



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2655/2015*, **, ***

<i>Communication submitted by:</i>	Aleksey Ivanov, on behalf of his brother, Sergey Ivanov (represented by counsel, Andrei Paluda)
<i>Alleged victim:</i>	Sergey Ivanov (deceased)
<i>State party:</i>	Belarus
<i>Date of communication:</i>	14 October 2015 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure (now rule 92), transmitted to the State party on 15 October 2015 (not issued in document form)
<i>Date of adoption of Views:</i>	18 July 2019
<i>Subject matter:</i>	Imposition of a death sentence after an unfair trial
<i>Procedural issues:</i>	Failure of the State party to cooperate; non-respect of the Committee's request for interim measures; non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Arbitrary deprivation of life; habeas corpus; right to a fair hearing by an independent and impartial tribunal; right to be presumed innocent
<i>Articles of the Covenant:</i>	6 (1) and (2), 9 (1)–(4) and 14 (1), (2) and (3) (a) (b) and (d)
<i>Articles of the Optional Protocol:</i>	1, 2 and 5 (2) (b)

1.1 The author of the communication is Aleksey Ivanov, a national of Belarus born in 1988, submitted on behalf of his brother, Sergey Ivanov, also a national of Belarus, born in 1994, who was at the material time detained on death row awaiting execution following the imposition of a death sentence. The author claims that the State party has violated his

* Adopted by the Committee at its 126th session (1–26 July 2019).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Duncan Muhumuza Laki, Photini Pazartzis, Hernán Quezada, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Héléne Tigroudja, Andreas Zimmermann and Gentian Zyberi.

*** A joint opinion (partly dissenting) by Committee members Arif Bulkan, Héléne Tigroudja, Andreas Zimmermann and Gentian Zyberi is annexed to the present Views.



brother's rights under articles 6 (1) and (2), 9 (1)–(4) and 14 (1), (2), (3) (a), (b) and (d) of the Covenant. The Optional Protocol entered into force for Belarus on 30 December 1992. The author is represented by counsel.

1.2 On 15 October 2015, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to grant interim measures under rule 92 of its rules of procedure (now rule 94) and requested the State party not to carry out the death sentence against Sergey Ivanov while his case was under examination by the Committee.

1.3 On 24 May 2016, the Committee received confirmation from counsel to the effect that Sergey Ivanov's death sentence had been carried out on 18 April 2016.¹

The facts as submitted by the author

2.1 On 29 August 2013, the body of a girl, A.A., born in 1994, was found bearing the signs of violence. On the same day, Sergey Ivanov was arrested on suspicion of murder and detained in the Rechitsk District Internal Affairs Office. On 8 September 2013, Mr. Ivanov was officially placed in pretrial detention by order of a prosecutor. He received the prosecutor's order only on 9 September. He was not brought before a judge or other officer authorized by law to exercise judicial power, either on 29 August or on 8 September.

2.2 On 18 March 2015, the Gomel Regional Court found Sergey Ivanov guilty of having committed repeated acts of violent hooliganism, as part of a group of persons (article 339, part 2, of the Criminal Code); intentionally causing serious bodily harm endangering the life of the victim (article 147, part 2, paragraph 7); repeated violent robbery committed in a group of persons endangering life and health of the victim (article 206, part 2); repeated theft of property (article 205, part 2); and murder committed with particular cruelty (article 139). The court sentenced him to death. The trial court did not consider as mitigating circumstances the defendant's "sincere confession" to the murder and his cooperation throughout the investigation.

2.3 On 26 March 2015, Sergey Ivanov appealed the judgment of the Gomel Regional Court to the Supreme Court. On 14 July, the Supreme Court dismissed the appeal and upheld the lower court's judgment of 18 March. The author submits that, consequently, the Regional Court's judgment entered into force immediately.

2.4 On 21 July 2015, Sergey Ivanov submitted an application for a pardon to the President of Belarus.²

2.5 Despite considering this remedy to be ineffective, on 25 August 2015, the author's brother appealed to the Prosecutor General within the supervisory review procedure. His appeal was dismissed on 28 September. On 2 October, the author's brother appealed, also within the supervisory review procedure, before the President of the Supreme Court. At the time of the submission of the present communication he had not yet received a decision, but the author notes that, according to the Committee's well-established jurisprudence, this remedy may not be considered effective, and claims that his brother has exhausted all the available domestic remedies.

