



**International Covenant on
Civil and Political Rights**

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Human Rights Committee

Communications Nos. 1919-1920/2009

**Views adopted by the Committee at its 109th session
(14 October–1 November 2013)**

<i>Submitted by:</i>	Alexander Protsko and Andrei Tolchin (not represented by counsel)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Belarus
<i>Date of communications:</i>	22 August 2009 (initial submissions)
<i>Document references:</i>	Special Rapporteur's rule 97 decisions, transmitted to the State party on 24 November 2009 (not issued in document form)
<i>Date of adoption of Views:</i>	1 November 2013
<i>Subject matter:</i>	Freedom of expression; freedom of assembly
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Unjustified restriction of the right to impart information
<i>Articles of the Covenant:</i>	19 and 21
<i>Article of the Optional Protocol:</i>	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 (109th session)

concerning

Communications Nos. 1919-1920/2009*

Submitted by: Alexander Protsko and Andrei Tolchin (not represented by counsel)

Alleged victims: The authors

State party: Belarus

Date of communication: 22 August 2009 (initial submissions)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2013,

Having concluded its consideration of communications Nos. 1919-1920/2009, submitted to the Human Rights Committee by Alexander Protsko and Andrei Tolchin 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 communications and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors are Alexander Protsko, “the first author” (communication No. 1919/2009), and Andrei Tolchin, “the second author” (communication No. 1920/2009), both Belarusian nationals born in 1953 and 1959 respectively. They claim to be victims of a violation by Belarus of their rights under articles 19 and 21 of the International Covenant on Civil and Political Rights. They are unrepresented. The Optional Protocol entered into force for the State party on 30 September 1992.

1.2 On 1 November 2013, pursuant to rule 94, paragraph 2, of its rules of procedure, the Committee decided to combine the two communications for decision in the light of their factual and legal similarity.

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Föhr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

The facts as submitted by the authors

2.1 In April 2009, in two different locations in the Gomel Region, both authors were distributing information leaflets about forthcoming peaceful assemblies to commemorate individuals who had died in the Chernobyl accident in April 1986.

Mr. Protsko

2.2 On 22 April 2009 in the village of Bragin, the first author distributed leaflets about a forthcoming peaceful commemoration to be held in Bragin which would include the laying of wreaths and flowers at the memorial to Vassily Ignatenko, who had died during the Chernobyl accident.

2.3 The police arrested Mr. Protsko and filed an official report alleging that he had committed an administrative offence under article 23.34, part 1, of the Code of Administrative Offences (liability for breaches in the organization or holding of assemblies, meetings, street rallies, demonstrations, picketing and other events). The author points out that article 8 of the Law on Mass Events of 30 December 1997 prohibits the preparation and distribution of any kind of information materials regarding a planned event prior to obtaining official authorization for the event in question. Given that he was distributing leaflets about an unauthorized planned event, the police officers decided that he had breached the rules regarding the organization of a peaceful assembly. The case was brought to court immediately.

2.4 On the same day, the Braginsk District Court found him guilty of breaching article 23.34, part 1, of the Code of Administrative Offences and fined him 105,000 Belarusian roubles. The Court also ordered the confiscation of the 600 leaflets that had been seized.

2.5 On 20 May 2009, the Gomel Regional Court rejected the first author's appeal against the District Court decision. The first author further complained to the Supreme Court Chairperson, under the supervisory review proceedings, but his complaint was rejected on 4 August 2009 by a Deputy Chairperson of the Court. The author notes that he has exhausted all available domestic remedies without obtaining redress.

Mr. Tolchin

2.6 On 23 April 2009, in the city of Narovlya, the second author distributed leaflets about a planned peaceful assembly in Narovlya to lay wreaths and flowers at a memorial to those who had lost their lives in the Chernobyl accident. The police apprehended Mr. Tolchin and filed a report for a breach of article 23.34, part 1, of the Code of Administrative Offences, on the grounds that he had distributed leaflets for an unauthorized event. On this basis, on 24 April 2009, the Narovlyansk District Court ordered the author's administrative arrest for five days. The author appealed against this decision, but on 15 May 2009, the Gomel Regional Court rejected his appeal. The ruling of the court of first instance therefore became final and enforceable.

2.7 With regard to exhaustion of domestic remedies, and referring to the Committee's case law on the matter, the author contends that supervisory review proceedings in the State party do not constitute an effective remedy. In addition, in administrative cases supervisory review requires the payment of a State tax. The author's subsequent appeal to the Chairman of the Supreme Court under the supervisory review proceedings was returned to him without having been examined due to his non-payment of this tax.

