melnikov, Mr. Rudkin, Mr. Seleznev, and Mr. Yaroslavtsev,

Having heard the conclusion of judge Mr. Knyazev, who held a preliminary examination of the complaint filed by Mr. Khoroshenko under Article 41 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation",

Decided:

1. Mr. Andrei Anatolyevich Khoroshenko, sentenced to the death penalty by the verdict of the Perm Regional Court on 13 October 1995, commuted subsequently to a life term, on June 15, 2003 submitted a communication to the Human Rights Committee. He claims to be a victim of violations by the Russian Federation of his rights under Article 2, paragraphs 1 and 3, Article 6, paragraphs 1 and 2, Article 7, Article 9, paragraphs 1, 2, 3 and 4, Article 10, paragraph 1, Article 14, paragraphs 1, 2, 3(a), 3(b), 3(c), 3(d), 3(e), and 3(g), Article 15, paragraph 1 and Article 26 of the International Covenant on Civil and Political Rights. The Human Rights Committee under Article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights adopted on 29 March 2011 the views in respect of the communication stating the violation by the Russian Federation of the rights of Mr. Khoroshenko under Article 6 the International Covenant on Civil and Political Rights in conjunction with Article 7, Article 9, paragraphs 1, 2, 3 and 4, Article 14, paragraph 1(a), 1(b), 1(d), and 1(g), of the Covenant.

The Committee finds violations such as:

the public and in particular the author's relatives and the relatives of other accused were excluded from the main trial in the absence of sufficient justification such as reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice;

the Prosecutor's Office and the Court failed to conduct fast and unbiased investigation into the allegations of ill-treatment (he was beaten and tortured by the police and he was thus forced to make statements confirming the version of the events promoted by the investigation);

upon the arrest of the author he was not informed of the reasons for the arrest or of any charge; that upon arrest he was not advised of his rights, such as his right not to testify against himself or to have legal aid free of charge; he was never brought before a judicial officer for the purpose of determining the lawfulness of his arrest; the author was arrested and put in detention without sufficient grounds proving his being a member of the gang or any other organized criminal group, which made his imprisonment to be in conflict with the law of the State party;

the author of the claim was not informed of some of the charges against him until 25 days after his arrest and that he was informed of the rest of the charges at the end of the pre-trial investigation; the author was not given adequate time and facilities to prepare his defense in that he did not have the opportunity to always freely and privately meet with his lawyer during the pre-trial proceedings; he did not receive copy of the trial's records immediately after the first instance verdict was issued, that despite numerous requests, he was not given some documents, he considered relevant for his defense; and he was even limited in the amount of paper he was given to prepare his appeal to the second instance.

Based on the above and pursuant to Article 2, paragraph 3(a) of the International Covenant on Civil and Political Rights, the Committee considers that the Russian Federation is under an obligation to provide Mr. Andrei Khoroshenko with an effective remedy including: conducting full and thorough investigation into the allegations of torture and ill-treatment and initiating criminal proceedings against those responsible for the treatment to which the author was subjected; a retrial in compliance with all guarantees under the Covenant; and providing the author with adequate reparation including compensation. The State party is also under an obligation to take steps to prevent similar violations occurring in the future. In addition the Committee requests the State party to publish the Committee's Views and wishes to re-

ceive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views.

Assuming that the Committee's Views as containing a request to conduct a retrial in compliance with all the guarantees under the International Covenant on Civil and Political Rights, can serve as a ground for cancellation or change the verdict passed, Mr. Khoroshenko applied to the Prosecutor General's Office, and then to the Supreme Court of the Russian Federation with a request to resume the proceedings on a criminal case because of new or newly revealed circumstances.

In a letter dated September 26, 2011, the acting head of Department for Ensuring Participation of Prosecutors in Supervisory Stage of the Criminal Proceedings of the General Prosecutor's Office of the Russian Federation, refused to meet Mr. Khoroshenko's request, having indicated that an official request of the Human Rights Committee to the General Prosecutor's Office of the Russian Federation with a request to eliminate violations of the applicant's case had not been received, however, the abolition or modification of judicial decisions refer to the competence of the court.

Judge of the Supreme Court by his letter of 3 November 2011 sent back Mr. Khoroshenko's application without hearing, referring to the fact that the Criminal Procedure Code of the Russian Federation does not provide for a supervisory review of decisions of the Supreme Court of the Russian Federation, and the Human Rights Committee's Views as such do not give sufficient grounds for the review of judicial decisions in order established by Chapter 49 of the Criminal Procedure Code of the Russian Federation (upon discovery of new facts).

In his complaint to the Constitutional Court of the Russian Federation Mr. Khoroshenko disputes the constitutionality of the following provisions of the Criminal Procedure Code of the Russian Federation: Article 403, paragraph 5 that establishes the procedure for considering supervisory appeals and reports, Article 413, part 4 that provides the grounds for resumption of the criminal proceedings in the view of new or newly revealed circumstances, and Article 415, paragraph 1 and 5 that regulates the initiation of proceedings in view of new of newly revealed circumstances.

According to the applicant, the disputed provisions are in conflict with Article 15, part 4, Articles 18, 21, 45, 46 and Article 55, parts 2 and 3 of the Constitution of the Russian Federation, as unduly restrict his right to judicial defense, by not providing for a possible supervisory revision of the decision of the Supreme Court of the Russian Federation in order to correct a judicial mistake and not recognizing the Human Rights Committee's Views as being the ground for resumption of the proceedings due to new or newly revealed circumstances.

2. From the content of Article 15, part 4, Article 17, part 1 and Article 46, part 1 of the Constitution of the Russian Federation, according to which everyone shall be guaranteed judicial protection of his or her rights and freedoms in accordance with the commonly recognized principles and norms of the international law, that are along with the international treaties of the Russian Federation a part of the legal system of the Russian Federation, in conjunction with Article 19, part 1, Article 46, part 2 and 3, Article 50, part 3 and Article 118, parts 1 and 2, which state that the justice shall be carried out only by the court of law, including through the criminal proceedings, based on the equality of everyone before the law and the court, and provide the right to appeal against unjust judicial decisions and to have those decisions reviewed, as well as the right to appeal in conformity with the international treaties of the Russian Federation to interstate bodies for the protection of human rights and freedoms when all the means of legal protection available within the state have been exhausted, it follows that the constitutional right to judicial protection as a fundamental, inalienable human right acting as a guarantor of the implementation of all other rights and freedoms - is not only the right to apply to court, but also the right to an effective remedy for violated rights and freedom through justice that meets the requirements of justness.

The above provisions of the Constitution of the Russian Federation are in agreement with the provisions of the Universal Declaration of Human Rights (Articles 8, 10 and 11), the International Covenant on Civil and Political Rights (Article 14) and the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6), under which everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal established under the law, in the determination of his rights and obligations and of any criminal charge against him.

Explaining the content of the right to judicial protection, the Constitutional Court of the Russian Federation has repeatedly stressed that the judicial protection of the rights and freedoms implies among other things making an appeal to the court against decisions and actions (inaction) of any governmental institutions, including judicial ones; and therefore the absence of a possibility to have erroneous judicial acts revised is inconsistent with the universal rule to ensure an effective remedy by means of the justice system that would meet the requirements of justice, and limits and detracts this right. At the same time the institutional and procedural conditions when reviewing erroneous decisions shall in any case meet the requirements of procedural economy in the use of remedies, the transparency of the execution of justice, shall eliminate delays or unjustified resumption of the trial and thus ensure a fair trial, and at the same time legal certainty, including the recognition of the legitimate power of judicial decisions and their cogency (res judicata),

which is inseparable to achieving a balance between public law and private law interests (Rulings No 4-P of February 2, 1996, No 5-P of February 3, 1998, No 2-P of February 5, 2007, etc.).

The European Court of Human Rights in practice is also guided by the fact that departure from the principle of legal certainty can be justified only by circumstances of significant and insurmountable character. As indicated in some of its decisions, the Convention on Protection of Human Rights and Fundamental Freedoms in principle allows revising court decisions that have come into legal force upon discovery of new facts with the purpose to correct errors made in the criminal proceedings, including correction of major fundamental violations or improper execution of justice. The procedure of cancellation of the final decision of the court suggests that there is evidence that had not previously been objectively available and that can lead to a different result of the court hearing. The person demanding the abolition of the court decision, should prove that he or she had had no possibility to present the evidence till the end of the trial, and that such evidence is of essential importance for the case (Rulings on the cases Pravednaya v. Russia of 18 November 2004, Vedernikova v. Russia of July 12, 2007, Sutyazhnik v. Russia of July 23, 2009).

3. The Federal legislator, implementing the powers assigned to it under Articles 71, paragraphs (в) and (о) and 76 (part 1) of the Constitution of the Russian Federation in the Criminal Procedure Code of the Russian Federation with the purpose to create an effective remedy mechanism to redress violation of rights in the course of judicial proceedings on a criminal case provided for procedures to appeal against unjust decisions – in the court of appeal instance and the court of cassation instance, which examine cases by the appeal (cassation) complaint or a presentation against sentences and other court's resolutions, which have not come into legal force (chapter 44, Articles 361-372, chapter 45, Articles 373-389), and as additional guarantee of legality and substantiation of judicial resolutions – revision of sentences, rulings and resolutions that have come into legal force, namely by a procedure at a Supervisory Agency (chapter 48, Articles 402-412), and the resumption of the proceedings on a criminal case because of new or newly revealed circumstances (chapter 49, Articles 413-419).

The question of the constitutionality of the provisions of Criminal Procedure Law regulating the revision of judicial decisions that have entered into legal force carried out as a supervisory measure and of a procedure of the resumption of the proceedings on a criminal case because of new or newly revealed circumstances, has already been raised before the Constitutional Court of the Russian Federation that finally came to the following conclusions.

This method of ensuring justness of judicial decisions on criminal cases, used in case where all other means of procedural and legal defense are inapplicable or have been exhausted, shall guarantee the fairness of judicial decisions as a prerequisite for judicial protection of the rights and freedoms of a man and a citizen, as well as maintaining the balance of between values such as fairness and stability of judicial acts.

The resumption of the proceedings on a criminal case – in contrast to revision of judicial decisions as supervision - is carried out in connection with the identification of the circumstances that have either arisen after examination of a criminal case, or existed at the time of the criminal proceedings, but were not known to the court and could not be taken into account by the court. Given the above the resumption of the proceedings on a criminal case because of new or newly revealed circumstances is not aimed at correcting deficiencies of previous prosecution and judicial execution, however, to provide possibility to examine new circumstances for the court, including such facts that are recognized by the criminal law as essential for identifying the grounds and limits of criminal law protection, however, due to objective reasons could not have been examined within the proceedings of the criminal case.

At the same time, it is possible to use a mechanism of revising a sentence that has come into legal force by resumption of the proceedings on a criminal case, when, after exhausting the capacity of judicial supervision it will be discovered that the sentence passed was unjust as a consequence of either ignoring the evidence collected, which was reflected in the record on the case, or their misevaluation, or misuse of the law.

The Constitution of the Russian Federation, in formulating the right to judicial protection, does not exclude, however, on the contrary provides for the correction of judicial error even after the case have been examined in the court instance, the decision of which may be recognized by industry legislation as final in the sense that under the normal procedure it can not be changed. This conclusion follows from Article 46 (part 3) of the Constitution of the Russian Federation, which recognizes that in conformity with the international treaties of the Russian Federation, everyone shall have the right to turn to interstate organs concerned with the protection of human rights and liberties when all the means of legal protection available within the state have been exhausted.

International treaties, in particular the International Covenant on Civil and Political Rights (Article 14, paragraph 6) providing for the possibility to revise a final decision of the court on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, ensure wider possibilities to correct judicial errors, than the Criminal Procedure Law of the Russian Federation. The international legal norm in question is under

Article 15, paragraph 4 of the Constitution of the Russian Federation shall be a component part of its legal system and shall have the priority over the national legislation in the matters of protection of human rights and liberties, violated as a result of judicial errors.

Restricting the circle of grounds for the resumption of the criminal case in order to review an unjust or unjustified decision that cannot be corrected in any other manner, makes impossible to provide justness of court decisions and restoration by court of the rights and legitimate interests of citizens and other persons, which leads to the violation of the provisions of the Constitution of the Russian Federation (Articles 2, 17, 18, 45 and 46), and of the International Covenant on Civil and Political Rights (Article 14, paragraph 6) and of the Convention on Human Rights and Fundamental Freedoms (Article 6, Article 3, and Article 4, paragraph 2 of Protocol No 7), which imply the need for revising a judicial decision if new or newly revealed circumstances are discovered, which can not but affect the substance of the decision (rulings of the Constitutional Court of the Russian Federation No 4-P of February 2, 1996, No 2-P of 5 February 2007, and No 6-P of May 16, 2007; decisions of the Constitutional Court of the Russian Federation No 28-O of April 9, 2002, No 290-O of July 10, 2003, No 962-O-O of December 4, 2007, etc.).

The above listed legal provisions of the Constitutional Court of the Russian Federation retain its force also under Article 6 of the Federal Constitutional Law "On Constitutional Court of the Russian Federation" and are mandatory for all representative, executive, and judicial bodies of the state power on the entire territory of the Russian Federation.

4. The Human Rights Committee was established under the International Covenant on Civil and Political Rights with the purpose to supervise and monitor compliance with commitments undertaken by the State parties to this International Treaty (Articles 28, 40, 41). In compliance with the Optional Protocol to the International Covenant on Civil and Political Rights a State party to the Covenant that becomes a party to the present Protocol recognizes 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 that State Party of any of the rights set forth in the Covenant, if all available domestic remedies have been exhausted (Article 1 and 2 of the Protocol).

