



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. 2269/2013*, **, ***

<i>Communication submitted by:</i>	Vitaly Lopasov (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	28 December 2012 (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 26 July 2013 (not issued in document form)
<i>Date of adoption of Views:</i>	25 July 2019
<i>Subject matter:</i>	Imposition of a fine for participating in a peaceful meeting; freedom of expression; lack of fair trial
<i>Procedural issues:</i>	Exhaustion of domestic remedies; State party's failure to cooperate
<i>Substantive issues:</i>	Freedom of assembly; freedom of expression
<i>Articles of the Covenant:</i>	2 (2), 19 and 21
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1. The author of the communication is Vitaly Lopasov, a national of Belarus born in 1973. He claims that the State party has violated his rights under articles 2 (2), 19 and 21 of the Covenant.¹ The Optional Protocol entered into force for the State party on 30 December 1992. The author is not represented by counsel.

* 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, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.

*** An individual opinion by Committee member Gentian Zyberi (partly dissenting) is annexed to the present Views.

¹ The author mentioned article 22 on the cover page of his complaint, however, the rest of his submission refers to article 21.



The facts as submitted by the author

2.1 On 27 October 2012, the author participated with others in a commemoration of the Belarusian uprising of 1863 in Grodno. In this context, together with other participants, the author moved between different locations, walking from the burial place of Romuald Traugutt towards the memorial of Kastus Kalinowski and laying flowers at Karl Marx Monument in Svisloch City, while attending meetings and listening to speeches delivered by several participants. Many of the participants, including the author, held a red and white flag.² The author submits that he has participated in similar commemorations over the past 20 years, holding flowers, funeral wreaths, coffins and various other symbols, including the old State flag, without any obstacles. He states that the meetings were of a peaceful nature and did not disturb public order.

2.2 During the event, the author was apprehended by police officers of the Department of Internal Affairs of Grodno and taken to the police station, without being given a reason. He was reported to the Svisloch District Court, for having violated the procedure for organizing and conducting public meetings.

2.3 On 30 October 2012, the Svisloch District Court established that the author had violated the provisions of the Law on Mass Events concerning the organization of a meeting, thereby committing an administrative offence under article 23.34 (1) of the Code of Administrative Offences. Consequently, the Svisloch District Court ordered the author to pay a fine of 3,000,000 old Belarusian roubles.³ He appealed this decision to the Grodno Regional Court, which upheld the decision of the court of first instance. On 29 November 2012, the Svisloch District Court's decision thus entered into force.

2.4 The author maintains that, in the absence of any well-founded explanations justifying the court's conclusion, the penalty imposed on him cannot be seen as justified for the protection of national security, public order or public health or morals, or for the respect of the rights or reputations of others.

2.5 The author submits that he has exhausted all domestic remedies. He indicates that he did not appeal the decision of the Svisloch District Court to the Chair of the Supreme Court or the Prosecutor General's Office under supervisory review proceedings, as such proceedings do not constitute an effective domestic remedy. He refers to the Committee's jurisprudence, according to which supervisory review procedures against court decisions that have already entered into force do not constitute an effective remedy.

The complaint

3.1 The author claims that the State has violated his rights under articles 19 and 21, read in conjunction with article 2 (2), of the Covenant, as the authorities did not let him participate in a peaceful commemorative event.

3.2 The author claims that the restrictions on conducting a public event were not justified by reasons based on protecting national security, public order or public health or morals, or respecting the rights and freedoms of others. He claims that the requirement of prior authorization for the organization of a meeting contained in the Law on Mass Events and the limitations on holding meetings in a designated area, as stipulated in Decision No. 717 of the Svisloch District Executive Committee, of 10 November 2011, on the designation of areas for public meetings in Svisloch, do not constitute permissible restrictions for the purposes of articles 19 and 21 of the Covenant.