2.6 The author also contended at the time of submission that his brother could be executed at any time as his sentence had entered into force. He therefore requested the granting of interim measures, namely suspension of the execution of the death penalty, pending consideration of the communication. Despite the decision of the Committee to grant the request for interim measures, counsel informed the Committee on 24 May 2016 that the execution has been carried out on 18 April.

The complaint

3.1 The author claims that the State party has violated his brother's rights under articles 6 (1) and (2), 9 (1)–(4) and 14 (1), (2), (3) (a), (b) and (d) of the Covenant. In particular, the

¹ Counsel submitted a copy of Mr. Ivanov's death certificate. At that time, the Committee issued a press release deploring the situation and condemning the execution.

² At the time of the submission of the communication, the application was still pending.

State party has violated the right to life of the author's brother under article 6 of the Covenant. The author notes that in Belarus, a person's counsels or his family are not notified of the date and time of a planned execution but are only notified of the execution once it has already taken place. He claims that the trial, lacking due process guarantees and concluding in a death sentence, violated in itself his brother's rights under article 6 (1) and (2) of the Covenant.

3.2 The author further claims that his brother's rights under article 9 (1)–(4) were violated during his apprehension as he was not brought promptly before a judge after his initial arrest. His brother saw a judge for the first time in November 2014, more than 450 days after his arrest, which violates his rights under article 9 (3) of the Covenant.

3.3 The author claims a violation of his brother's rights under article 14 (1) of the Covenant. The author claims that during the court proceedings the court was biased and failed in its duty of objectivity. He submits that the trial court was biased as it tolerated aggressive behaviour towards his brother by the murder victim's family and their counsel during the hearings. He was not offered sufficient time to prepare his defence and his access to his lawyer was limited, in violation of fair trial guarantees, which led to the death sentence.

3.4 The author also claims that his brother was placed on death row even before the court sentence acquired the force of *res judicata*. Both before the trial court and the Supreme Court, his brother was handcuffed and put in a cage. During his cassation appeal, he had to wear special clothing for persons sentenced to death, marked with letters indicating his sentence.³ In addition, he was brought to the court hearings by a convoy of four to six guards in the so-called "head to knees"⁴ position, which caused him to suffer increased blood pressure, dizziness and headaches. The trial judge did not take into consideration mitigating circumstances, such as his confession and sincere repentance. The hearings were not held in public but behind closed doors. Thus, the information about the trial was provided to the media directly by the investigating authorities. Ordinary citizens and independent journalists had no access to information. State media disregarded the principle of presumption of innocence and disseminated information against the author's brother that was not established during the trial. The media called the author's brother a murderer before the court sentence acquired the force of *res judicata*. The author claims that this violated his brother's right to be presumed innocent under article 14 (2) of the Covenant.

3.5 The author also claims a violation of his brother's rights under article 14 (3) (a) of the Covenant, as he was not informed promptly of the nature and cause of the charges against him. The author submits that his brother was detained on 29 August 2013 at 11.35 a.m., whereas the investigator drew up a detention protocol after 2 p.m., more than two hours after the arrest. Moreover, the protocol did not indicate when his brother was informed about its content.

3.6 Further, the author claims that his brother was not offered sufficient time to prepare his defence and his access to his lawyer was limited, in violation of his rights under article 14 (3) (b) and (d) of the Covenant. He was not informed promptly after his arrest about his rights, including about his right to counsel of his own choosing. On 29 August 2013, he was only provided with an ex officio counsel at 3.15 p.m., nearly four hours after his arrest. In the meantime, several procedural steps had already been taken: the detention protocol was drawn up, a personal search was completed and samples were sent for a comparative analysis. Moreover, he was not allowed confidential attorney-client time, as the investigator was present. During the pretrial investigation, two ex officio counsels changed and a third one, who the author's brother retained, stepped in only at the stage of preparation of the additional cassation appeal. The author's brother had no control over these frequent changes in his legal assistance. In addition, at the cassation appeal stage, he was again not able to meet his counsel confidentially, as prison staff were always present. Thus, he was not able to supplement his cassation appeal and to effectively exercise his right to defence.

³ The clothing bore the abbreviation for "exceptional measure of punishment".

⁴ A position in which the person's head is placed below the level of the thighs.