The Human Rights Committee shall bring any communications from individuals submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provisions of the Covenant; within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State (Article 4 of the Protocol); upon the examination of the communication at a closed meeting the

Committee shall forward its views to the State Party concerned and to the individual (Article 5 of the Protocol). The practice accepted by the Human Rights Committee in the examination of individual communications is such that if a violation has been established, the Committee recommends that the State party concerned should undertake to ensure that each any person recognized a victim of violation of any of the rights set forth in the International Covenant on Civil and Political Rights shall have an effective remedy (such as payment of compensation, repeated hearing, immediate release from custody, etc). At the same time the Committee in the General Comment No 33 The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Right (CCPR/C/GC/33, of 25 June 2009) states that while the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision: they are arrived at in a judicial spirit, including the impartiality and independence of Committee members, they have the determinative character of the decisions, represent an authoritative determination suggesting a remedy from a violation established; in any case, States parties must use whatever means lie within their power in order to give effect to the views issued by the Committee (paragraphs 11-13 and 20).

Under rule 101 of the Rules of Procedure of the Human Rights Committee (CCPR/C/3/Rev.8 of 27 September 2005) upon the communication of the Views of the Committee to the individual and to the State party concerned the Committee shall designate a Special Rapporteur for follow-up on Views for the purpose of ascertaining the measures taken by States parties to give effect to the Committee's Views; the Special Rapporteur may make such contacts and take such action as appropriate for the due performance of the follow-up mandate and makes such recommendations for further action by the Committee as may be necessary and regularly reports to the Committee on follow-up activities. The Committee in its turn submits to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities, that includes a summary of its activities under the Optional Protocol (Article 45 of the Covenant and Article 6 of the Protocol).

Despite the fact that neither the International Covenant on Civil and Political Rights nor the Optional Protocol do not contain provisions that directly determine the meaning for the State parties of the Views of the Human Rights Committee adopted on individual communications, this does not relieve the Russian Federation, which has recognized the competence of the Committee to receive and examine communications from individuals under its jurisdiction claiming to be victims of a violation by the Russian Federation of any of the rights set forth in the Covenant and thereby to determine where a violation of the Covenant has taken place, of the conscientious and responsible

implementation of the Committee's Views in the framework of its voluntarily adopted international legal obligations.

As per the Ruling No 8-P of 27 March 2012 of the Constitutional Court of the Russian Federation, the Russian Federation, having the sovereign statehood (preamble, Article 3, chapter 1, Article 4, chapter 1 of the Constitution of the Russian Federation), is an independent and equal participant in interstate communication and at the same time, by declaring itself a democratic rule-of-law state (Article 1, chapter 1 of the Constitution of the Russian Federation) shall follow the commitments voluntarily assumed under international treaties, as stated by the provisions of the Vienna Convention on the Law of Treaties, by virtue of which Every State possesses capacity to conclude treaties, the binding authority of which is impossible for the state without the consent of States to be bound by a treaty (Articles 6 and 11), every treaty in force is binding upon the parties to it and must be performed by them in good faith (Article 26), a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty (Article 27).

Because of the generally recognized principle of international law "pacta sunt servanda» and within the meaning of subparagraph "a" of paragraph 3 of Article 2 of the International Covenant on Civil and Political Rights imposing on each State party to the Covenant an obligation to ensure that any person whose rights or freedoms as recognized by the Covenant are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity, the Russian Federation cannot evade from an adequate response to Views of the Human Rights Committee, including cases where the Committee considers that as a result of the violation of the provisions of the International Covenant on Civil and Political Rights repeated hearing of the criminal case of the person whose communication gave the ground for the Committee's relevant Views shall be conducted.

Failing which would not only have called into question the compliance of the Russian Federation with its obligations voluntarily assumed under the International Covenant on Civil and Political Rights and the Optional Protocol, and thus would have been the evidence of failure to comply with Articles 2 and 17 (chapter 1) of the Constitution of the Russian Federation, which state that it shall be a duty of the state to recognize, respect and protect the rights and liberties of man and citizen in conformity with the commonly recognized principles and norms of the international law, but would have also made meaningless the right arising from Article 46 (part 3) of the Constitution of the Russian Federation stating that in conformity with the international treaties of the Russian Federation, everyone shall have the right to turn to the Human Rights Committee when all the domestic remedies available within the state have been exhausted.

5. In accordance with Article 413 of the Criminal Procedure Code of the Russian Federation the court sentence, ruling or resolution, that has come into legal force, may be cancelled and the proceedings on a criminal case may be resumed because of new or newly revealed circumstances (part 1); the new circumstances shall be recognizing by the Constitutional Court of the Russian Federation of the law applied by the court in the given criminal case, as not corresponding to the Constitution of the Russian Federation; a violation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, established by the European Court of Human Rights, or other violations of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as other new circumstances (part 4).

The right to institute proceedings on account of new circumstances not related to the decisions of the Constitutional Court of the Russian Federation or the European Court of Human Rights shall belong to the public prosecutor; seen as the reasons for an institution of the proceedings because of new circumstances may be the communications of citizens and of officials, as well as the data obtained in the course of the preliminary investigation and of the court examination of other criminal cases (parts 1 and 2 of Article 415 of the Criminal Procedure Code of the Russian Federation); and revision of the sentence because of new or newly revealed circumstances in favour of the convict is not limited by any time terms (part 1 of Article 414 of the Criminal Procedure Code of the Russian Federation).

From the contents of the above provisions of the Criminal Procedure Law in conjunction with Articles 15 (part 4), 17 (part 1), 45 and 46 of the Constitution of the Russian Federation and in view of the legal positions set out by the Constitutional Court of the Russian Federation in its resolutions that have retained their legal force, it follows that the adoption by the Human Rights Committee of the views containing the proposal addressed to the Russian Federation to conduct a new trial shall be a sufficient reason for the public prosecutor to pass a decision to initiate proceedings in view of new circumstances, if the violations of the provisions of the International Covenant on Civil and Political Rights identified by the Committee can not be corrected by other means, and their removal is necessary to ensure justness of the sentence (decision, ruling) that came into legal force and to restore the rights and legitimate interests of citizens and other persons. In fact, it has been confirmed also by paragraph 9 of Resolution of the Plenum of the Supreme Court of the Russian Federation dated October 10, 2003 № 5 “On application by the courts of general jurisdiction of the universally recognized principles and norms of international law and the international treaties of the Russian Federation”, according to which in the administration of justice the courts should have in mind that the misuse by the court of generally recognized principles and norms of the international law and the international treaties

of the Russian Federation can serve as a ground for cancellation or changing of a judicial act.

This does not exclude the right of the federal legislator to use other measures to implement a mechanism of a legal, including criminal procedure, response to the Views of the Human Rights Committee adopted on individual communications of persons under the jurisdiction of the Russian Federation and declaring a violation by the Russian Federation of any of the rights set in the International Covenant on Civil and Political Rights.

As for challenging the constitutionality of part 5 of Article 403 of the Criminal Procedure Code of the Russian Federation, Mr. Khoroshenko already addressed this matter to the Constitutional Court of the Russian Federation, which by its decision No 1226-OO of 29 September 2011 refused to admit his complaint for consideration because it did not meet the requirements of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", in according to which the complaint to the Constitutional Court of the Russian Federation can be recognized admissible. Raising once again the issue of verification of the compliance of part 5 of Article 403 of the Criminal Procedure Code of the Russian Federation to the Constitution of the Russian Federation, Mr. Khoroshenko does not present any new arguments in support of his complaint about its unconstitutionality, and therefore the complaint in this part, as being in fact aimed at revision of a decision previously passed by the Constitutional Court of the Russian Federation, by virtue of Articles 79, 96 and 97 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation" shall not be admissible.

6. Thus, the provisions of the Law challenged by the applicant does not preclude in the current legal system the possibility of the resumption of the proceedings in view of new circumstances following the Views of the Human Rights Committee adopted as a result of examination of individual communications and addressing the Russian Federation with the proposals to reopen the trial, and therefore can not be regarded as violating the constitutional rights of the applicant.

Verification of the validity of justness and of the administration of the law, which took place in the applicant's case, is related to the establishment and examination of the actual circumstances of his criminal prosecution and does not fall under the jurisdiction of the Constitutional Court of the Russian Federation on the examination of complaints of citizens as it is defined in Article 125 (part 4) of the Constitution of the Russian Federation and Article 3 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation".

Based on the above and in accordance with paragraph 2, part 1 of Article 43 and part 1 of Article 79 of the Federal Constitutional Law "On the Con-

stitutional Court of the Russian Federation", the Constitutional Court of the Russian Federation has

ruled:

That the complaint of citizen Mr. Andrei Anatolievich Khoroshenko shall be recognized as not subject to further consideration by the Constitutional Court of the Russian Federation, since resolving the issue raised by the applicant does not require a final decision to be passed in the from of a ruling as provided for by Article 71 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation".

That the ruling of the Constitutional Court of the Russian Federation on the complaint shall be final and not subject to appeal.

That the present definition shall be published in the "Bulletin of the Constitutional Court of the Russian Federation."

The Chairman of
the Constitutional Court
of the Russian Federation V. D. Zor'kin

No 1248-O

Annex 9

СООБРАЖЕНИЯ КОМИТЕТА ПО ПРАВАМ ЧЕЛОВЕКА ПО ДЕЛУ № 2120/2011 ВЛАДИСЛАВ КОВАЛЕВ, ЛЮБОВЬ КОВАЛЕВА И ТАТЬЯНА КОЗЯР ПРОТИВ БЕЛАРУСИ

United Nations **CCPR**/C/106/D/2120/2011

International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 2120/2011

Views adopted by the Committee at its 106th session (15 October – 2 November 2012)

Submitted by:	Lyubov Kovaleva and Tatyana Kozyar (represented by counsel, Roman Kisliak)
Alleged victims:	The authors and Vladislav Kovalev, their son and brother respectively
State party:	Belarus
Date of communication:	14 December 2011
Document references:	Special Rapporteur's rules 92 and 97 decision, transmitted to the State party on 15 December 2011 (not issued in document form)
Date of adoption of Views:	29 October 2012
Subject matter:	Imposition of a death sentence after unfair trial
Procedural issues:	Standing to act on behalf of an alleged victim; State party's failure to cooperate and non-respect of the Committee's request for interim measures; insufficient substantiation of claims; non-exhaustion of domestic remedies

Substantive issues:	Arbitrary deprivation of life; torture and ill-treatment; arbitrary deprivation of liberty; right to be brought promptly before a judge; right to a fair hearing by an independent and impartial tribunal; right to be presumed innocent; right to adequate time and facilities for the preparation of his defense and to communicate with his counsel; right not to be compelled to testify against himself or to confess guilt; right to have his sentence and conviction reviewed by a higher tribunal; interim measures to avoid irreparable damage to the alleged victim; right to freedom of thought, conscience and religion; violation of obligations under the Optional Protocol
Articles of the Covenant:	6, paragraphs 1 and 2; 7; 9, paragraphs 1 and 3; 14, paragraphs 1, 2, 3 (b), 3 (g) and 5; 18
Articles of the Optional Protocol:	1, 2 and 5, paragraph 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 (106th session)

concerning

Communication No. 2120/2011[1]

Submitted by:	Lyubov Kovaleva and Tatyana Kozyar (represented by counsel, Roman Kisliak)
Alleged victims:	The authors and Vladislav Kovalev, their son and brother respectively
State Party:	Belarus
Date of communication:	14 December 2011

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

Meeting on 29 October 2012,

Having concluded its consideration of communication No. 2120/2011, submitted to the Human Rights Committee by Lyubov Kovaleva and Tatyana Kozyar 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 authors of the communication and the State party,

Adopts the following:

Views under Article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication are Lyubov Kovaleva and Tatyana Kozyar, both nationals of Belarus. They submit the communication on their own behalf and on behalf of Vladislav Kovalev, a national of Belarus born in 1986 (their son and brother, respectively) who at the time of submission of the communication was detained on death row after being sentenced to death by the Supreme Court of Belarus. The authors claim that Mr. Kovalev is a victim of violations by Belarus of his rights under Article 6, paragraphs 1 and 2; Article 7, Article 9, paragraphs 1 and 3; and Article 14, paragraphs 1, 2,

[1] The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, 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.

3 (b), 3 (g) and 5, of the International Covenant on Civil and Political Rights.[2] The authors also claim to be victims of a violation of Articles 7 and 18 in their own respect. The authors are represented by counsel, Mr. Roman Kisliak.

1.2 When registering the communication on 15 December 2011, and pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to carry out Mr. Kovalev's execution while his case was under examination by the Committee. This request for interim measures of protection was subsequently reiterated on 27 January, 14 February, 1 March and 15 March 2012.

1.3 On 14 February 2012, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to examine the admissibility of the communication together with its merits.

1.4 On 15 March 2012, in reply to the State party's note verbale dated 15 March 2012,[3] the Chairperson of the Committee reiterated the Committee's request for interim measures, drawing the State party's attention to the fact that `non-respect of interim measures constitutes a violation by States parties of their obligations to cooperate in good faith under the Optional Protocol to the Covenant.

1.5 On 19 March 2012, the authors notified the Committee that Mr. Kovalev's execution had been carried out. On the same day, the Committee issued a press release, deploring the execution.

The facts as presented by the authors

2.1 The authors submit that, on 30 November 2011, the Supreme Court of Belarus, acting as trial court, convicted Mr. Kovalev for commission of the following crimes: aggravated hooliganism; intentional destruction and damage of property committed by dangerous means; illegal acquisition, carrying, storing and selling explosives; storing, carrying and transporting an explosive device, committed repeatedly by a group of persons upon preliminary arrangement; failure to report the preparation of a particularly serious crime and of the person who committed such a crime and of his/her whereabouts; and aiding and abetting terrorist activities resulting in deaths, serious or other injuries, particularly ***large-scale damage*** or ***other serious consequences***.

2.2 Mr. Kovalev was found guilty of these crimes purportedly committed between 2000 and 2011, including of aiding and abetting another defendant, Mr. K., in carrying out terrorist attacks on 11 April 2011 at Oktyabrskaya subway station in the city of Minsk. He was sentenced to death by shooting, without confiscation of property. At the time of submission of the communication, he was awaiting his execution in the investigation detention facility

[2] The Optional Protocol entered into force for Belarus on 30 December 1992.

[3] See paragraphs 6.1–6.3.