3.3 The author submits that, by ratifying the Covenant, the State party has undertaken, under article 2 thereof, to respect and to ensure all individual rights listed in the Covenant, and to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the Covenant. The State party, however, is not fulfilling its obligations under article 2 (2), read in conjunction with articles 19 and 21, of the Covenant, since the Law on Mass Events contains vague and ambiguous provisions. For example, article 9 of the Law

² The flag was used before 1996 and is largely considered a symbol of the opposition and its use is forbidden in public.

³ At the time of the administrative hearing, this was equal to about approximately \$352.

gives local executive authorities the discretionary power to designate specific permanent locations for the organization of peaceful assemblies, without any justification.

3.4 In this context, the author requests that the Committee recommend that the State party align its legislation, particularly the Law on Mass Events and Decision No. 717 of the Svisloch District Executive Committee, with the international standards set out in articles 19 and 21 of the Covenant.

State party's observations on admissibility

4.1 On 22 January 2013, the State party submitted that, upon becoming a party to the Optional Protocol, it had agreed, under article 1 thereof, to recognize the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State party of any rights protected by the Covenant. The State party challenged the Committee's wide interpretation of the Optional Protocol and, in that context, expressed its concern at the lack of exhaustion of domestic remedies when registering individual communications and the registration of cases submitted by third parties. It submitted that the Committee did not have unlimited authority to widely interpret the Covenant. To that end, the State party requested that the Committee stop registering individual communications in breach of the requirements of the Optional Protocol.

4.2 The State party also informed the Committee that it would not respond to any correspondence concerning communications registered in violation of the Optional Protocol, neither on admissibility, nor on the merits.

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

5.1 In a letter dated 27 October 2015, the author commented on the State party's observations on admissibility. Referring to the Committee's jurisprudence, he points out that an appeal to the Prosecutor General under the supervisory review procedure does not constitute an effective remedy. He adds that this procedure is at the discretion of a prosecutor and does not entail a consideration of the case on its merits. He concludes that all available and effective domestic remedies have been exhausted in his case.

5.2 Referring to State party's observations concerning the broad interpretation of the Covenant, the author notes that the State party has an obligation not only to follow the rules and procedures of the Committee, but also the comprehensive interpretation of the substantive provisions of the Covenant by the Committee as reflected in its general comments.

State party's lack of cooperation

6.1 The Committee notes the State party's assertion that there are no legal grounds for consideration of the author's communication, insofar as it was registered in violation of the provisions of the Optional Protocol, and that if a decision is taken by the Committee on the present communication, the State party will dissociate itself from the Committee's Views.

6.2 The Committee recalls that, under article 39 (2) of the Covenant, it is empowered to establish its own rules of procedure, which States parties have agreed to recognize. It 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 claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and article 1 of the Optional Protocol). The Committee recalls its practice, as reflected in rule 99 (b) of its rules of procedure, that individuals may be represented by a person of their choice, provided that the representative is duly authorized. Implicit in a State's adherence to the Optional Protocol is the undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications and, after examination thereof, to forward its Views to the State party and to the individual (art. 5 (1) and (4)). The rules of procedure ensure that a State party to the Optional Protocol has every opportunity to present its position on admissibility and the merits of a case brought before the Committee.

6.3 It is incompatible with those obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication and in the expression of its Views.⁴ It is up to 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 should be registered and by declaring beforehand that it will not accept the Committee's determination on the admissibility or the merits of the communication, the State party is violating its obligations under article 1 of the Optional Protocol.

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 rule 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 takes note of the State party's argument that the author has failed to exhaust all domestic remedies. It notes that the only remedies possible for the author after his appeal was dismissed by the Grodno Regional Court would have been an appeal under the supervisory review procedure to the Prosecutor General or the Supreme Court. In this context, the Committee recalls its jurisprudence, according to which a petition to a prosecutor's office requesting a review of court decisions that have taken effect does not constitute an effective remedy that has to be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.⁵ In addition, the State party has not provided examples to demonstrate that supervisory review proceedings before the Supreme Court could bring effective relief in cases concerning freedom of expression and assembly, namely similar to the one at stake. Thus, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