State party's observations on admissibility and the merits

4.1 In a note verbale dated 10 December 2015, the State party submitted its observations on admissibility and the merits. It contends that the communication is inadmissible because the author's brother failed to exhaust all domestic remedies available to him; notably, he did not file a supervisory review request with the Supreme Court. His defence counsel, Mr. Kremko, filed such a request with the Supreme Court on 5 October 2015, which was rejected by the First Deputy Chair of the Supreme Court. According to article 175 (1) of the Criminal Code, the submission of a supervisory review request suspends the execution of the death penalty for the time of its consideration.

4.2 The State party submits that Sergey Ivanov also applied to the President for a pardon, which was still pending at the time of the submission of the communication. In accordance with article 175 of the Criminal Code, the execution of a death sentence is suspended while a request for pardon is examined.

4.3 As to the merits, the State party explains that on 18 March 2015, the Gomel Regional Court found the author's brother guilty and convicted him for violation of articles 147 (2) (7), 139 (2) (6), 205 (2), 206 (2) and 339 (2) of the Criminal Code. The trial court sentenced him to death by shooting. On 14 July, the Supreme Court upheld the decision of the Gomel Regional Court and dismissed the cassation appeals filed by the author's brother and by his retained counsel, Ms. Romanovskaya.

4.4 The State party maintains that the author's brother's guilt was proven, confirmed by the totality of the evidence, examined and evaluated by the court. He admitted his guilt on all charges and confirmed the circumstances of the crime committed against the victims of the criminal case. The State party asserts that the court examined the circumstances of the case in a comprehensive, complete and objective manner, which indicated the particular danger of Sergey Ivanov posed for the society. Therefore, the death penalty imposed on Mr. Ivanov is reasonable and fair. The allegations stated in the communication submitted by the complainant on behalf of his brother concerning the violation of articles 6, 9 and 14 of the Covenant are not based on the materials of the criminal case. The criminal case was considered by a competent, independent and impartial court. No requests for the recusal of judges were made by the parties during the trial. The court examined all motions of the parties and issued reasoned decisions. Sergey Ivanov had legal assistance assigned to him throughout the proceedings; notably, he was represented by counsel, Ms. Romanovskaya, during the pretrial investigation and the trial court hearings, and by counsel, Mr. Kremko, during the cassation proceedings.

4.5 As to the alleged violations of Sergey Ivanov's rights under article 9 of the Covenant, the State party clarifies that on 29 August 2013, Mr. Ivanov was arrested on suspicion of murder, which was explained to him during the detention, and he was provided with a copy of the detention order. He was informed, against his signature and in the presence of his counsel, Ms. Romanovskaya, about his rights and obligations as a suspect as well as about the possibility to challenge his detention. Subsequently, in the presence of his counsel, he was presented with the decisions to prosecute him and the decision to detain him on remand, which was sanctioned by a prosecutor, and was given copies of these documents; his rights and obligations as accused as well as his right to appeal his detention on remand were explained.

4.6 The State party maintains that Sergey Ivanov did not appeal his detention on remand before the court. The State party further maintains that he did not file any complaints about violations of his right to communicate confidentially with his counsels, Ms. Romanovskaya and Mr. Kremko, in the course of the pretrial investigation, the trial or the cassation proceedings.

4.7 The court fully assessed his psychological state. According to the conclusions of the forensic psychiatric examination, Sergey Ivanov had an antisocial personality disorder, as well as an inability to feel guilt. Despite this disorder, while committing crimes he could fully understand the nature and social danger of his actions. During the court hearings, Mr. Ivanov agreed with the conclusions of the experts.

4.8 The State party invites the Committee to take into account article 6 (2) of the Covenant, which states that in countries that have not abolished the death penalty, it may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime; this is not contrary to the provisions of the Covenant.

Author's comments on the State party's observations on admissibility

5.1 On 8 February 2016, the author responded to the State party's observations. He submits that the author of a complaint before the Committee does not need to exhaust all available domestic remedies, only those that can be considered effective. According to the author, the Committee's long-standing jurisprudence has held that the supervisory review procedure that still exists in post-Soviet countries is ineffective.⁵ Besides, the author reiterates that his brother's counsel, Mr. Kremko, filed a supervisory review request, which was rejected by the Deputy Chair of the Supreme Court. Moreover, the submission of this request does not constitute an effective remedy as it can only delay the execution of the sentence while the request is being considered. The author submits that in 2009, none of the supervisory review requests filed in death penalty cases was successful in triggering a review of such a case.