(SIZO) of the Belarus State Security Committee. On 7 December 2011, Mr. Kovalev prepared, in the presence of his lawyer, a power of attorney authorizing his mother, Ms. Kovaleva, to act on his behalf, and a written request for authentication of the document was lodged with the head of the SIZO. Although the lawyer was informed that the document would be ready the next day, it was never provided to him or Mrs. Kovaleva. She complained about this fact to the head of the SIZO, the president of the State Security Committee, the General Prosecutor and the Deputy President of the Supreme Court, to no avail.[4]

2.3 The authors submit that the decision of the Supreme Court of 30 November 2011 was not subject to appeal. On 7 December 2011, Mr. Kovalev submitted a request for pardon to the President of Belarus. The authors submit that, since both applications for supervisory review and for pardon are discretionary procedures, they had exhausted all available and effective domestic remedies.

The complaint

3.1 The authors submit that Mr. Kovalev was arrested on 12 April 2011 and was detained pending trial from 12 April 2011 to 15 September 2011, when he was for the first time brought before a judge. They contend that a delay of more than five months before bringing him before a judicial officer was excessively long and did not meet the requirement of promptness set out in Article 9, paragraph 3, of the Covenant, and thus violates Mr. Kovalev's rights under Article 9, paragraphs 1 and 3, of the Covenant.

3.2 The authors also claim that, in violation of Article 7 and Article 14, paragraph 3 (g), of the Covenant, Mr. Kovalev was subjected to physical and psychological pressure with the purpose to secure a confession of guilt. Officers of the Department for Combating Organized Crime talked to him in the absence of a lawyer. As a result of pressure, Mr. Kovalev made self-incriminating statements that allegedly served as a basis for his conviction. Before the confrontation with the other defendant, the investigator told him that if he changed his testimony during the court hearing, the prosecutor would insist on death penalty or life sentence; however, if he admitted his guilt, he would serve a limited prison term.

3.3 Mr. Kovalev subsequently retracted his confession during the court hearings, claiming that he was innocent and had made self-incriminating statements under pressure.[5] The authors claim that, with the exception of his self-incriminating testimony, the court was not presented with any other evidence in support of his guilt. The video of a man with a bag that was used as evidence in the case and that, according to the prosecution, portrays the

[4] Authors provided copies of the respective complaints.

[5] This fact is confirmed by the trial transcript (excerpts available on file).

other defendant carrying the explosive device was allegedly tampered with and cannot be deemed authentic. The authors also submit that the law enforcement authorities claimed that Mr. Kovalev's bodily injuries attested during the investigation (bruise marks on his head on the right temple and on the chin, bruises on his hands resulted from rigid blunt objects, as well as on his shoulders and knees)[6] were sustained as a result of the force used in the course of the arrest operation. The authors claim, however, that no such force was used, since Mr. Kovalev was asleep when he was arrested and was woken up by masked officers.[7] In substantiation of their argument that Mr. Kovalev had not sustained any bodily injuries during his arrest, the authors refer to a picture of him taken on 12 April 2011 following his arrest (part of the materials of the preliminary investigation),[8] as well as to his videotaped testimony broadcasted on official television channels after his arrest, depicting him sitting on the floor of the apartment with his hands handcuffed behind his back. None of the injuries attested on 13 April 2011 by the forensic medical examination are visible either on the picture or on the videotape, which confirms the fact that Mr. Kovalev was subjected to pressure after his arrest, in violation of the prohibition of torture and his right not to be compelled to testify against himself or to confess guilt, as set forth in Articles 7 and 14, paragraph 3 (g), of the Covenant.

3.4 The authors further claim that the trial court was biased and violated the principle of independence and impartiality, in violation of Article 14, paragraph 1, of the Covenant. They consider that the court was under pressure: the access in the court room, besides police officers, was controlled by other unidentified persons in civilian clothes, who refused to disclose their identity. They were allegedly obviously officers of intelligence services. They were checking the persons entering the court room and could refuse access to or even arrest persons who came to attend the trial. This created an atmosphere of fear and is an indication of the pressure exercised on the court, as well as of the violation of the principle of publicity of court proceedings. The court also violated the principle of impartiality and equality of arms by rejecting most of the requests of the defense, at the same time satisfying all the motions submitted by the prosecution.

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6 Although the authors could not provide a copy of the report of the forensic medical examination of 13–25 April 2011 attesting these injuries, they provided a copy of a newspaper article published by *BelGazeta* in issue No. 40 (814) of 10 October 2011, which states, inter alia, that the defense lawyer drew the court's attention to Mr. Kovalev's injuries and read out the conclusion of the forensic medical examination, according to which he had bruise marks on the chin, on the right temple of his head, on his hands, forearm and knees, caused by rigid blunt objects.

7 Mr. Kovalev stated during the court proceedings that he was woken up by masked officers, this statement being recorded in the trial transcript (excerpt available on file).

8 The authors provided the picture in question.

3.5 Following Mr. Kovalev's arrest and before his conviction by the court, several State officials made public statements affirming his guilt, in violation of the principle of presumption of innocence. His guilt was also widely discussed in the official mass media, in particular the news agency BELTA (Belarusian Telegraph Agency), which presented to the public at large materials of the preliminary investigation as fait accompli[9] long before the consideration of the case by the court, thus engendering among the public a negative attitude towards Mr. Kovalev, as if he was already a confirmed criminal. Moreover, he was kept in a metal cage throughout the court proceedings and the photographs of him behind metal bars in the court room[10] were published in the local print media. Undoubtedly, such behaviour created a public negative attitude towards Mr. Kovalev and influenced the court in sentencing him to death. The authors recall that, according to paragraph 30 of the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial,[11] defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. They claim that the above facts disclose a violation of Mr. Kovalev's presumption of innocence guaranteed under Article 14, paragraph 2, of the Covenant.

3.6 The authors claim a violation of Mr. Kovalev's rights under Article 14, paragraph 3 (b), of the Covenant. During the pretrial investigation, Mr. Kovalev was visited by his lawyer only once, and for the rest they met only during investigative actions. The lawyer did not have the opportunity to meet and talk to him confidentially. On 14 September 2011, on the eve of the court hearings, the lawyer was denied access to his client. Mr. Kovalev's requests for confidential meetings with his lawyer were rejected.[12] The lawyer was able to talk to Mr. Kovalev only before the start of court hearings when he was brought to the court and put in the cage, i.e. for not more than between three and five minutes. On three occasions, they were able talk for half an hour, one hour and two hours respectively, as well as before the start of pleadings. The authors claim that, in the circumstances, Mr. Kovalev's right

[9] The authors supplied, inter alia, a copy of an article published by BELTA on 18 August 2011, citing as a source law enforcement bodies. The article refers to the accused as "terrorists" and discloses extensive information about the acts committed by them as well as other details of the investigation.

[10] Such photographs are available on file.

[11] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI.

[12] The authors provided an excerpt from the trial transcript, confirming that Mr. Kovalev requested the court to give him the opportunity to communicate with his lawyer in private, since he had not had such a possibility before the initiation of court proceedings. The court declined this request, and Mr. Kovalev's lawyer then inquired about the possibility to communicate with the accused during the break, to which the presiding judge responded in the affirmative.

to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing, as set forth in Article 14, paragraph 3 (b), of the Covenant, has been violated.

3.7 Furthermore, the authors also allege a violation of Article 14, paragraph 5, of the Covenant. They submit that the sentence handed down by the Supreme Court is not subject to appeal, therefore the State party violated Mr. Kovalev's right to have his sentence and conviction reviewed by a higher tribunal.

3.8 The authors also claim that Mr. Kovalev was sentenced to death after a trial conducted in violation of the fair trial guarantees set forth in Article 14 of the Covenant. Therefore, in accordance with the Committee's established practice, this amounts to a violation of Mr. Kovalev's right to life under Article 6 of the Covenant.

3.9 On 13 May 2012, after the execution of Mr. Kovalev had been carried out, the authors supplemented their initial communication to the Committee with new allegations. They claim that, by proceeding with the execution of Mr. Kovalev despite the Committee's request for interim measures to suspend his execution while his case is under consideration by the Committee, the State party violated the provisions of the Optional Protocol to the Covenant. They urge the Committee to recommend that the State party include a rule in its legislation that would provide for the suspension of the execution of a death sentence in a given case in view of the registration by the Committee of an individual communication alleging a violation of the right to life and the Committee's request for interim measures of protection, so as to prevent such violations in the future.

3.10 The authors further submit that the date of the execution was kept secret, and was not known as at 11 March 2012 when they visited Mr. Kovalev in the SIZO. The execution was carried out on 15 March 2012. Based on the practice of execution of capital sentences in Belarus, the authors believe that Mr. Kovalev was not informed beforehand of the date of the execution. Therefore they claim that Mr. Kovalev's situation of uncertainty about his fate from the date on which his death sentence was imposed (30 November 2011) until its execution (15 March 2012) caused him additional mental distress, in violation of Article 7 of the Covenant. They request the Committee to find such practice of non-disclosure of the date of the execution unacceptable and contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, and to recommend that Belarus abolish this inhuman practice and bring it in line with its obligations under Article 7 of the Covenant.

3.11 Furthermore, the authors submit that, from 13 March 2012 (when mass media published information about the consideration of Mr. Kovalev's application for pardon) to 17 March 2012 (when they received the letter of

the Supreme Court informing them that the execution had been carried out) they had no information about Mr. Kovalev's whereabouts and whether he was alive or not. The lawyer was denied access to him. The authors therefore claim that the atmosphere of complete secrecy surrounding the date, time and place of the execution caused them severe mental suffering and stress, in violation of their rights under Article 7 of the Covenant, and request the Committee to recommend that the State party abolish such practice of not informing relatives about the date of execution of persons sentenced to death.

3.12 Finally, the authors claim that, following the execution of Mr. Kovalev, the State party's authorities consistently refused to hand over his body for burial, invoking Article 175, paragraph 5, of the Criminal Execution Code according to which relatives are not informed in advance of the date of execution, the body is not handed over and the place of burial is not disclosed.[13] They submit that they are Orthodox Christians and wish to bury Mr. Kovalev in accordance with their religious beliefs and rituals. The State party's authorities also refuse to disclose the location of Mr. Kovalev's grave. The authors therefore claim that the State party's refusal to hand over Mr. Kovalev's body for burial amounts to a violation of their rights under Article 18 of the Covenant. This refusal prevented them from burying Mr. Kovalev in accordance with the requirements of the Orthodox Christianity, in violation of the right to manifest one's religion and to perform religious rites and rituals, as set forth in Article 18 of the Covenant. They request the Committee to recommend that Belarus abolish the practice of not returning the body of executed persons to relatives and of concealing from relatives the location of the burial site.

State party's observations on admissibility

4.1 By note verbale dated 24 January 2012, the State party contests the registration of the communication, claiming that it was registered in breach of Article 1 of the Optional Protocol. The State party also submits that Mr. Kovalev had not exhausted domestic remedies, as required under the Optional Protocol. Although Mr. Kovalev filed a supervisory review application to the Supreme Court and lodged an application for presidential pardon, both applications were still pending before national authorities.

4.2 According to Article 24 of the Constitution of Belarus, the death penalty may be applied in accordance with the law as an exceptional penalty for the most serious crimes and only in accordance with the verdict of a court of law. Pursuant to Article 59 of the Criminal Code of Belarus, the death sentence may be applied as an exceptional measure for particularly

[13] The authors provided copies of letters emanating from the Ministry of Interior, the Presidential Administration and the Prosecutor's office of Minsk city.

serious crimes involving premeditated deprivation of life with aggravating circumstances. In this regard, Mr. Kovalev was sentenced to death following the judgment handed down by a court of law, in accordance with the Constitution, the Criminal Code and the Criminal Procedure Code of Belarus and therefore the imposed death penalty is not contrary to the international instruments to which Belarus is a party. According to national legislation, the execution of Mr. Kovalev was suspended until competent authorities decided on his applications for supervisory review and presidential pardon.

4.3 On 25 January 2012, the State party submits, with regard to the present communication together with around sixty other communications that, when becoming a State 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 States 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".

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

5.1 The authors provided their comments on 8 February 2012. They confirm that the communication was registered by the Human Rights Committee before the State party decided on Mr. Kovalev's applications for supervisory review and presidential pardon. They claim however that neither the request for pardon, nor the application for supervisory review to the Supreme Court constitute domestic remedies that must be exhausted before a communication is submitted to the Committee. The presidential pardon is a remedy of humanitarian character, and not a legal remedy. Also, the application for supervisory review cannot be regarded as an effective remedy, since the lodging of such an application does not automatically lead to its consideration. The

convicted person requests the president of the court to file a protest motion. Only the protest filed at the request of the convicted person triggers the procedure of supervisory review of the court decision. Such a protest motion, if admitted, is considered by a collegial organ, the presidium of the court. However, the supervisory review application itself is considered by a single judge in the absence of public hearings, and therefore cannot be regarded as a remedy.

5.2 The authors further submit that, according to the Committee's established practice, only domestic remedies that are both available and effective must be exhausted. The Committee does not consider the requests for pardon and supervisory review applications as domestic remedies that must be exhausted before a communication is submitted. According to the Committee's jurisprudence, presidential pardons are an extraordinary remedy and as such do not constitute an effective remedy for the purposes of Article 5, paragraph 2 (b), of the Optional Protocol.[14]

5.3 On 29 February 2012, the authors informed the Committee that the Supreme Court had dismissed Mr. Kovalev's supervisory review application on 27 February 2012.

State party's further observations on admissibility and merits

6.1 In a note verbale of 15 March 2012, the State party claimed that the communication was inadmissible, since it was submitted to the Committee by third parties and not by the alleged victim himself. With reference to Article 1 of the Optional Protocol to the Covenant, it submits that the Republic of Belarus has recognized the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any rights set forth in the Covenant. The Optional Protocol did not approve the competence of the Committee to provide an interpretation of Article 1 which deviates from the language agreed by States parties. The Vienna Convention on the Law of Treaties (1969) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) stipulate that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Only subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions shall be taken into account and no such agreement was concluded. Accordingly, the Optional Protocol and its provisions cannot be substituted for the Committee's rules of procedure

[14] Communication No. 1132/2002, *Chisanga v. Zambia*, Views adopted on 18 October 2005, para. 6.3.

and its practice because it deprives the Optional Protocol of its object and purpose.