7.4 The Committee further notes the author's claim that his rights under articles 19 and 21, read in conjunction with article 2 (2), of the Covenant, were violated. The Committee recalls its jurisprudence, which indicates that the provisions of article 2 of the Covenant set forth a general obligation for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol.⁶ The Committee also considers that the provisions of article 2 cannot be invoked as a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim. The Committee notes, however, that the author has already alleged a violation of his rights under articles 19 and 21, resulting from the interpretation and application of the existing laws of the State party, and the Committee does not consider that an examination of whether the State party also violated its general obligations under article 2 (2) of the Covenant, read in conjunction with articles 19 and 21, to be distinct from an examination of the violation of the author's rights under articles 19 and 21 of the Covenant. The Committee therefore considers that the author's claims in this regard are incompatible with article 2 of the Covenant, and inadmissible under article 3 of the Optional Protocol.

⁴ See, for example, *Levinov v. Belarus* (CCPR/C/105/D/1867/2009, 1936/2010, 1975/2010, 1977/2010, 1978/2010, 1979/2010, 1980/2010, 1981/2010 and 2010/2010), para. 8.2; and *Poplavny v. Belarus* (CCPR/C/115/D/2019/2010), para. 6.2.

⁵ See, for example, *Alekseev v. Russian Federation* (CCPR/C/109/D/1873/2009), para. 8.4; *Lozenko v. Belarus* (CCPR/C/112/D/1929/2010), para. 6.3; and *Sudalenko v. Belarus* (CCPR/C/115/D/2016/2010), para. 7.3.

⁶ See, for example, *Poliakov v. Belarus* (CCPR/C/111/D/2030/2011), para. 7.4.

7.5 The Committee considers that the author has sufficiently substantiated his claim under articles 19 and 21 of the Covenant, for the purposes of admissibility. It, therefore, declares the communication admissible and proceeds with its consideration of the merits.

Considerations of the merits

8.1 The Committee has considered the communication 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 The Committee notes the author's claim that his apprehension and conviction for his participation in a peaceful demonstration held without prior authorization constitute an unjustified restriction on his rights to freedom of expression and to freedom of assembly as protected by articles 19 (2) and 21 of the Covenant. The Committee must therefore consider whether the restriction imposed on the author's rights in the present case are justified under any of the criteria set out in article 19 (3) and in the second sentence of article 21 of the Covenant.

8.3 The Committee recalls that article 19 (3) of the Covenant allows certain restrictions, but they shall only be such as are provided by law and are necessary for the respect of the rights and reputations of others and for the protection of national security or public order (*ordre public*) or public health or morals. The Committee refers to its general comment No. 34 (2011) on the freedoms of opinion and expression, noting that those freedoms are indispensable conditions for the full development of the person and are essential for any society. They constitute the foundation stone for every free and democratic society. Any restriction on the exercise of those freedoms must conform to the strict tests of necessity and proportionality.⁷ Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they were predicated. The Committee recalls that it is for the State party to demonstrate that the restrictions on the author's rights under article 19 were necessary and proportionate.⁸

8.4 Likewise, in the absence of any pertinent information from the State party to justify the restrictions imposed contrary to the provisions of article 19 (3) of the Covenant, the Committee concludes that the author's rights under article 19 (2) of the Covenant have been violated.

8.5 The Committee also recalls that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is a fundamental human right that is essential for the public expression of one's views and opinions and is indispensable in a democratic society. This right entails the possibility of organizing and participating in a peaceful assembly, including the right to a stationary assembly (such as a picket) in a public location. The organizers of an assembly generally have the right to choose a location within sight and hearing of their target audience; no restriction on this right is permissible unless it is imposed in conformity with the law and is necessary in a democratic society, in the interests of national security or public safety, public order, or the protection of public health or morals or the rights and freedoms of others. The State party is thus under an obligation to justify the limitation on the right protected by article 21 of the Covenant.⁹

8.6 The Committee notes the author's allegations that he was apprehended and brought to a police station for participating in a peaceful but unauthorized demonstration and for holding an unauthorized red and white flag in Svisloch. He later received an administrative fine for violating article 23.34 (1) of the Code of Administrative Offences.