5.2 The author alleges that, according to article 5 (2) (b) of the Optional Protocol, the Committee does not consider communications until it ensures that the author has exhausted all available domestic remedies. However, the Committee's jurisprudence provides that the rule governing exhaustion applies only if legal protection is effective and available. The author recalls the Committee's jurisprudence according to which the supervisory review procedure concerning court decisions that have entered into force constitutes an extraordinary remedy of a discretionary nature that is limited to legal matters and therefore is not an effective remedy for the purposes of article 5 (2) (b) of the Optional Protocol.⁶ The author further recalls that 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."⁷

5.3 The author states that a person sentenced to death in Belarus usually learns about the refusal to grant a supervisory review request a few minutes before the execution. He alleges that the death penalty in Belarus is carried out in conditions of secrecy. The convicted person, his lawyer and his family are not informed about the outcome of the request before the execution. Therefore, the person sentenced to the death penalty has no time to appeal to the Committee upon rejection of his internal appeals.

5.4 As to the State party's argument that the procedure of applying for a pardon to the President of Belarus has not been exhausted as an available domestic remedy, the author points out that this mechanism does not need to be exhausted before applying to the Committee as it constitutes a legal procedure of a humanitarian nature and not a legal remedy for the violation of rights. The author recalls that, according to the Committee's well-established jurisprudence, this procedure does not constitute an effective domestic remedy.⁸ The author states that, according to the regulations on the procedure for implementation of pardoning convicted persons in the Republic of Belarus,⁹ the execution of a sentence of death against a person so sentenced shall be suspended until the consideration or refusal of a request for pardon. Thus, the President, regardless of whether this procedure is initiated by the person sentenced to death or someone else, makes the final

⁵ See *Iskiyaev v. Uzbekistan* (CCPR/C/95/D/1418/2005).

⁶ See *Torres Ramirez v. Uruguay* (CCPR/C/10/D/4/1977); *Gelazauskas v. Lithuania* (CCPR/C/77/D/836/1998); *Bandazhevsky v. Belarus* (CCPR/C/86/D/1100/2002); *Korolko v. Russian Federation* (CCPR/C/100/D/1344/2005); *Umarov v. Uzbekistan* (CCPR/C/100/D/1449/2006); *Gerashchenko v. Belarus* (CCPR/C/97/D/1537/2006); *P.L. v. Belarus* (CCPR/C/102/D/1814/2008); and *Tulzhenkova v. Belarus* (CCPR/C/103/D/1838/2008).

⁷ General comment No. 32 (2008) on the right to equality before courts and tribunals and to a fair trial, para. 50.

⁸ See *Singarasa v. Sri Lanka* (CCPR/C/81/D/1033/2001); and *Chisanga v. Zambia* (CCPR/C/85/D/1132/2002).

⁹ Approved by decree of the President of the Republic of Belarus dated 3 December 1994.

decision and issues the decree. The author emphasizes that a decision by the President to replace a death sentence with life imprisonment has been taken only once in the last 20 years. Before their consideration by the President, requests for pardon are first considered by a commission on requests for pardon under the President. Decisions are taken by a simple majority of the members of the commission, which may invite representatives of State bodies, public associations and the media to its meetings. However, the representatives of the author's brother were not invited¹⁰ to the commission's meetings.

Lack of cooperation by the State party

6.1 The Committee notes that the State party failed to respect the Committee's request for interim measures by executing Sergey Ivanov before the Committee had concluded its consideration of the communication.

6.2 The Committee recalls that article 39 (2) of the Covenant authorizes it to establish its own rules of procedure, which 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 Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation of any of the rights set forth in the Covenant (preamble and article 1 of the Optional Protocol). Implicit in the adherence of a State 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 (1) and (4)). It is incompatible with its obligations under article 1 of the Optional Protocol for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of communications and in the expression of its Views.¹¹

6.3 In the present case, the Committee observes that, when the author submitted the communication dated 14 October 2015, he informed the Committee that his brother had been sentenced to death and that the sentence could be carried out at any time. On 15 October, the Committee transmitted to the State party a request not to carry out the death sentence while the case was under examination by the Committee. On 24 May 2016, the Committee received information that Sergey Ivanov had been executed, despite its request for interim measures of protection. The Committee observes that it is uncontested that the execution in question took place, in total disregard of the request for interim measures of protection addressed to the State party.