6.2 As regards the merits of the case, the State party submits that Mr. Kovalev was sentenced to death by the Supreme Court of Belarus, the highest judicial instance in Belarus. Article 6, paragraph 2, of the Covenant, stipulates that a sentence of death may be imposed only for the most serious crimes in accordance with the law in force. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

6.3 With regard to the Committee's request not to execute Mr. Kovalev while his communication is pending before the Committee, the State party notes that such a request is beyond the mandate of the Committee and is not binding in terms of its international legal obligations. Accordingly, the Criminal Code is the only source of criminal law in Belarus. It recalls that Mr. Kovalev lodged a supervisory application to the Supreme Court and applied for presidential pardon. In accordance with national legislation, the death penalty cannot be carried out until such applications are considered.

Authors' further submissions

7.1 On 19 March 2012, the authors notified the Committee that on 17 March 2012 they had received a letter from the Supreme Court, dated 16 March 2012, informing them of the execution of Mr. Kovalev.

7.2 On 30 March 2012, the authors provided additional information. They submit that on 11 March 2012 they were granted permission for a meeting with Mr. Kovalev, this being the last time they had seen him alive. On 13 March 2012, local mass media published information, according to which Mr. Kovalev's application for pardon had been considered, without however indicating the outcome. On 13 and 14 March 2012, Mr. Kovalev's lawyer was denied access to him, without any explanations. In the evening of 14 March 2012, mass media reported that the President of Belarus refused to grant pardon to Mr. Kovalev and the other defendant.

7.3 On 15 March 2012, Ms. Kovaleva travelled to Minsk in order to find out the fate of her son. On the same day, the lawyer's attempt to obtain a meeting with Mr. Kovalev again failed and he was told that Mr. Kovalev had been transferred, without any further details about his whereabouts being provided. On 15 March 2012, Mrs. Kovaleva submitted a written application to the President of Belarus, requesting the suspension of her son's execution for at least one year in order for the Human Rights Committee to take a decision on his communication.

7.4 On 16 March 2012, Ms. Kovaleva, together with the lawyer of Mr. Kovalev, attempted to obtain information on his whereabouts and whether he was alive. However, they could not obtain any such information from authorities. On 17 March 2012, Mrs. Kovaleva received a letter from the Su-

preme Court, dated 16 March 2012, informing her of the execution of her son. On 28 March 2012, she obtained the death certificate which indicates 15 March 2012 as the date of death.

State party's further submission

8. By note verbale dated 19 July 2012, the State party informed the Committee that it discontinued proceedings regarding the present communication and will dissociate itself from the Views that might be adopted by the Human Rights Committee.[15]

Issues and proceedings before the Committee

The State party's failure to cooperate and to respect the Committee's request for interim measures

9.1 The Committee notes the State party's submission: that there are no legal grounds for the consideration of the present communication insofar as it is registered in violation of Article 1 of the Optional Protocol, because the alleged victim did not present the communication himself and has failed to exhaust domestic remedies; that it has no obligations regarding 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 above communications will be considered by its authorities as "invalid".

9.2 The Committee recalls that Article 39, paragraph 2 of the International Covenant on Civil and Political Rights 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 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 concerned (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.[16] The Committee observes that, by failing to accept the Com-

[15] The State party also provided the Committee with a DVD documentary film, "Subway", containing materials related to the investigation of the criminal charges against the alleged victim and the other defendant, including statements made by them during the investigation.

[16] See, inter alia, communications No 869/1999, *Piandiong et al. v. the Philippines*, Views

mittee's determination whether a communication shall be registered and by declaring beforehand that it will not accept the determination of the Committee on the admissibility and the merits of the communication, the State party violates its obligations under Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights.

9.3 Furthermore, the Committee observes that, when submitting the communication on 14 December 2011, the authors informed the Committee that at that point Mr. Kovalev was on death row. On 15 December 2011, the Committee transmitted to the State party a request not to carry out Mr. Kovalev's execution while his case was under consideration; this request for interim measures was reiterated several times. On 19 March 2012, the authors notified the Committee that Mr. Kovalev's execution had been carried out and subsequently provided a copy of the death certificate indicating 15 March 2012 as the date of his death, but not disclosing the cause of his death. The Committee notes that it is uncontested that the execution in question took place despite the fact that a request for interim measures of protection had been duly addressed to the State party and reiterated several times.

9.4 Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or to frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In the present case, the authors allege that Mr. Kovalev was denied his rights under various Articles of the Covenant. Having been notified of the communication and the Committee's request for interim measures, the State party breached its obligations under the Protocol by executing the alleged victim before the Committee concluded its consideration of the communication.

9.5 The Committee recalls that interim measures under rule 92 of its rules of procedure adopted in conformity with Article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the rule, especially by irreversible measures such as, as in the present case, the execution of Mr. Kovalev, undermines the protection of Covenant rights through the Optional Protocol.[17]

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adopted on 19 October 2000, para. 5.1, and No. 1041/2001, *Tulyaganova v. Uzbekistan*, Views adopted on 20 July 2007, paragraphs 6.1–6.3.

[17] See, inter alia, communications No. 964/2001, *Saidova v. Tajikistan*, Views adopted on 8 July 2004, para. 4.4; No. 1044/2002, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, paras. 6.1–6.3; No. 1280/2004, *Tolipkhuzhaev v. Uzbekistan*, Views adopted on 22 July 2009, para. 6.4.

Consideration of admissibility

10.1 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.

10.2 The Committee takes note of the State party's argument that the communication is inadmissible since it was submitted to the Committee by third parties and not by the alleged victim himself. In this respect, the Committee recalls that rule 96 (b) of its rules of procedure provides that a communication should normally be submitted by the individual personally or by that individual's representative, but that a communication submitted on behalf of an alleged victim may, however, be accepted when it appears that the individual in question is unable to submit the communication personally.[18] In the present case, the Committee notes that the alleged victim was being detained on death row at the time of submission of the communication, and that, although he prepared and signed a power of attorney authorizing his mother to act on his behalf, the administration of the SIZO failed to authenticate it, despite several complaints being lodged with relevant domestic authorities (see para. 2.2 above). In the circumstances, the failure to provide a power of attorney cannot be attributable to the alleged victim or to his relatives. The Committee further recalls that, where it is impossible for the victim to authorize the communication, the Committee has considered a close personal relationship to the alleged victim, such as family ties, as a sufficient link to justify an author acting on behalf of the alleged victim.[19] In the present case, the communication was submitted on behalf of the alleged victim by his mother and his sister, who have presented a duly signed power of attorney for the counsel to represent them before the Committee. The Committee therefore considers that the authors are justified by reason of close family connection in acting on behalf of Mr. Kovalev. Accordingly, the Committee is not precluded by Article 1 of the Optional Protocol from examining the communication.

10.3 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.

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[18] See also communication No. 1355/2005, *X. v. Serbia*, inadmissibility decision of 26 March 2007, para. 6.3.

[19] *See Official Records of the General Assembly, Thirty-third Session, Supplement No. 40* (A/33/40), para. 580. See also, inter alia, communications No. 5/1977, *Bazzano v. Uruguay*, Views adopted on 15 August 1979, para. 5; No. 29/1978, *E. B. v. S*, decision on admissibility adopted on 14 August 1979; No. 43/1979, *Drescher v. Uruguay*, Views adopted on 21 July 1983, para. 3.

10.4 With regard to the requirement laid down in Article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party's argument that Mr. Kovalev had not exhausted all domestic remedies at the time of submission of his communication in view of the fact that his applications for supervisory review and for presidential pardon were still pending before national authorities. In this regard, the Committee notes that Mr. Kovalev's application for supervisory review and presidential pardon were rejected on 27 February 2012 and 14 March 2012 respectively, and reiterates its previous jurisprudence, according to which a supervisory review is a discretionary review process[20] and presidential pardons are an extraordinary remedy[21] and as such none of them constitute an effective remedy for the purposes of Article 5, paragraph 2 (b), of the Optional Protocol. Therefore, the Committee is not precluded by Article 5, paragraph 2 (b), of the Optional Protocol, from considering the communication.

10.5 In the absence of any information or evidence in support of the authors' claim that Mr. Kovalev's rights under Article 9, paragraph 1, of the Covenant have been violated, the Committee finds this claim insufficiently substantiated, for purposes of admissibility, and declares it inadmissible under Article 2 of the Optional Protocol.

10.6 The Committee considers that the remaining allegations raising issues under Article 6, paragraphs 1 and 2; Article 7, Article 9, paragraph 3; and Article 14, paragraphs 1, 2, 3 (b) and (g), and 5, of the Covenant in respect of Mr. Kovalev, and under Articles 7 and 18 in respect of the authors themselves, have been sufficiently substantiated, for purposes of admissibility, and proceeds to their examination on the merits.

Consideration of the merits

11.1 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.

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[20] See the Committee's general comment No. 32, paragraph 50: "A system of supervisory review that only applies to sentences whose execution has commenced does not meet the requirements of article 14, paragraph 5, regardless of whether such review can be requested by the convicted person or is dependent on the discretionary power of a judge or prosecutor"; and, for example, communications No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted on 17 March 2003, para. 7.2; No. 1100/2002, *Bandajevsky v. Belarus*, Views adopted on 28 March 2006, para. 10.13; No. 1344/2005, *Korolko v. Russian Federation*, inadmissibility decision of 25 October 2010, para. 6.3; No. 1449/2006, *Umarov v. Uzbekistan*, Views adopted on 19 October 2010, para. 7.3.

[21] See communications No. 1033/2001, *Singarasa v. Sri Lanka*, Views adopted on 21 July 2004, para. 6.4; No. 1132/2002, *Chisanga v. Zambia*, Views adopted on 18 October 2005, para. 6.3.

11.2 The Committee notes the authors' claims under Articles 7 and 14, paragraph 3 (g), of the Covenant that Mr. Kovalev was subjected to physical and psychological pressure with the purpose of eliciting a confession of guilt and that, although he retracted his self-incriminating statements during court proceedings, his confession served as a basis for his conviction. In this regard, the Committee recalls that once a complaint about ill-treatment contrary to Article 7 has been filed, a State party must investigate it promptly and impartially.[22] It further recalls that the safeguard laid down in Article 14, paragraph 3 (g), of the Covenant must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.[23] As it transpires from the decision of 30 November 2011, the Supreme Court considered that Mr. Kovalev changed his statements in order to mitigate his punishment, stating that the confessions of the accused and other evidence were obtained in strict compliance with the criminal procedure norms and were thus admissible as evidence. However, the State party has not presented any information to demonstrate that it conducted any investigation into these allegations. In these circumstances, due weight must be given to the authors' claims and the Committee concludes that the facts before it disclose a violation of Mr. Kovalev's rights under Articles 7 and 14, paragraph 3 (g), of the Covenant.[24]

11.3 As to the authors' claim that Mr. Kovalev was arrested on 12 April 2011 and was brought for the first time before a judge only on 15 September 2011, i.e. after more than five months from the arrest, the Committee notes that the State party failed to address these allegations. While the meaning of the term "promptly" in Article 9, paragraph 3, must be determined on a case-by-case basis, the Committee recalls its general comment No. 8 (1982) on the right to liberty and security of persons[25] and its jurisprudence,[26] pursuant to

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[22] See the Committee's general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. A, para. 14.

[23] See, for example, the Committee's general comment No. 32, para. 41; communications No. 330/1988, *Berry* v. *Jamaica,* Views adopted on 4 July 1994, para. 11.7; No. 1033/2001, *Singarasa* v. *Sri Lanka*, Views adopted on 21 July 2004, para. 7.4; No. 1769/2008, *Bondar* v. *Uzbekistan*, Views adopted on 25 March 2011, para. 7.6.

[24] See, for example, the Committee's general comment No. 32, para. 60; communications No. 1401/2005, Kirpo v. Tajikistan, Views adopted on 27 October 2009, para. 6.3; No. 1545/2007, Gunan v. Kyrgyzstan, Views adopted on 25 July 2011, para. 6.2.

[25] Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, para. 2.

[26] The Committee found that, in the absence of any explanations by the State party, a delay of three days in bringing a person before a judge did not meet the requirement of promptness within the meaning of article 9, paragraph 3 (see communication No. 852/1999, Borisenko v. Hungary, Views adopted on 14 October 2002, para. 7.4). The Committee also concluded that a delay of one week in a capital case cannot be deemed compatible with article 9,

which delays should not exceed a few days. The Committee therefore considers the delay of five months before bringing Mr. Kovalev before a judge to be incompatible with the requirement of promptness set forth in Article 9, paragraph 3, and thus in violation of Mr. Kovalev's rights under this provision.

11.4 The Committee further notes the authors' allegations that the principle of presumption of innocence was not respected, because several State officials made public statements about Mr. Kovalev's guilt before his conviction by the court and mass media made available to the public at large materials of the preliminary investigation before the consideration of his case by the court. Moreover, he was kept in a metal cage throughout the court proceedings and the photographs of him behind metal bars in the court room were published in local print media. In this respect, the Committee recalls its jurisprudence[27] as reflected in its general comment No. 32, according to which "the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle".[28] The same general comment refers to the duty of all public authorities to refrain from prejudging the outcome of a trial, including by abstaining from making public statements affirming the guilt of the accused;[29] it further states that defendants should normally not be shackled or kept in cages during trial or otherwise presented to the court in a manner indicating that they may be dangerous criminals and that the media should avoid news coverage undermining the presumption of innocence. On the basis of the information before it and in the absence of any other pertinent information from the State party, the Committee considers that the presumption of innocence of Mr. Kovalev guaranteed under Article 14, paragraph 2, of the Covenant has been violated.