8.7 The Committee notes the author's claim that he did not request prior authorization to participate in the demonstration owing to the stringent regime of the Law on Mass Events, which imposes unreasonable restrictions on the right guaranteed by article 21 of the Covenant. The Committee recalls that, while imposing restrictions on the right of peaceful assembly, the State party should be guided by the aim of facilitating the right, rather than

⁷ Reference is made to paragraph 22 of general comment No. 34.

⁸ See, for example, *Olechkevitch v. Belarus* (CCPR/C/107/D/1785/2008), para. 8.5; and *Pivonos v. Belarus* (CCPR/C/106/D/1830/2008), para. 9.3.

⁹ See, for example, *Poplavny v. Belarus*, para. 8.5.

imposing unnecessary or disproportionate limitations on it.¹⁰ In that regard, the Committee notes that, while the restrictions imposed in the author's case were in accordance with the law, the State party has not attempted to explain why such restrictions were necessary and whether they were proportionate for one of the legitimate purposes set out in the second sentence of article 21 of the Covenant. Nor has the State party explained how, in practice in the present case, the author's participation in a peaceful demonstration in which only a few persons participated could have violated the rights and freedoms of others or posed a threat to the protection of public safety, public order or public health or morals. The Committee observes that the State party must justify why apprehending the author and imposing an administrative fine on him were necessary and proportionate to that purpose. Therefore, in the absence of any pertinent explanation from the State party, the Committee considers that due weight must be given to the author's allegations.

8.8 The Committee notes that the author was apprehended and given an administrative fine in accordance with article 23.34 (1) of the Code of Administrative Offences because of his participation in an unauthorized demonstration. The Committee notes that the Svisloch District Court found that the author had violated articles 5 and 11 of the Law on Mass Events, which stipulates that all public assemblies, rallies, marches, demonstrations and pickets are subject to prior authorization by the authorities, whereas the use of flags or pennants should be registered in accordance with established procedure. The Committee notes that the State party has failed to demonstrate that the apprehension of, and fine imposed on, the author, although based in law, were necessary and proportionate to achieve one of the legitimate purposes under the second sentence of article 21 of the Covenant. The Committee therefore concludes that the facts as submitted reveal a violation by the State party of the author's rights under article 21 of the Covenant.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of the author's rights under articles 19 (2) and 21 of the Covenant. The Committee reiterates its conclusion that the State party has also 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 the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to take appropriate steps to (a) provide the author with adequate compensation; and (b) take steps to prevent similar violations occurring in the future. In that connection, the Committee reiterates that the State party should revise its legislation in accordance with its obligation under article 2 (2), in particular, the Law on Mass Events and Decision No. 717 of the Svisloch District Executive Committee, as applied in the present case, with a view to ensuring that the rights under articles 19 and 21 of the Covenant may be fully enjoyed in the State party.

11. 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 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.

¹⁰ See, for example, *Turchenyak et al. v. Belarus* (CCPR/C/108/D/1948/2010), para. 7.4.

Annex

Individual opinion of Committee member Gentian Zyberi (partly dissenting)

1. I am in agreement with the Committee's finding of a violation of articles 19 and 21. My dissent relates to the Committee's decision not to address the author's claim of a violation of articles 19 and 21, read in conjunction with article 2 (2), of the Covenant (para. 3.1).

The Committee's position on the claim under article 2 (2)

2. First, in para. 7.4, the Committee points out that the provisions of article 2 of the Covenant set forth a general obligation for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol.¹ Subsequently, the Committee clarifies that it "considers that the provisions of article 2 cannot be invoked as a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim". Finally, given that the complainant had alleged a violation of his rights under articles 19 and 21, the Committee set aside the examination of whether the State party also violated article 2 (2), as incompatible with article 2 of the Covenant and inadmissible under article 3 of the Optional Protocol.