6.4 The Committee reiterates that, apart from any violation of the Covenant found against a State party in a communication, a State party commits serious violations of its obligations under the Optional Protocol if it acts to prevent or 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 concerning the implementation of the obligations of the State party under the Covenant nugatory and futile.¹² In the present case, the author alleges that the rights of his brother, Sergey Ivanov, under various provisions of the Covenant were violated in a manner that directly reflects on the legality of his death sentence. Having been notified of the communication and the request by the Committee for interim measures of protection, the State party committed a serious violation of its obligations under the Optional Protocol by executing the alleged victim before the Committee had concluded its consideration of the communication.

6.5 The Committee recalls that interim measures under rule 94 of its rules of procedure, adopted in accordance with article 39 of the Covenant, are essential to its role under the Optional Protocol in order to avoid irreparable damage to the victim of an alleged violation.

¹⁰ The Belarusian Helsinki Committee repeatedly makes requests to attend, but their approval has been denied.

¹¹ See, inter alia, *Piandiong and others v. Philippines* (CCPR/C/70/D/869/1999), para. 5.1; *Maksudov and others v. Kyrgyzstan* (CCPR/C/93/D/1461, 1462, 1476 and 1477/2006), paras. 10.1–10.3; and *Yuzepchuk v. Belarus* (CCPR/C/112/D/1906/2009), para. 6.2.

¹² See, inter alia, *Idieva v. Tajikistan* (CCPR/C/95/D/1276/2004), para. 7.3; and *Kovaleva and Kozyar v. Belarus* (CCPR/C/106/D/2120/2011), para. 9.4.

Violation of that rule, especially by irreversible measures such as, in the present case, the execution of Sergey Ivanov, undermines the protection of Covenant rights through the Optional Protocol.¹³

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

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

7.3 The Committee notes the State party's contention that Sergey Ivanov failed to exhaust all domestic remedies available to him by not filing himself a supervisory review request with the Supreme Court. The Committee observes that his counsel, Mr. Kremko, filed such a request, which was rejected by the Deputy Chair of the Supreme Court. The Committee further recalls its jurisprudence according to which the filing of requests to a court, or to a prosecutor's office, for a supervisory review directed against court decisions that have entered into force and depend on the discretionary power of a judge or a prosecutor constitutes an extraordinary remedy, and that therefore the State party must show that there is a reasonable prospect that such requests would provide an effective remedy in the circumstances of the case.¹⁴ However, the State party has not shown whether and in how many cases petitions submitted under supervisory review procedures have been applied successfully in cases concerning the procedure for carrying out death penalty sentences. In those circumstances, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.¹⁵

7.4 With regard to the requirements laid down in article 5 (2) (b) of the Optional Protocol, the Committee also takes note of the State party's argument that Sergey Ivanov had not exhausted all domestic remedies at the time of submission of the communication, in particular in view of the fact that his application for a presidential pardon was still pending. In this regard, and in the light of the information regarding the execution of Mr. Ivanov, the Committee reiterates its previous jurisprudence, according to which the presidential pardon is an extraordinary remedy¹⁶ and as such does not constitute an effective remedy for the purposes of article 5 (2) (b) of the Optional Protocol. Furthermore, in the present case the pardon could not on its own have constituted a sufficient remedy for the violations alleged. Therefore, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from considering the communication.

7.5 The Committee further takes note of the author's allegation that confidential attorney-client meetings between Sergey Ivanov and his counsels did not take place due to the presence of investigators or prison authorities. In this regard, the Committee notes the State party's objection that Sergey Ivanov did not file any complaint about violations of his right to communicate confidentially with his counsels. In the absence of further information, the Committee is unable to establish whether domestic remedies have been exhausted with regard to this particular claim under article 14 (3) (b) and (d) of the Covenant, and

¹³ See, inter alia, *Saidova v. Tajikistan* (CCPR/C/81/D/964/2001), para. 4.4; *Tolipkhuzhaev v. Uzbekistan* (CCPR/C/96/D/1280/2004), para. 6.4; and *Kovaleva and Kozyar v. Belarus*, para. 9.5.