11.5 With regard to the authors' claims that Mr. Kovalev was visited by his lawyer only once during the pretrial investigation, that the confidentiality of their meetings was not respected, that they did not have adequate time to prepare the defense and that the lawyer was denied access to him on several occasions, the Committee recalls that Article 14, paragraph 3 (b) provides that accused persons must have adequate time and facilities for the preparation of their defense and to communicate with counsel of their own choosing, this

paragraph 3 (see communication No. 702/1996, McLawrence v. Jamaica, Views adopted on 18 July 1997, para. 5.6).

[27] See, for example, communications No. 770/1997, Gridin v. Russian Federation, Views adopted on 20 July 2000, para. 8.3; No. 1520/2006, Mwamba v. Zambia, Views adopted on 10 March 2010, para. 6.5.

[28] See Committee's general comment No. 32, para. 30.

[29] Ibid., para. 30.

provision being an important element of the guarantee of a fair trial and an application of the principle of equality of arms.[30] The right to communicate with counsel requires that the accused is granted prompt access to counsel, and counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.[31] The Committee is of the view that the conditions, as described by the authors, in which Mr. Kovalev was assisted by his lawyer during the pretrial investigation and in the course of court proceedings adversely affected his possibilities to prepare his defense.[32] In the absence of any information by the State party to refute the authors' specific allegations and in the absence of any other pertinent information on file, the Committee considers that the information before it reveals a violation of Mr. Kovalev's rights under Article 14, paragraph 3 (b), of the Covenant.

11.6 The authors further claim that Mr. Kovalev's right to have his sentence and conviction reviewed by a higher tribunal was violated in view of the fact that the sentence rendered by the Supreme Court is not subject to appeal. The Committee observes that, as it transpires from materials before it, Mr. Kovalev was sentenced to death at first instance by the Supreme Court on 30 November 2011 and the judgment mentions that it is final and not subject to any further appeal. Although Mr. Kovalev availed himself of the supervisory review mechanism, the Committee notes that such review only applies to already executory decisions and thus constitutes an extraordinary means of appeal which is dependent on the discretionary power of judge or prosecutor. When such review takes place, it is limited to issues of law only and does not permit any review of facts and evidence and therefore cannot be characterized as an "appeal", for the purposes of Article 14, paragraph 5.[33] The Committee recalls in this respect that even if a system of appeal may not be automatic, the right to appeal under Article 14, paragraph 5 imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.[34] In the ab-

[30] Ibid., para. 32.

[31] Ibid., para. 34. See also communications No. 1117/2002, Khomidov v. Tajikistan, Views adopted on 29 July 2004, para. 6.4; No. 907/2000, Siragev v. Uzbekistan, Views adopted on 1 November 2005, para. 6.3; No.770/1997, Gridin v. Russian Federation, Views adopted on 20 July 2000, para. 8.5.

[32] See communications No. 1117/2002, Khomidov v. Tajikistan, Views adopted on 29 July 2004, para. 6.4; No. 283/1988, Little v. Jamaica, Views adopted on 1 November 1991, para. 8.4; No. 1167/2003, Rayos v. Philippines, Views adopted on 27 July 2004, para 7.3.

[33] See footnote 19 above.

[34] See Committee's general comment No. 32, para. 48; communications No. 1100/2002, Bandajevsky v. Belarus, Views adopted on 28 March 2006, para. 10.13; No. 985/2001, Aliboeva v. Tajikistan, Views adopted on 18 October 2005, para. 6.5; No. 973/2001, Khalilova v. Tajikistan, Views adopted on 30 March 2005, para. 7.5; No. 964/2001, Saidova

sence of any explanation from the State party, the Committee considers that the absence of a possibility to appeal the judgment of the Supreme Court passed at first instance to a higher judicial instance is inconsistent with the requirements of Article 14, paragraph 5.[35]

11.7 The Committee notes the authors' allegations, not refuted by the State party, that the Supreme Court was biased, and violated the principle of independence, impartiality, equality of arms and the principle of publicity of court proceedings, contrary to Article 14, paragraph 1, of the Covenant. In the light of the Committee's findings that the State party failed to comply with the guarantees of a fair trial under Article 14, paragraphs 2, 3 (b) and (g), and 5, of the Covenant, the Committee is of the view that Mr. Kovalev's trial suffered from irregularities which, taken as a whole, amount to a violation of Article 14, paragraph 1, of the Covenant.

11.8 The author's further claim a violation of Mr. Kovalev's right to life under Article 6 of the Covenant, since he was sentenced to death after an unfair trial. The Committee notes that the State party has argued, with reference to Article 6, paragraph 2, of the Covenant, that Mr. Kovalev was sentenced to death following the judgment handed down by the Supreme Court, in accordance with the Constitution, the Criminal Code and the Criminal Procedure Code of Belarus, and that the imposed death penalty was not contrary to the international instruments to which Belarus is a State party. In this respect, the Committee recalls its general comment No. 6 (1982) on the right to life, where it noted that the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant, which implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and the right to review by a higher tribunal".[36] In the same context, the Committee reiterates its jurisprudence that the imposition of a sentence of death upon conclusion of a trial, in which the provisions of Article 14 of the Covenant have not been respected, constitutes a violation of Article 6 of the Covenant.[37] In the light of the Committee's findings of a violation of Article

v. Tajikistan, Views adopted on 8 July 2004, para. 6.5; No. 701/1996, Gómez Vázquez v. Spain, Views adopted on 20 July 2000, para. 11.1.

35 See, for example, communications No. 985/2001, Aliboeva v. Tajikistan, Views adopted on 18 October 2005, para. 6.5; No. 973/2001, Khalilova v. Tajikistan, Views adopted on 30 March 2005, para. 7.5.

36 Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, para. 7; see also communication No. 253/1987, Kelly v. Jamaica, Views adopted on 8 April 1991, para. 5.14.

37 See the Committee's general comment No. 32, para. 59; communications No. 719/1996, Levy v. Jamaica, Views adopted on 3 November 1998, para. 7.3; No. 1096/2002, Kurbanov v. Tajikistan, Views adopted on 6 November 2003, para. 7.7; No. 1044/2002, Shukurova v. Tajikistan, Views adopted on 17 March 2006, para. 8.6; No. 1276/2004, Idieva v. Tajikistan,

14, paragraphs 1, 2, 3 (b) and (g), and 5, of the Covenant, it concludes that the final sentence of death in respect of Mr. Kovalev was passed without having met the requirements of Article 14, and that as a result Article 6 of the Covenant has been violated.

11.9 In the light of the above finding of a violation of Article 6 of the Covenant, the Committee will not examine separately the authors' allegation under Article 7 with regard to Mr. Kovalev's mental distress caused by the situation of uncertainty about his fate (see para. 3.10 above).

11.10 The Committee notes the authors' claim that they themselves are victims of a violation of Article 7 of the Covenant in view of the severe mental suffering and stress caused to them as a result of the authorities' refusal to reveal any detail about Mr. Kovalev's situation or whereabouts from 13 March 2012 (rejection of his application for pardon) until 17 March 2012 (when they were informed that the death sentence had been carried out), as well as their failure to inform them beforehand of the date, time and place of the execution, to release the body for burial and to disclose the location of Mr. Kovalev's burial site. These allegations remain unchallenged by the State party. The Committee notes that the law in force prescribes that the family of an individual under sentence of death is not informed in advance of the date of the execution, the body is not handed over to them and the location of the burial site of the executed prisoner is not disclosed. The Committee understands the continued anguish and mental stress caused to the authors, as the mother and sister of the condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his grave. The complete secrecy surrounding the date of the execution and the place of burial, as well as the refusal to hand over the body for burial in accordance with the religious beliefs and practices of the executed prisoner's family have the effect of intimidating or punishing the family by intentionally leaving it in a state of uncertainty and mental distress. The Committee therefore concludes that these elements, cumulatively, and the State party's subsequent persistent failure to notify the authors of the location of Mr. Kovalev's grave, amount to inhuman treatment of the authors, in violation of Article 7 of the Covenant.[38]

11.11 Having come to this conclusion, the Committee will not examine the authors' separate allegations under Article 18 of the Covenant.

Views adopted on 31 March 2009, para. 9.7; No. 1304/2004, Khoroshenko v. Russian Federation, Views adopted on 29 March 2011, para. 9.11; No. 1545/2007, Gunan v. Kyrgyzstan, Views adopted on 25 July 2011, para. 6.5.

[38] See also communications No. 886/1999, *Schedko* v. *Belarus*, Views adopted on 3 April 2003, para. 10.2; No. 887/1999, *Staselovich* v. *Belarus*, Views adopted on 3 April 2003, para. 9.2; No. 973/2001, *Khalilov* v. *Tajikistan*, Views adopted on 30 March 2005, para. 7.7; No. 985/2001, *Aliboeva* v. *Tajikistan*, Views adopted on 18 October 2005, para. 6.7; No. 1044/2002, *Shukurova* v. *Tajikistan*, Views adopted on 17 March 2006, para. 8.7.

12. The Human Rights Committee, acting under Article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of Mr. Kovalev's rights under Articles 6; 7; 9, paragraph 3; and 14, paragraphs 1, 2, 3 (b) and (g), and 5, of the Covenant, as well as under Article 7 in relation to the authors themselves. The State party also breached its obligations under Article 1 of the Optional Protocol to the Covenant.

13. In accordance with Article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including appropriate compensation for the anguish suffered, and disclosure of the burial site of Mr. Kovalev. The State party is also under an obligation to prevent similar violations in the future, including by amending Article 175, paragraph 5 of the Criminal Execution Code so as to bring it in line with the State party's obligations under Article 7 of the Covenant.

14. 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 in case that a violation has been established, 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. In addition, it requests the State party 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]

Annex 10

VIEWS ADOPTED BY THE HUMAN RIGHTS COMMITTEE ON COMMUNICATION NO. 1784/2008 VLADIMIR SHUMILIN V. BELARUS

Unated Nations **CCPR**/C/105/D/1784/2008

International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 1784/2008

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

Submitted by:	Vladimir Schumilin (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	17 March 2008 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 29 April 2008 (not issued in document form)
Date of adoption of Views:	23 July 2012
Subject matter:	Sanctioning (fining) of an individual for having distributed leaflets in violation of the right to disseminate information without unreasonable restrictions.
Substantive issues:	Right to impart information; permissible restrictions.
Procedural issues:	Exhaustion of domestic remedies
Article of the Covenant:	19, paras. 2 and 3
Article of the Optional Protocol:	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. 1784/2008[1]

Submitted by:	Vladimir Schumilin (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	17 March 2005 (initial submission)

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

Meeting on 23 July 2012,

Having concluded its consideration of communication No. 1784/2008, submitted to the Human Rights Committee by Vladimir Schumilin 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

The author is Vladimir Shumilin, a Belarusian national born in 1973. He claims to be a victim of violation by Belarus of his rights under Article 19, paragraph 2, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 December 1992. The author is unrepresented by counsel.

[1] 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. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

The facts as submitted by the author

2.1 On 12 February 2008, the author distributed leaflets[2] containing information on the venue of a meeting in Gomel city with Mr. Milinkevich - a former candidate for the post of President of the Republic. The same day, he was apprehended by the police and a record concerning the commission of an administrative offence under Article 23.24 (part 1) of the Code of Administrative Offences was established. The said Article provides for the engagement of liability for violating the existing regulations on the organization and the conduct of meetings, street rallies, demonstrations, other mass events or pickets. These regulations are set by a specific law on mass events, whose Article 8 forbids anyone to produce and disseminate information materials concerning events if the issue whether to authorize the event is still under consideration.

2.2 Given that the leaflets distributed by the author contained information concerning a meeting of a politician with citizens, the police considered that the author was doing this in breach of the law. The same day, the author was brought to the Court of the Soviet District in Gomel. The Court immediately issued a ruling that by distributing leaflets for a non-authorized meeting, the author had breached the provisions of Article 23.24 (part 1) of the Code of Administrative Offences and fined him 1.05 million Belarusian roubles (equal at that time to US$ 488). The author notes that the amount of the fine then exceeded the average monthly salary in Belarus.

2.3 The author points out that nothing in the administrative case file indicated that the court had based its conclusion on something other than the police record concerning him distributing leaflets. Therefore, the only question which had had to be examined by the court would have been to verify whether by distributing leaflets about an upcoming meeting amounted to a breach, by the author, of the regulations governing the organization of peaceful assembly. In his opinion, neither the police nor the court made an effort to clarify why the limitation of the author's right to disseminate in-

[2] The author submits a copy of the leaflets in question. It contains a photograph of Mr. Milinkevich, and an explanation to the Gomel citizens that a month ago the City's Executive Committee was asked to authorize a public meeting with Mr. Milinkevich in the « Festivalny » Hall. It is explained that this request was supported by more than 300 Gomel's residents, and that the administration has later on refused to authorize the meeting under an « invented » pretext. The text continues with an explanation that the meeting with Mr. Milinkevich would take place anyway, on 15 February 2008, at 4 p.m. in an area between buildings located at Nr. 94-98 at Barykin Street, and at 5.30, at the Yanaki Kupaly Square. It is also explained that Mr. Milinkevich would expose his program for overcoming the social-economic problems, which have occurred due to the "short-sighted" policy of the "current leadership", and he would also reply to questions. Finally, the leaflet contains a contact phone number for further explanations.

formation in this case was necessary for the purposes of Article 19 of the Covenant.

2.4 On 29 February 2008, the Gomel Regional Court, on appeal, simply confirmed the Soviet District Court's decision, without providing a qualification of the author's acts in light of the Covenant's provisions, in spite of the explicit request of the author in this connection in his appeal claim. In particular, in his appeal, the author reminded the court that the provisions of international treaties in force for Belarus prevail in case of conflict with norms of domestic law, and that under the Vienna Law of the Treaties, national law cannot be invoked to justify non-application of provisions of international law; under Article 15 of the State party's Law on international agreements, universally recognized principles of international law and the provisions of international agreements into force for Belarus are part of the domestic law. Article 19 of both the Universal Declaration of Human Rights and the Covenant prescribe the freedom to disseminate information.