My position on the claim under article 2 (2)

3. Unlike the Committee, I deem that when raised in conjunction with substantive rights, a violation of article 2 (2) should be addressed, subject to the legal test and legal guidance the Committee has developed in its jurisprudence, primarily through its case law, but also through its general comments and concluding observations. Other colleagues that have served with the Committee have adopted and explained this view in different cases and contexts.²

4. Article 2 (2) lays down the State party's foundational obligation that, where not already provided for by existing legislative or other measures, each State party to the Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the Covenant. The State party should put in place a domestic legal framework and relevant legal and administrative practices that ensure respect for the provisions of the Covenant. In the absence of such a domestic legal framework and practices, the State party would be in violation of its obligations under the Covenant and the problem facing the affected individuals subject to the jurisdiction of that State party and the Committee as the monitoring body would be of a structural nature.

Freedom of expression and the right of peaceful assembly in Belarus

5. Over the years the Committee has received more than 30 cases against Belarus concerning violations of articles 19 and 21 and has found a violation in most, if not all, of them. This points towards a significant structural problem, related to State non-compliance

¹ See, for example, *Poliakov v. Belarus* (CCPR/C/111/D/2030/2011), para. 7.4.

² See, for example, *Weerawansa v. Sri Lanka* (CCPR/C/95/D/1406/2005) (individual opinion of Fabián Omar Salvioli (partially dissenting)); *Kungurov v. Uzbekistan* (CCPR/C/102/D/1478/2006) (individual opinion of Fabián Omar Salvioli); *Djebrouni and Berzig v. Algeria* (CCPR/C/103/D/1781/2008) (individual opinion of Fabián Omar Salvioli, joined by Cornelis Flinterman (concurring)); and *Poliakov v. Belarus* (CCPR/C/111/D/2103/2011) (individual opinion of Fabián Omar Salvioli (concurring)).

with its obligations under the Covenant. Such a dire situation should have prompted the Committee to address the violation of article 2 (2), read in conjunction with articles 19 and 21, as requested by the complainant.

6. What makes such an assessment even more compelling in this case is that the Committee's own legal test has been satisfied. According to this three-prong test, article 2 provisions cannot be invoked in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of the violation, there is a distinct violation and the individual is directly affected.³ In the case at hand, first, the failure by the State party to observe its obligations under article 2 can be seen as the proximate cause of the violation. The Law on Mass Events and related practices by the authorities of Belarus created the preconditions whereby the rights of the author were violated. Second, there was a distinct violation of the rights of the author under articles 19 and 21 of the Covenant (paras. 8.4 and 8.8). Third, and finally, the author was directly affected. The violation of his rights under articles 19 and 21 was not theoretical or abstract, but direct and personal.

7. In the remedies section, the Committee correctly reiterates that the State party should revise its legislation in accordance with its obligation under article 2 (2), in particular, the Law on Mass Events and Decision No. 717 of the Svisloch District Executive Committee, as it is applied in the present case, with a view to ensuring that the rights under articles 19 and 21 of the Covenant may be fully enjoyed in the State party (para. 10). However, in my view, this general finding in the remedies section should have been matched by an assessment of whether there had been a violation of article 2 (2) in conjunction with substantive rights in the merits section of the Committee's Views.

Concluding remarks

8. Generally, the test developed by the Committee is adequate for dismissing claims in which there are no clear structural problems, the violations complained of are abstract or not direct or the case record is not sufficiently clear. However, the Committee should carefully assess cases that follow a specific pattern of violations that are indicative of structural problems in the domestic legal framework and related practices. In the future, the Committee should consider addressing claims of violations of substantive rights in conjunction with article 2 (2), especially when specifically asked to do so by a complainant and when its prior jurisprudence demonstrates the existence of structural problems with the domestic legal framework and relevant practices.

³ *Poliakov v. Belarus*, para. 7.4.