¹⁴ See *Gelazauskas v. Lithuania*, para. 7.5; *Sekerko v. Belarus* (CCPR/C/109/D/1851/2008), para. 8.3; *Protsko and Tolchin v. Belarus* (CCPR/C/109/D/1919-1920/2009), para. 6.5; *Schumilin v. Belarus* (CCPR/C/105/D/1784/2008), para. 8.3; *P.L. v. Belarus*, para. 6.2; *E.Z. v. Kazakhstan* (CCPR/C/113/D/2021/2010), para. 7.3; *Alekseev v. Russian Federation* (CCPR/C/109/D/1873/2009), para. 8.4; *Dorofeev v. Russian Federation* (CCPR/C/111/D/2041/2011), para. 9.6; and *Grunov and Grunova v. Belarus* (CCPR/C/123/D/2375/2014-CCPR/C/123/D/2690/2015), para. 7.3.

¹⁵ See also *Kostenko v. Russian Federation* (CCPR/C/115/D/2141/2012), para. 6.3.

¹⁶ See *Singarasa v. Sri Lanka*, para. 6.4; *Chisanga v. Zambia*, para. 6.3; *Kovaleva and Kozyar v. Belarus*, para. 10.4; and *Selyun v. Belarus* (CCPR/C/115/D/2289/2013), para. 6.3.

considers that it is precluded by article 5 (2) (b) of the Optional Protocol from considering this part of the communication.

7.6 The Committee takes note of the allegations that Sergey Ivanov's rights under article 9 (1) (2) and (4) and article 14 (1) and (3) (a) (b) and (d) of the Covenant were violated. It notes that the State party has disputed those allegations. In the absence of further detailed information or evidence in support of those claims, the Committee finds the allegations insufficiently substantiated for the purposes of admissibility and declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.7 The Committee considers that the author's remaining claims, raising issues under articles 6 (1) and (2), 9 (3) and 14 (2) of the Covenant, have been sufficiently substantiated for the purposes of admissibility and proceeds with its consideration of the merits.

Consideration of the merits

8.1 The Committee has considered the case in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

8.2 Regarding the claims that Sergey Ivanov was not afforded his rights under article 9 (3) of the Covenant, the Committee recalls that, in accordance with that article, any person arrested or detained on a criminal charge must be brought promptly before a judge or other officer authorized by law to exercise judicial power. The Committee also recalls that, while the exact meaning of "promptly" may vary depending on objective circumstances, delays should not exceed a few days from the time of arrest. In the view of the Committee, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances.¹⁷ The Committee takes note of Sergey Ivanov's unchallenged allegations that he was apprehended on 29 August 2013, was officially placed in pretrial detention by the order of a prosecutor on 8 September 2013 and was not brought before a judge until November 2014. The Committee recalls that, in its general comment No. 35, it stated that it was inherent to the proper exercise of judicial power that such power should be exercised by an authority that was independent, objective and impartial in relation to the issues dealt with, and that a public prosecutor could not be considered as an officer authorized to exercise judicial power within the meaning of article 9 (3).¹⁸ In these circumstances, the Committee considers that the facts before it show that Sergey Ivanov was not brought promptly before a judge or other officer authorized by law to exercise judicial power, as required under article 9 (3) of the Covenant. Accordingly, the Committee concludes that the above-mentioned facts reveal a violation of Sergey Ivanov's rights under article 9 (3) of the Covenant.

8.3 The Committee also notes the allegations that the principle of presumption of innocence was not respected in Sergey Ivanov's case because he was handcuffed and kept in a cage during the court hearings and, in addition, had to wear special clothing prescribed for persons sentenced to death, marked with letters indicating "exceptional measure of punishment", in the prison and during the cassation proceedings when the sentence had not yet entered into force. In this respect, the Committee recalls its jurisprudence, as also reflected in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, 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 that principle. In the same general comment, the Committee also 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 that undermines the presumption of innocence.¹⁹ On the basis of the

¹⁷ General comment No. 35 (2014) on liberty and security of person, para. 33.

¹⁸ Ibid., para. 32.

¹⁹ General comment No. 32 (2007), para. 30. See also *Pustovoi v. Ukraine* (CCPR/C/110/D/1405/2005), para. 9.2.

information before it and in the absence of any other pertinent information or argumentation from the State party as to the need to keep the author's brother handcuffed and in a cage throughout the court trial and wearing special clothing prescribed for persons sentenced to death during his cassation appeal hearing, the Committee considers that the facts as presented demonstrate that the right of Sergey Ivanov to be presumed innocent, as guaranteed under article 14 (2) of the Covenant, has been violated.