2.5 The author refers to the Committee's jurisprudence in similar cases, and emphasizes that the restriction of his right was not necessary for purposes of national security, public order, the defense of the morals and health of the population, or the freedoms of others.[3] He notes that the rights under Article 19 are not absolute and may be restricted, but adds that the provisions of the State party's law on mass events restricting the right to disseminate information cannot be in conformity with the State party's obligations under the Covenant, as they are not aimed at protecting the State security or safety, the public order, or necessary for the protection of the health and morals of the population or for the protection of the rights and freedoms of others.

2.6 The author explains that he has exhausted available effective domestic remedies, without submitting appeals under the supervisory review proceedings which do not lead systematically to a review of a case and are thus not effective.

The complaint

3. The author claims that the application of the law on mass events in his case resulted in an unjustified limitation of his right to disseminate information under Article 19, Article 2, of the Covenant.

State party's observations on admissibility and merits

4.1 On 2 June and 4 August 2008, the State party provided its observations on the admissibility and the merits of the communication. It explained that, on 12 February 2008, the Court of the Soviet District of Gomel found

[3] The author refers in particular to case No. 780/1997, Laptsevich v. Belarus, Views adopted on 20 March 2000.

the author guilty under Article 23.34, part 1, of the Code of Administrative Offences and sentenced him to a fine. The court found out that, on 12 February 2008, the author together with another individual distributed leaflets calling for the citizens to attend an unauthorized meeting to take place on 15 February 2008. The police seized 1,933 leaflets in their possession. The State party explains that in court, Mr. Shumilin had accepted his guilt, and that he did not complain to a prosecutor about his administrative case. The court's decision was confirmed on appeal, on 29 February 2008, by the Gomel Regional Court. This decision entered into force immediately, and further appeals were only possible under the supervisory review proceedings.

4.2 The State party challenges the admissibility of the communication. It explains that under the provisions of the Procedural-Execution Code on Administrative Offences ("P.E. Code" hereafter), the author could have introduced a request for a supervisory review of the decision of the Gomel Regional Court with the President to the higher jurisdiction, the President of the Supreme Court in this case, but he failed to do so.

4.3 The State party explains that appeals under the supervisory review proceedings, as set up under Article 12.14 of the P.E. Code, suppose a verification of the legality of the appealed decision, the grounds for decision and its fairness, in light of the arguments contained in the appeal. If the court reveals grounds for the improvement of the situation of the individual concerned, the previous decision may be re-examined in parts, even if the person had not requested this specifically in his/her appeal. Thus, according to the State party, the author's contention that supervisory proceedings are not effective is groundless. The State party adds that the author is still in a position to file a supervisory review appeal with the Supreme Court.

4.4 On the merits, the State party rejects the author's allegations in the present communication as groundless. It explains that under Article 23.34 of the Code of Administrative Offences, violating the regulations on the organisation or carrying out of assemblies, meetings, demonstrations or mass events, constitutes an administrative offence and is subject to a warning or a fine. The material on file, including the leaflets in question, makes it clear that the planned meeting was not authorized. The leaflets contain a call to the citizens to attend the event. Given that no authorization for the said event has been received, the acts of the author could only be considered as constituting a breach of the regulation on the organization of mass events. The author breached Article 8 of the law on mass events, pursuant to which prior to the receipt of an authorization to conduct a mass event, it is forbidden to anyone without exception to prepare and disseminate information materials.

Author's comments on the State party's observations

5.1 On 22 September 2008, the author explains that he has not complained to the prosecutor's office because his complaint would not lead to the re-examination of his case as such appeals are non-efficient and do not lead to the examination of the merits of the case. He notes that only effective and accessible remedies should be exhausted.

5.2 As to the State party's contention that he had distributed leaflets calling for a meeting prior to the obtaining of an authorization for the conduct of the event, the author notes that the Covenant is directly applicable in the State party and that it guarantees the freedom of everyone to freely disseminate all kinds of information. Even if this right is not absolute, its restrictions may only be done if justified for the purpose of the permissible limitations contained in Article 19, paragraph 3, of the Covenant. Given that the restrictions of his rights were not justified under any of these permissible limitations, the authorities have breached his rights under Article 19, paragraph 2, of the Covenant.

5.3 The author adds that pursuant to Article 8 of the Constitution, the State party accepts the universally recognized principles of international law and ensures that national law complies with them. He notes that States parties must fulfil their international obligations in good faith, and points out that, according to Articles 26 and 27 of the Vienna Law of the Treaties, a party to an international agreement cannot invoke its national law to justify non-execution of the international treaty. He also notes that under Article 15 of the State party's law on international treaties, the universally recognized principles of international law and the provisions of the international treaties to which Belarus is a party constitute a part of the domestic law. Article 19, paragraph 2, of the Covenant guarantees the freedom of expression, including the right to disseminate information. This right can only be limited for the purposes listed in Article 19, paragraph 3, of the Covenant. The grounds invoked by the courts when engaging his administrative liability in his case are not, according to the author, justifiable under any of the permissible limitations.

Additional observations by the State party

6.1 On 26 March 2009, the State party provided additional information. It noted, first, that the author is not correct when declaring that an appeal to the prosecutor's office does not lead to a re-examination of a case and that the supervisory appeal to the Supreme Court is not effective. In support, the State party provides statistical data, according to which in 2007, the Supreme Court examined appeals in 733 administrative cases, including at the request of the prosecutors' office. The Chairperson of the Supreme Court quashed or modified the decisions (rulings) in 116 cases (63 at the request of the pros-

ecutor's office). In 2008, 171 such decisions were quashed or modified, 146 out of which were initiated by the prosecutor's office. A total of 1,071 administrative cases were examined by the Supreme Court in 2008. Thus, in 2007, the Supreme Court has quashed or modified decisions in administrative cases in 24.4 per cent of the cases appealed, and in 2008, this figure constitutes 29.6 per cent.

6.2 The State party next contends that the author's affirmation that the decision to have his administrative liability engaged was not justified under Article 19, paragraph 3, of the Covenant, is groundless. The law on mass events regulates the organization and conduct of assemblies, meetings, demonstrations, street rallies, pickets, etc. Its preamble makes it clear that the aim of creating such a framework is to set up the conditions for the realization of the constitutional rights and freedoms of the citizens and the protection of the public safety and public order when such events are conducted on the streets, squares, or other public area. The author has breached the limitations under Article 23.34 of the Code of Administrative Offences and Article 8 of the Law on Mass Events, which are necessary for the protection of the public safety and order during the conduct of gatherings, meetings, street rallies, etc.

6.3 The State party adds that the right to freely express an opinion is guaranteed by Article 19 to all citizens of the States parties to the Covenant. It explains that, as a party to the Covenant, it fully recognizes and complies with its obligations thereon. Article 33 of the Constitution guarantees the freedom of opinion and beliefs and their free expression. Even if the right to freedom of expression is considered as one of the main human rights, it is not absolute. Article 19 is not included in the list of Articles, which cannot be derogated at any circumstances, contained in Article 4 of the Covenant. Thus, the exercise of these rights can be restricted by the State, provided that the limitations are provided by law, have a legitimate aim, and are necessary in a democratic society.

6.4 Pursuant to Article 23 of the Constitution, limitations of rights and freedoms are permitted only if they are provided by law and are in the interest of national security, public order, protection of morals and health of the population, and the rights and freedoms of others. Similarly, Article 19, paragraph 3, of the Covenant provides that the rights set up in paragraph 2 of the same provision imply special obligations and particular responsibility. The exercise of these rights can therefore be limited, but the limitations must be provided by law and be necessary for the respect of the rights and reputation of others, the protection of the public order, health or morals.[4]

[4] In this connection, the State party also notes that article 29 of the Universal Declaration of Human Rights provides that "(1) everyone has duties to the community in which alone the free and full development of his personality is possible" and that "(2) in the exercise of his

6.5 According to the State party, the above-mentioned permits it to conclude that the realization of the right to receive and disseminate information can be achieved exclusively in a lawful manner, i.e. in the framework of the existing legislation of a State party to the Covenant. The current Belarusian legislation offers the necessary conditions for the free expression of the opinion by the citizens, and for the receipt and dissemination of information.

6.6 The State party contends that the author induces the Committee into error concerning the existing legislation. Thus, pursuant to Article 2.15, part 2, point 7, of the P.E. Code, a prosecutor, within his/her powers, can introduce a protest motion against court rulings on administrative cases which are contrary to the existing legislation. Article 2.15, point 1, of the same Code provides that court rulings on administrative cases which have entered into force can be re-examined, in particular following a protest motion introduced by a prosecutor. Article 12.14, point 2, of the Code provides that following the examination of the protest motion, the attacked ruling may be annulled partly or in its totality, and the case may be referred back for a new examination. Article 12.11, point 3, fixes a six months' timeframe for the introduction of protest motions, starting as of the date of the entry into force of the attacked rulings. Therefore, an appeal to the prosecutor's office may lead to a re-examination of the merits of an administrative case. In the present case, the author consciously has not availed himself of all domestic remedies of legal protection available to him.

Additional comments by the author

7.1 On 9 March 2011, the author reiterates that, according to him, supervisory review appeals do not constitute an effective remedy, due to the fact that their examination is left at the discretion of a single official, and if an appeal is granted, it would not lead to an examination of elements of facts and evidence. The author notes that the Committee has dealt with this issue on several occasions, and has concluded that it is not necessary to appeal under the supervisory review proceedings for purposes of Article 5, paragraph 2 (b), of the Optional Protocol. The author also notes that the existing law does not allow individuals to file complaints to the Constitutional Court.

7.2 The author disagrees with the State party's rejection of his contention that his administrative case was not grounded under any of the permissible restrictions listed in paragraph 3 of Article 19 of the Covenant, and he explains that the courts' decision in the case do not contain such argumentation. The judges in his case only referred to the national laws in their decisions, and ig-

rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

nored completely the State party's obligations under international law. With reference to the Committee's case-law,[5] the author notes that the Committee has decided that giving a priority to the application of national law over the Covenant's provisions was incompatible with the State party's obligations under the Covenant. Pursuant to Article 8, part 1, of the State party's Constitution, when they were examining his case, the courts were obliged to bear in mind the prevalence of the State party's international obligations over its national law's provisions.

7.3 The author reiterates that the Covenant's provisions prevail over national law and are part of it. He emphasizes that limitations of the right to disseminate information must be justified under Article 19, paragraph 3, of the Covenant but this was not done in this case, and thus his right to freedom of expression was unduly restricted.

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, as required by Article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement.

8.3 As to the issue of exhaustion of domestic remedies, the Committee has noted the author's explanation that he has not sought to have the decision of the Court of the Soviet District of Gomel of 12 February 2008 or the decision, on appeal, of the Gomel Regional Court of 29 February 2008, examined under the supervisory review proceedings, as such a remedy is neither effective nor accessible. The Committee also notes the State party's objections in this respect, and in particular the statistical figures provided in support, intending to demonstrate that supervisory review was effective in a number of instances. However, the State party has not shown whether and in how many cases supervisory review procedures were applied successfully in cases concerning freedom of expression. The Committee recalls its previous jurisprudence, according to which supervisory review procedures against court decisions which have entered into force do not constitute a remedy, which has to be exhausted for purposes of Article 5, paragraph 2 (b), of the Optional Protocol.[6] In light of this, the Committee considers that it is not precluded by

[5] The author refers in particular to the Committee's Views in communication No. 628/1995, Pak v. Republic of Korea.

[6] See, for example, communication No. 1814/2008, P.L. v. Belarus, Inadmissibility decision

the requirements of Article 5, paragraph 2 (b), of the Optional Protocol, to examine the present communication.

8.4 The Committee considers that the author has sufficiently substantiated his claim of a violation of his rights under Article 19, paragraph 2, of the Covenant. Accordingly, it declares the communication admissible, and proceeds with its 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 issue before the Committee is whether the author's fine for having distributed leaflets concerning two meetings of the Gomel population with a political opponent, for which authorization had not been given, has violated his rights under Article 19, paragraph 2, of the Covenant.

9.3 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. Any restrictions to freedom of expression 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".

9.4 The Committee has noted the State party's explanation that under its law on mass events, no information concerning possible meetings can be disseminated before the official authorization of the said meeting by the competent authorities and that the author's action constituted an administrative offence. The State party has also acknowledged that the right to freedom of expression may only be limited in line with the requirements set up in Article 19, paragraph 3, of the Covenant, without explaining, however, how, in practice, in this particular case, the author's actions affected the respect of the rights or reputations of others, or posed a threat to the protection of national security or of public order (ordre public), or of public health or morals. 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. In light of the refusal of the Gomel Regional Court to examine the issue on whether the restriction of the author's right to impart information was necessary, and in the absence of any

of 26 July 2011, paragraph 6.2.

other pertinent information on file to justify its authorities' decisions under Article 19, paragraph 3, the Committee considers that the limitations of the author's rights in the present case were incompatible with the requirements of this provision of the Covenant. It therefore concludes that the author is a victim of a violation by the State party of his rights under Article 19, paragraph 2, of the Covenant.

10. 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 of the author's rights under Article 19, paragraph 2, 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 author with an effective remedy, including the reimbursement of the present value of the fine and any legal costs incurred by the author, as well as compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the State party should review its legislation, in particular the Law on Mass Events, and its application, to ensure its conformity with the requirements of Article 19, of the Covenant.

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 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 in case a violation has been established, 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.]

Annex 11

VIEWS ADOPTED BY THE COMMITTEE ON THE ELIMINATON OF DISCRIMINATION AGAINST WOMEN ON COMMUNICATION NO. 23/2009 INGA ABRAMOVA V. BELARUS

United Nations **CEDAW**/C/49/D/23/2009

Committee on the Elimination of Discrimination against Women
Forty-ninth session
11-29 July 2011

Views

Communication No. 23/2009

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

Submitted by:	Inga Abramova (represented by counsel, Roman Kisliak)
Alleged victim:	The author
State party:	Belarus
Date of communication:	3 April 2009 (initial submission)

On 25 July 2011, the Committee on the Elimination of Discrimination against Women adopted the annexed text as the Committee's views under Article 7, paragraph 3, of the Optional Protocol in respect of communication No. 23/2009.

Annex

Views of the Committee on the Elimination of Discrimination against Women under Article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (forty-ninth session)

Communication № 23/2009[1]

Submitted by:	Inga Abramova (represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	3 April 2009 (initial submission)

The Committee on the Elimination of Discrimination against Women, established under Article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 25 July 2011,

Adopts the following:

Views under Article 7, paragraph 3, of the Optional Protocol

1. The author of the communication, dated 3 April 2009, is Inga Abramova, a national of Belarus born in 1986. She claims to be a victim of violation by Belarus of her rights under Article 2, paragraphs (a), (b), (d), (e) and (f), Article 3 and Article 5, paragraph (a), read in conjunction with Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women ("the Convention"). The author is represented by counsel, Roman Kisliak. The Convention and its Optional Protocol entered into force for the State party on 4 March 1981 and 3 May 2004, respectively.

Facts as presented by the author

2.1 On 10 October 2007, the author, who is a journalist and activist of the "For Freedom" movement, was hanging blue ribbons in the city of Brest,

[1] The following members of the Committee participated in the examination of the present communication: Ms. Ayse Feride Acar, Ms. Nicole Ameline, Ms. Olinda Bareiro -Boba dil la, Ms. Magalys Arocha Dominguez, Ms. Violet Tsisiga Awori, Ms. Barbara Evelyn Bailey, Ms. Meriem Belmihoub-Zerdani, Mr. Niklas Bruun, Ms. Naela Mohamed Gabr, Ms. Ruth Halperin-Kaddari, Ms. Yoko Hayashi, Ms. Ismat Jahan, Ms. Soleda d Murillo de la Vega, Ms. Violet a Neubauer, Ms. P ramila P at t en, Ms. Silvia P iment el, Ms. Maria Helena Lopes de Jesus P ires, Ms. Victoria Popescu, Ms. Zohra Rasekh, Ms. Patricia Schulz, Ms. Dubravka Šimonović and Ms. Zou Xiaoqiao.

Belarus, in order to draw public attention to the "European March" campaign that was to be held in Minsk on 14 October 2007. At 7.50 p.m., she was arrested by a police officer of the Interior Division of the Brest Regional Executive Committee and taken to the Interior Department of Lenin District of Brest City.

She was accused of hanging blue ribbons and posters calling for participation in the "European March", which constitutes "minor hooliganism". In the early morning of 11 October 2007, at 1.45 a.m., she was placed in the temporary detention facility of the Interior Department of Lenin District. On the same day, her case was examined by the Lenin District Court, which found the author guilty of minor hooliganism. The court imposed on the author an administrative sanction in the form of five days of administrative arrest. She was released from detention on 15 October 2007.

2.2 The author claims that the cell where she was detained was located underground and was used to detain persons on criminal charges as well as those under administrative arrest. She claims that all staff working in the IVS facility were male. From time to time a nurse came to visit the detainees, but she was not an employee of the Interior Department.

2.3 She further submits that the IVS facility consisted of nine cells, two of which were intended to house women. She was detained in a cell of 4 by 3 metres with a height of 2.7 metres. The cell was designed to accommodate six persons, and was equipped with a table, six bunk beds and a wooden commode. All the furniture was nailed to the floor.

2.4 The author submits that the cells were cold; the heaters were turned off although the outside temperature was as low as 1° C. She claims that detention in such conditions amounted to torture. The cell was equipped with a washstand with one cold water tap and a toilet bowl. The toilet was located inside the cell and was separated from the rest of the cell only on one side by a small screen of 50 by 50 centimetres. Thus, if a cellmate was sitting on a bed situated opposite the toilet, she could see anyone using the toilet. Male prison staff periodically watched the prisoners through the door peephole. Since the screen did not obstruct the view of the toilet from the door, they could observe the author using the toilet. It was unpleasant and embarrassing for her to use the toilet in such circumstances. She claims that having to use the toilet without a proper separation between it and the rest of the cell amounted to degrading treatment.

2.5 She adds that the bedding provided was dirty and the cells were full of spiders. Her cell was full of smoke as her cellmates were smokers and the ventilation did not disperse the tobacco smell. The lighting was also poor, the window was small and the glass was so dirty that the daylight did not penetrate. She saw daylight only once during her five-day detention, when she was allowed a 15-minute walk outside. The light provided by the light bulb

in the cell was not sufficient to read by and she had to get up and stand next to it to be able to read. The light was switched on around the clock, which prevented her from sleeping. She was fed only twice a day.

2.6 The author claims that she suffers from kidney problems and therefore must avoid catching cold. After the first night spent in the cold cell, she developed severe back pain. At her request, an ambulance team intervened and provided her with medical aid. She also had headaches and fever. The author claims that she has had many health problems since her detention in such conditions.

2.7 Before her admission to the detention facility, she was taken to a railway station for a body search. There were no female staff at the IVS facility to perform the search. At the time of her admission to the IVS facility, one of the guards allegedly poked her with his finger on the pretext of checking whether she was wearing a belt. She said, "Hands off". After a moment, he poked her buttock with his finger. In response to her second "Hands off", he said that she should be grateful that they were not undressing her. Another security guard allegedly threatened to strip her naked.

2.8 The guards made frequent humiliating comments about the author. For example, when they saw her standing next to the light bulb reading, one of the guards commented that she needed "to see a psychiatrist". On several occasions, the guards "joked" that she would be "taken outside and shot". Furthermore, instead of calling her by her name, they called her "the fourth", as that was the number of the bed she was occupying in her cell. At one point, a prison guard threw a dead rat into the cell that she was sharing. When she and her cellmates jumped on their beds screaming in fear, the guard was laughing.

2.9 The author availed herself of the following domestic remedies:

(i) Complaint to the competent authorities (in accordance with the Law of the Republic of Belarus "On Petition" and the Law "On Internal Affairs Organs")

On 19 December 2007, the author submitted a complaint of violation of her rights in detention to the head of the Interior Department of Lenin District and to the head of the Interior Division of the Brest Regional Executive Committee. By a letter of 3 January 2008, the author was informed by the head of the Interior Department that her allegations had not been verified. The author filed another complaint with the head of the Interior Division of the Brest Regional Executive Committee on 5 February 2008; her petition was forwarded to the head of the Interior Department of Lenin District, who informed her on 27 February 2008 that her claims had not been confirmed.

(ii) Complaint to the Prosecutor's Office, in conformity with the Law of the Republic of Belarus "On the Public Prosecutor's Office"

On 19 December 2007, the complaint was lodged with the Prosecutor of Lenin District of Brest City. The Prosecutor informed the author that her claims had not been confirmed and her allegations had not been verified. The author's complaint of 5 February 2008 submitted to the Prosecutor of Brest Region remained unanswered.

(iii) Application to the courts under the civil procedure

On 11 February 2008, the author filed an application with the Lenin District Court, under the civil procedure, in accordance with Article 353 of the Belarusian Code of Civil Procedure, of violation of her right under Article 7 of the International Covenant on Civil and Political Rights not to be subjected to inhuman treatment and her right under the Convention not to be subjected to discrimination on the basis of her sex. On 14 February 2008, the court stated that it refused to initiate civil proceedings on the grounds that it did not have jurisdiction over her case. She appealed against the decision to the Judicial Board on Civil Cases of the Brest Regional Court on 7 March 2008, which rejected her appeal on 10 April 2008.

(iv) Application to the courts under the administrative procedure

On 11 March 2008, the author submitted a complaint of violation of her rights not to be subjected to inhuman treatment and not to be discriminated against on the basis of her sex to the Lenin District Court of Brest City under the procedure for administrative offences as established by Article 7, paragraph 1, of the Procedural Executive Code of the Republic of Belarus on Administrative Offences. In a decision dated 14 March 2008, the court refused to initiate civil proceedings, although the author claims that she had not requested the court to start civil proceedings but to recognize, in accordance with the procedure set out in chapter 7 of the Procedural Executive Code of the Republic of Belarus on Administrative Offences, that the actions (and omissions to act) of the detention facility staff violated her rights. On 28 March 2008, the author appealed against this decision to the Brest Regional Court. On 28 April 2008, the Judicial Board on Civil Cases of the Brest Regional Court quash ed the decision of the Lenin District Court and referred the case back for new consideration. On 12 May 2008, the Lenin District Court dismissed the author's complaint on procedural grounds. The court stated, inter alia, that at the time of submission of her complaint the administrative process against her had already been terminated, since the court's decision had

entered into force. The author claims that this argument is not true, as the legal process is not terminated as long as there is the possibility to appeal.

Complaint

3.1 The author claims that she is a victim of violation by Belarus of her rights under Article 2, paragraphs (a), (b), (d), (e) and (f), Article 3 and Article 5, paragraph (a), read in conjunction with Article 1 of the Convention. She claims that during her detention she was subjected to inhuman and degrading treatment and that detention in a cold cell amounted to torture. She further claims that such conditions of detention may have had an adverse effect on her reproductive health.

3.2 The author claims that temporary detention facilities of the Ministry of the Interior are not adapted for the detention of women. Allegedly, only one such detention block, located in Minsk, is staffed by female employees; the rest are staffed exclusively by men. The author claims that the Ministry of the Interior refused on numerous occasions to confirm or deny this information and to provide the number of temporary detention facilities where no female staff are employed, invoking the legislation of the Republic of Belarus on protection of State secrets, which restricts access to such information. She submits that this situation in the temporary detention facilities is a result of discrimination in the hiring of women as staff.

3.3 The author submits that her conditions of detention were worse than those of male prisoners, since she was the object of sexual harassment and was subjected to degrading treatment by male personnel. She invokes rule 53 (3) of the Standard Minimum Rules for the Treatment of Prisoners (Economic and Social Council resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977), which stipulates that "Women prisoners shall be attended and supervised only by women officers", and claims that the breach of rule 53 (3) constitutes a violation of her right not to be discriminated against on the basis of her sex, as set forth in the Convention.

3.4 The author claims that she has exhausted all available domestic remedies and that they proved to be ineffective. She also claims that the same matter has not been examined under another procedure of international investigation or settlement.

Observations of the State party on admissibility and merits

4.1 By a note verbale of 25 March 2010, the State party confirms that the author was detained for five days for minor hooliganism. It acknowledges that the author complained of the conditions of her detention to the courts and other State organs. However, the legal proceedings concerning the author's allegations were discontinued and her complaints were turned down because no procedure for consideration by the courts of such complaints is

provided for under the procedural legislation. The examination of such complaints falls under the competence of the head of the IVS facility or other persons authorized by him. The procedure in question is regulated by Decree No. 234 of the Ministry of the Interior of 20 October 2003 "On approval of the internal regulations of temporary detention facilities of internal affairs authorities". The State party argues that the author has not submitted any complaints to the administration of the IVS facility or to the Ministry of the Interior. Therefore, she has not exhausted all available domestic remedies. It also maintains that the author's allegations have not been confirmed and thus should be considered as unsubstantiated.

4.2 The State party further submits that persons arrested for administrative offences for which the sanction of administrative arrest is provided under national legislation can be detained in temporary detention facilities of the Ministry of the Interior. These facilities are also regulated by Decree No. 234 as described in paragraph 4.1 above. Under section 18.7 of the Procedural Executive Code of Belarus, persons arrested for administrative offences are detained in strict isolation.

Men, women and persons with previous convictions are detained separately. A detainee is allocated floor space of not less than 4 m2. The author was detained in cells No. 3 and No. 5, the size of which is 15.3 m2 and 13.6 m2, respectively. These cells were intended to house women.

4.3 The State party states that, under the internal rules of temporary detention facilities, the persons arrested or detained for administrative offences are provided with bedding and shelves to keep items of personal hygiene and cutlery. Cells are equipped with a table and benches, sanitary facilities, a tap with drinking water, a drawer for toiletries, a radio, a waste bin and ventilation. Detainees can also use their own bedding, clothes and shoes. Upon admission to the detention facility, the author was offered clean bedding; however, she refused and used her own bedding provided by her family.

4.4 Placement of detainees in cells takes into account their personality and psychological state. If possible, smokers are detained separately. The cells are equipped with ventilation systems, windows for natural lighting, light bulbs and heaters. Detainees are allowed to walk outdoors for not less than an hour per day. The author refused to walk outdoors because of bad weather.

4.5 As to the author's claim that she was offered only two meals per day, the State party submits that the food ration of detainees is regulated by the decree of the Council of Ministers of 21 November 2006 and that meals are provided three times per day in the temporary detention facility.

4.6 The author requested emergency medical aid, and an ambulance arrived 10-15 minutes later. After examining her, the doctor confirmed that the author could be detained in the IVS facility. Cells are regularly inspected by

the centre of hygiene and epidemiology, which also provides disinfection services.

4.7 The State party concludes that the author's complaint under the Convention is inadmissible. It claims that the form of the complaint and its content do not correspond to provisions of the Convention.

Author's comments on the observations of the State party on admissibility and merits

5.1 In a submission dated 4 February 2011, the author reiterates her initial claims and refutes the State party's argument that the communication is not substantiated and should be declared inadmissible.

5.2 She further refutes the State party's contention that no complaints were submitted to the administration of the temporary detention facility. The author claims that the head of the IVS facility himself treated her badly, insulting her by saying that she was "not a woman". She had described all these facts in the Article "Five days" published in *The Brest Courier* newspaper. A copy of the Article was enclosed with the complaints she had submitted to the authorities. However, she stated that it was useless to address complaints to the detention facility's personnel, including the head of the facility, in particular because national legislation prohibits the consideration of petitions by State officials whose own actions/omissions to act are being challenged.

5.3 The author further contests the State party's argument that she did not submit complaints about the conditions of her detention to the Ministry of the Interior; she claims to have filed numerous complaints with the internal affairs organs. On 19 December 2007, a petition was submitted to the head of the Interior Department of Lenin District and to the head of the Interior Division of the Regional Executive Committee of Brest. On 5 February 2008, she filed a second complaint with the head of the Interior Division of the Regional Executive Committee of Brest. All those petitions were forwarded to the head of the Interior Department of Lenin District. Furthermore, after the publication of the Article "Five days" in *The Brest Courier*, in December 2007 a member of the House of Representatives of the National Assembly filed a deputy's motion with the Minister of the Interior requesting an explanation as to why minor offenders were being detained in IVS facilities in such inhumane conditions. The Minister requested all materials concerning the author's case from the Interior Division of the Regional Executive Committee of Brest. She was subsequently questioned about the conditions of her detention and the alleged violations of her rights. This information was provided to the Minister of the Interior. The author thus submits that her complaints were examined by internal affairs organs at all levels: district, regional and national.