8.4 The Committee notes the statement by the State party (para. 4.8) that the death penalty is not prohibited when imposed for the "most serious crimes". This is provided for in article 6 (2) of the Covenant. The Committee recalls its general comment No. 36 (2018) on article 6 of the Covenant in which the Committee states that the term "most serious crimes" refers to intentional killing. In this case, the author's brother was sentenced to death after a conviction for murder, which is a most serious crime. However, the Covenant also provides that stringent fair trial requirements must furthermore be met before the death penalty may be imposed, in order to comply with article 6.²⁰

8.5 The authors also claim that Sergey Ivanov's right to life under article 6 of the Covenant was violated, as he was sentenced to death after an unfair trial. In that respect, the Committee recalls its jurisprudence according to which the imposition of a sentence of death upon the 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.²¹ Referring to its general comment No. 32, the Committee recalls that in cases of trials leading to the imposition of the death penalty, scrupulous respect of the guarantees of fair trial is particularly important.²² In addition, in its general comment No. 36, the Committee also noted that violation of the fair trial guarantees provided for in article 14 of the Covenant in proceedings resulting in the imposition of the death penalty would render the sentence arbitrary in nature, and in violation of article 6 of the Covenant. Such violations may involve failure to respect the presumption of innocence, which may manifest itself in the accused being put in a cage or handcuffed during the trial.²³ In the light of the Committee's findings of a violation of article 14 (2) of the Covenant, the Committee concludes that the final sentence of death and the subsequent execution of Sergey Ivanov did not meet the requirements of article 14 and that, as a result, his right to life under article 6 of the Covenant has also been violated.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of Sergey Ivanov's rights under articles 6, 9 (3) and 14 (2) of the Covenant. The Committee also concludes that, by not respecting its request for interim measures, the State party violated its obligations under article 1 of the Optional Protocol.

10. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide individuals whose Covenant rights have been violated with an effective remedy in the form of full reparation. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the

²⁰ General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, paras. 35 and 41.

²¹ See general comment No. 32, para. 59. See also *Levy v. Jamaica* (CCPR/C/64/D/719/1996), para. 7.3; *Kurbanova v. Tajikistan* (CCPR/C/79/D/1096/2002), para. 7.7; *Shukurova v. Tajikistan* (CCPR/C/86/D/1044/2002), para. 8.6; *Idieva v. Tajikistan*, para. 9.7; *Khoroshenko v. Russian Federation* (CCPR/C/101/D/1304/2004), para. 9.11; *Gunan v. Kyrgyzstan* (CCPR/C/102/D/1545/2007), para. 6.5; and *Grunov and Grunova v. Belarus*, para. 8.6.

²² General comment No. 32, para. 59.

²³ General comment No. 36, para. 41.

Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

Annex

Joint opinion of Committee members Arif Bulkan, H el ene Tigroudja, Andreas Zimmermann and Gentian Zyberi (partly dissenting)

1. We fully concur with the Committee’s conclusions on the present communication as expressed in paragraph 9, but disagree with the finding of inadmissibility of the author’s claim under article 14 (3) (b) and (d). At the outset, we note that the circumstances surrounding Sergey Ivanov’s trial, conviction and execution were replete with irregularities, commencing from the time of his arrest. Notably, he was detained for more than 450 days before being taken before a judge for the first time. Such an inordinate delay is incompatible with fairness and violates the State’s obligations under the Covenant, as repeatedly observed in previous cases.¹ Considered together with the problems alleged regarding his legal representation, which we discuss below, these amount to procedural irregularities that cannot be tolerated in a trial which might result in the imposition of the death penalty – a punishment that is both final and irreversible. In this regard, we recall the Committee’s unwavering stance that the death penalty, if retained, must be subject to “strict conditions”² and procedural guarantees scrupulously respected.³ Moreover, the State party did not comply with the interim measures requested in this case, which the Committee has already found (para. 6.4) to constitute a serious violation of its obligations under the Optional Protocol.

2. The author alleges that his brother’s access to legal counsel was violated because of a number of circumstances, including the facts that he was not provided with counsel until four hours after his arrest and when certain procedural steps had already been taken; that during the pretrial investigation two ex officio counsel changed and a third one retained by him only became involved at the final stage of the cassation appeal; that he had no control over these changes of counsel; and that he was not allowed confidential attorney-client time as the investigator was always present (para. 3.6). Relying on the State party’s objection that the author’s brother did not file any complaint regarding these breaches at the domestic level, the majority found this claim to be inadmissible under article 5 (2) (b) of the Optional Protocol.