5.4 The author reiterates that she filed complaints with the internal affairs organs and the Prosecutor's Office, and also addressed the courts under the civil procedure and the procedure for administrative offences. However, her attempts to exhaust domestic remedies were futile, as none of those remedies proved to be effective.

5.5 In respect of the merits of the communication, the author recalls that the subject of her communication under the Convention concerns primarily the discrimination she faced as a woman during her detention in the IVS facility, and not the conditions of detention as such. She maintains that in the IVS facility of the Interior Department of Lenin District where she was detained from 11 to 15 October 2007, as in most temporary detention facilities of the Ministry of the Interior, the staff was comprised exclusively of men from 2002 to 2009. This information was confirmed by the head of the Interior Department of Lenin District in his letters to the author dated 7 August 2008 and 8 September 2008. The author claims that these circumstances constitute discrimination against the women who would have wished to work in IVS facilities as police officers, warders or security guards, and is a violation of the State party's obligation to ensure to women, on equal terms with men, the right to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government, as set out in Article 7 (b) of the Convention. Furthermore, this circumstance demonstrates discrimination against the author on the basis of her sex during her detention in a facility staffed exclusively by male personnel, because this inevitably led to the impairment of her rights and freedoms, especially of her right not to be subjected to torture and other cruel, inhuman or degrading treatment and the right to humane treatment and respect for her dignity, as prescribed in Articles 7 and 10 (1) of the International Covenant on Civil and Political Rights. She recalls the following concrete facts which impaired her rights under Articles 7 and 10 (1) of the Covenant, violations that affected her to a greater degree than the male prisoners of the same detention facility:

(a) The possibility of male staff to observe her through the door peephole and video surveillance, including when she was dressing or using the toilet;

(b) The prison personnel's attitude at the time of her admission to the detention facility, when she was inappropriately touched by a male guard and threatened with being stripped naked;

(c) The guards' statements that she would be "taken out and shot";

(d) The guards' mockery when she was reading standing next to the light bulb and their statements that she needed "to see a psychiatrist";

(e) The guards' practice of calling her "the fourth" when addressing her instead of using her name; male detainees were not treated in such a manner;

(f) The guard's mockery at the reaction of her cellmates when he threw a dead rat into their cell in order to scare them;

(g) The insults of the head of the detention facility, who entered the office during the meeting with her lawyer screaming that she had "put blue ribbons all over the city". When the lawyer asked him to show more respect for a woman, the head of the detention facility said she was "not a woman" and verbally insulted her.

5.6 The author considers that the above facts constitute inhuman and degrading treatment of her and discrimination against her on the basis of her sex, in the sense of Article 1 of the Convention. She claims that such actions were possible because of the exclusively male composition of the personnel. The State party was under an obligation to provide better conditions for her detention than for men, in view of the fact that she is a young woman of reproductive age. The detention in a cold cell and in poor sanitary conditions was more detrimental to her health than to that of male prisoners. She fell ill while in detention and her condition required medical assistance. The author draws the Committee's attention to the fact that the State party in its observations has failed to address her specific claims under the Convention and limited itself to commenting only on the conditions of detention.

5.7 By her submission of 17 March 2011, the author informs the Committee about changes that have been made in the personnel policy of the IVS facility of the Interior Department of Lenin District after the registration of her communication by the Committee. In December 2010 and January/February 2011, information that female police officers are working in the IVS facility came to the author's attention. In order to confirm this information, the author and her counsel addressed letters to the head of the IVS facility with a request to officially confirm or refute the information, as well as to provide information on the number of female staff and the dates that they became part of the personnel. In a letter of 14 March 2011, the head of the detention facility confirmed that women are at present working in the detention facility, but did not indicate their number or the date of their employment. Despite these positive changes, the author maintains that her communication should be examined by the Committee.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 In accordance with rule 64 of its rules of procedure, the Committee shall decide whether the communication is admissible under the Optional Protocol to the Convention. Pursuant to rule 72, paragraph 4, of its rules of procedure, it shall do so before considering the merits of the communication.

6.2 The Committee notes the State party's argument that the communication shall be declared inadmissible under Article 4, paragraph 1, of the Optional Protocol for non-exhaustion of domestic remedies, because the author did not submit complaints on conditions of her detention to the administration of the detention facility or the Ministry of the Interior. In accordance with Article 4, paragraph 1, of the Optional Protocol, the Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted, unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief. The Committee recalls its jurisprudence, according to which the author must have raised in substance at the domestic level the claim that he/she wishes to bring before the Committee[2] so as to enable domestic authorities and/or courts to have an opportunity to deal with such a claim.[3] In this respect, it notes that the author submitted complaints regarding the conditions of detention and the disrespectful attitude of male prison personnel towards her to the internal affairs organs, inter alia, the head of the Interior Department of Lenin District and the head of the Interior Division of the Regional Executive Committee of Brest. The author also filed a complaint with the Prosecutor's Office and brought suits under both civil and administrative procedures in the competent courts. Furthermore, after a deputy of the House of Representatives of the National Assembly submitted a motion to the Ministry of the Interior in December 2007, the author was questioned about detention conditions and violation of her rights, and the results were presented to the Ministry of the Interior. The State party has not contested this information. Therefore, the Committee considers that the author diligently pursued domestic remedies, by addressing her complaints to the competent authorities of the internal affairs organs, to the Prosecutor's Office, as well as to the national courts. In the light of the uncontested information provided by the author as regards the exhaustion of domestic remedies, and in the absence of any information from the State party as to the existence of other available and effective domestic remedies of which the author could have availed herself, the Committee concludes that the requirements of Article 4, paragraph 1, of the Optional Protocol have been met.

6.3 With regard to Article 4, paragraph 2 (a), of the Optional Protocol, the Committee has been informed that the same matter has not already been and is not being examined under another procedure of international investigation or settlement.

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[2] See communication No. 8/2005, Kayhan v. Turkey, decision of 27 January 2007 (CEDAW/ C/34 /D /8 /20 05), para. 7.7.

[3] See communication No. 10/2005, *N.S.F. v. The United Kingdom* , decision of 30 May 2007 (CEDAW/ C/38 /D /1 0/2 005) , para. 7.3.

6.4 The Committee considers that the author's allegations relating to Articles 2 (a), (b), (d), (e) and (f), 3 and 5 (a), read in conjunction with Article 1 of the Convention, are sufficiently substantiated for purposes of admissibility, and thus declares the communication admissible.

6.5 In view of the foregoing, the Committee does not share the State party's view that the form and content of the author's communication do not correspond to the provisions of the Convention and that it should be declared inadmissible. Therefore, the Committee concludes that the present communication complies with the admissibility criteria set out in Articles 2, 3 and 4 of the Optional Protocol.

Consideration of the merits

7.1 The Committee has considered the present communication in the light of all the information made available to it by the author and by the State party, as provided for in Article 7, paragraph 1, of the Optional Protocol.

7.2 The Committee takes note of the author's claim that her detention for five days in poor, unhygienic and degrading conditions, in a temporary detention facility staffed exclusively by men where she was exposed to humiliating treatment, constitutes inhuman and degrading treatment and discrimination on the basis of her sex, within the meaning of Article 1 of the Convention, and constitute a violation by Belarus of its obligations under Articles 2 (a), (b), (d), (e) and (f), 3 and 5 (a), read in conjunction with Article 1 of the Convention.

7.3 The Committee observes that the State party has only summarily refuted these claims, considering them unsubstantiated. It has not provided any clarifications on the substance of these allegations, but limited itself to a general description of the detention premises (e.g., the size of the cells, the existing equipment, furniture, etc.), including reference to national administrative acts regulating, for example, the food ration of prisoners. In the view of the Committee, although this description may be of relevance, it does not necessarily address the substance of the author's claims: for instance, the author did not contest the existence of a light bulb in the cell, but specifically complained that it provided insufficient light; likewise, she did not complain about the lack of a heater in the cell, but claimed it was turned off at all times. Furthermore, the State party did not comment in any way on the author's allegations that staff working in the detention facility were exclusively male and that, as a result, she was subjected to gender-based discrimination. In this regard, the Committee recalls its recent concluding observations on the State party's report (CEDAW/C/BLR/CO/7), in which it expresses grave concern about inhuman and degrading treatment of women activists during detention, and urges the State party to ensure that the complaints submitted by those women are promptly and effectively investigated (paras. 25 and 26).

7.4 In accordance with Article 3 of the Convention and rule 53 of the Standard Minimum Rules for the Treatment of Prisoners, the Committee recalls that women prisoners shall be attended and supervised only by women officers. It further recalls its general recommendation No. 19 (1992) on violence against women, according to which discrimination against women within the meaning of Article 1 encompasses gender-based violence, i.e., "violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such act s, coercion and other deprivations of liberty" (para. 6).[4] The Committee reiterates that "gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms", including the "right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment", constitutes discrimination within the meaning of Article 1 of the Convention (para. 7 (b) of the recommendation).

7.5 The Committee recalls that the fact that detention facilities do not address the specific needs of women constitutes discrimination, within the meaning of Article 1 of the Convention. Thus, in line with Article 4 of the Convention, principle 5 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173 of 9 December 1988) states that special measures designed to address the specific needs of women prisoners shall not be deemed to be discriminatory. The need for a gender-sensitive approach to problems faced by women prisoners has also been endorsed by the General Assembly by its adoption, in its resolution 65/229, of the United Nations Rules for the Treatment of Women Prisoners and Non -custodial Measures for Women Offenders (the Bangkok Rules).

7.6 In the present case, besides the poor conditions of detention, the author claims that all staff working in the detention facility were exclusively male. As a woman prisoner, she was supervised by male guards, who had unrestricted visual and physical access to her and other women prisoners. The Committee recalls in this respect that, according to rule 53 of the Standard Minimum Rules for the Treatment of Prisoners:

(1) In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution.

(2) No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.

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[4] See also general recommendation No. 28 (2010) on the core obligation s of States parties under article 2 of the Convent ion on the Elimination of All Forms of Discrimination against Women, para. 19.

(3) Women prisoners shall be attended and supervised only by women officers.

This important safeguard based on non-discrimination against women in line with Article 1 of the Convention has been reaffirmed by the Committee in its concluding observations on States parties' reports,[5] as well as by the Human Rights Committee in paragraph 15 of its General Comment No. 28 (2000) on the equality of rights between men and women and the report of the Special Rapporteur on violence against women, its causes and consequences (see E/CN.4/ 2000/ 68/Add .3, para. 44).

7.7 The Committee notes that, upon admission to the detention facility, the author was inappropriately touched by one of the guards and was threatened with being stripped naked. Furthermore, the guards were in a position to watch her through the door peephole in the course of private activities, such as using the toilet, which was located inside the cell and was blocked from view on only one side by a screen intended to give an impression of privacy, but which did not obstruct the view of the toilet from the door. She also felt humiliated by the offensive statements of the guards and by the degrading name, "the fourth", used by guards. These allegations have not been challenged by the State party. The Committee recalls that respect for women prisoners' privacy and dignity must be a high priority for the prison staff. The Committee considers that the disrespectful treatment of the author by State agents, namely male prison staff, including inappropriate touching and unjustified interference with her privacy constitutes sexual harassment and discrimination within the meaning of Articles 1 and 5 (a) of the Convention and its general recommendation No. 19 (1992). In that general recommendation, the Committee observed that sexual harassment is a form of gender-based violence, which can be humiliating and may further constitute a health and safety problem. Therefore, the Committee concludes that the State party failed to meet its obligations under Articles 2 and 5 (a) of the Convention.

7.8 The Committee recognizes that the author of the communication suffered moral damages and prejudice due to the humiliating and degrading treatment, the sexual harassment and the negative health consequences suffered during detention.

Recommendations

7.9 Acting under Article 7, paragraph 1, of the Optional Protocol to the Convention, and in the light of all the above considerations, the Committee is of the view that the State party has failed to fulfil its obligations under Articles 2 (a), (b), (d), (e) and (f), 3 and 5 (a), read in conjunction with Article 1

[5] See, for example, concluding observations of the Committee on the Elimination of Discrimination against Women on the sixth periodic report of Yemen (CEDAW/ C/Y E M/ CO /6).

of the Convention, and with general recommendation No. 19 (1992) of the Committee, and makes the following recommendations to the State party:

1. Concerning the author of the communication:

Provide appropriate reparation, including adequate compensation, to the author, commensurate with the gravity of the violations of her rights;

2. General:

(a) Take measures to ensure the protection of the dignity and privacy, as well as the physical and psychological safety of women detainees in all detention facilities, including adequate accommodation and materials required to meet women's specific hygiene needs;

(b) Ensure access to gender-specific health care for women detainees;

(c) Ensure that allegations by women detainees about discriminatory, cruel, inhuman or degrading treatment are effectively investigated and perpetrators prosecuted and adequately punished;

(d) Provide safeguards to protect women detainees from all forms of abuse, including gender-specific abuse, and ensure that women detainees are searched and supervised by properly trained women staff;

(e) Ensure that personnel assigned to work with female detainees receive training relating to the gender-specific needs and human rights of women detainees in line with the Convention as well as the United Nations Rules for the Treatment of Women Prisoners and Non -custodial Measures for Women Offenders (the Bangkok Rules);

(f) Formulate policies and comprehensive programs that ensure the needs of women prisoners are met, in respect of their dignity and fundamental human rights.

7.10 In accordance with Article 7, paragraph 4, of the Optional Protocol, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the views and recommendations of the Committee. The State party is also requested to publish the Committee's views and recommendations and to have them translated into the official national languages and widely distributed in order to reach all relevant sectors of society.

Scientific publication

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