3. We find the conclusion of inadmissibility unconvincing, partly because the matters complained of were all facts which the State party did not dispute. Indeed, the State party admitted that there were changes of counsel afforded to the author’s brother, mentioning at least two different names of counsel who represented him at different stages of the trial (para. 4.4).

4. The majority’s position is even more peculiar given that the State party expressly raised the non-exhaustion objection in relation to two allegations, the second concerning the brother’s detention on remand. However, and without any discussion, the majority found the other claim to be admissible, thereafter rightly proceeding to a finding of violation by reason of the 450-day detention of the brother before he was taken before a judge. In our view, this is an inconsistent approach given that the procedural background in relation to both claims (under articles 9 and 14) is the same, so that if the former is admissible, so too should be the latter.

5. Ultimately, it is unclear what domestic remedy would have been available to the brother and effective in the circumstances. The changes in counsel and denial of private communication were occasioned by domestic authorities and were occurrences over which the author’s brother had no control. Not only were these claims unrefuted, but the State party merely alleged that no complaint was made without specifying what domestic

¹ *Shaw v. Jamaica* (CCPR/C/62/D/704/1996), para. 7.3; and *Khadzhiyev and Muradova v. Turkmenistan* (CCPR/C/D/2252/2013), para. 7.8.

² General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, paras. 16 and 17.

³ General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 59.

procedures were available to provide redress. Where non-exhaustion is raised, this Committee has frequently required the State party to show both what procedure was available and that there is a reasonable prospect that the purported remedy would be effective in the circumstances.⁴ For all these reasons, we therefore find that there is no substance in the non-exhaustion objection and that the author's claim under article 14 (b) and (d) is admissible.

6. The right to counsel is an indispensable aspect of a fair trial, acknowledged in many domestic systems and in the Committee's long-standing and consistent jurisprudence. In its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the right was described as "an application of the principle of equality of arms".⁵ In capital cases, legal representation assumes such importance that where lacking – for whatever reason – the imbalance created cannot be cured even by a vigilant and fair trial judge. As stated by the Committee, "it is axiomatic that legal assistance be available in capital cases ... even if the unavailability of private counsel is to some degree attributable to the author himself, and even if the provision of legal assistance would entail an adjournment of proceedings. This requirement is not rendered unnecessary by efforts that might otherwise be made by the trial judge to assist the author in handling his defence in the absence of counsel."⁶

7. Moreover, the right of the defendant is to have counsel of her/his own choosing, as specifically emphasized in both article 14 (3) (b) and (d). This requirement underscores not just the objective value of legal representation, but the necessity of a defendant being able to choose and have confidence in counsel providing that representation. As stated by the Committee, the right "entails the freedom of the defendant not only to choose but also to replace a lawyer and this right should not be restricted unless it is absolutely necessary for the administration of justice ..."⁷ These multiple dimensions of the right speak to its unassailable importance and its heightened role in capital cases.

8. Against this legal background, we note the very serious breaches alleged by the author to have occurred during his brother's trial. In particular, counsel changed on several occasions for reasons outside the brother's control, and a third counsel started representing him only when an additional cassation appeal was under preparation. Those disadvantages, already significant, were compounded by the denial of confidential time between the brother and his counsel. We cannot state with any confidence that such seemingly desultory, erratic, compromised representation, over which the brother had no control, did not impact negatively on the trial and the ultimate finding of guilt. Given the failure of the State party to refute these allegations, due weight must be accorded to them. In these circumstances, we find that these facts as submitted reveal a violation of Sergey Ivanov's rights under article 14 (3) (b) and (d) of the Covenant.

⁴ *Protsko and Tolchin v. Belarus* (CCPR/C/109/D/1919-1920/2009), para. 6.5; *Schumilin v. Belarus* (CCPR/C/105/D/1784/2008), para. 8.3; and *Dorofeev v. Russian Federation* (CCPR/C/111/D/2041/2011), para. 9.6.

⁵ General comment No. 32, para. 32. See also *Smith v. Jamaica* (CCPR/C/47/D/282/1988), para. 10.4.

⁶ *Robinson v. Jamaica* (CCPR/C/35/D/223/1987), para. 10.3.

⁷ *Y.M. v. Russian Federation* (CCPR/C/116/D/2059/2011), para. 9.4.