The complaint

3.1 The authors claim that, in their cases, the application of the Law on Mass Events resulted in an unjustified restriction of their right to impart information about a peaceful

commemoration, as protected under article 19, paragraph 2, of the Covenant and the right of peaceful assembly, as protected under article 21 of the Covenant.

3.2 Both authors claim that the courts did not explain why they were fined, apart from repeating that they had failed to comply with the statutory obligation to obtain authorization for a gathering prior to distributing leaflets about it. The appeal courts adopted their decisions without assessing the authors' acts in the light of the Covenant, despite the authors' specific request that they do so. The authors maintain that the restriction in question was not necessary for the purposes of article 19, paragraph 3, of the Covenant: for respect of the rights or reputations of others, the protection of national security or of public order (*ordre public*), or of public health or morals. Thus, according to the authors, they are victims of a violation of their rights under article 19, paragraph 2, and article 21 of the Covenant.

State party's observations on admissibility and on the merits

4.1 By two notes verbales of 25 January 2010, the State party provided its observations on the admissibility and the merits of the communications. It explains that, on 22 and 23 April 2009 respectively, the authors were found guilty of having distributed leaflets about commemorations without having obtained the requisite prior authorization from the authorities, thus violating the law. Both authors were apprehended by the police and were given official records for breaching the Code on Administrative Offences.

4.2 On 22 April 2009, the Braginsk District Court found Mr. Protsko guilty of a breach of article 23.34, paragraph 1, of the Code of Administrative Offences regulating the organization or holding of mass events and fined him 105,000 Belarusian roubles. On 20 May 2009, this decision was confirmed on appeal by the Gomel Regional Court. On 4 August 2009, Mr. Protsko's appeal under the supervisory review proceedings was rejected by a Deputy Chairperson of the Supreme Court.

4.3 On 24 April 2009, the Narovlyansk District Court found Mr. Tolchin guilty of a breach of article 23.34, paragraph 1, of the Code of Administrative Offences, and sentenced him to five days' administrative arrest. On 15 May 2009, this decision was confirmed on appeal by the Gomel Regional Court. On 14 July 2009, Mr. Tolchin's appeal under the supervisory review proceedings was returned to him by the Supreme Court due to his failure to pay the requisite State tax.

4.4 The State party adds that, under article 12.1 of the Code of Administrative Offences, rulings in administrative cases may be appealed by the person against whom the administrative case is opened. It notes that Mr. Protsko did not appeal to the Gomel Department of Internal Affairs or to the Ministry of Internal Affairs (as allowed under article 7.2 of the Procedural-Executive Code of Administrative Offences) against his apprehension by the Braginsk District Department of Internal Affairs or about the fact that the police had filed an administrative offence report on him. Similarly, Mr. Tolchin did not appeal to these institutions against his apprehension or the administrative offence report issued on him by the Narovlyansk District Department of Internal Affairs. Neither did the authors bring supervisory claims before the Prosecutor's Office. The State party also points out that Mr. Protsko has failed to submit a supervisory review complaint to the Chairperson of the Supreme Court, and that Mr. Tolchin has failed to appeal directly to the Chairperson of the Supreme Court under the supervisory review proceedings. Thus, according to the State party, the authors have not exhausted all available domestic remedies and there are no grounds to believe that these remedies would be unavailable or ineffective.

4.5 The State party adds that Mr. Tolchin's contention that supervisory review proceedings are ineffective is groundless. In substantiation, it provides statistical data indicating that in 2009, the Prosecutor's Office received 3,235 claims relating to

administrative offences, of which 518 were acted upon. On the basis of protest motions by the General Prosecutor's Office, the Supreme Court quashed and modified 126 final rulings on administrative offences which had already been enforced. According to the State party, these data show that the prosecutor's supervisory review (*nadzor*) constitutes an effective remedy for judicial protection and that a large number of cases involving administrative offences are examined each year on the basis of prosecutor's protest motions. With respect to monetary losses which complainants suffer when bringing a supervisory claim, the State party notes that the compulsory payment of a State tax is provided by law and the law must be obeyed.

4.6 Regarding the claim that the Law on Mass Events is incompatible with the provisions of the Covenant, the State party argues that the aim of the law in question is not only to regulate the organization and holding of mass events, meetings, rallies, demonstrations, picketing and other events, but also to ensure the conditions for the realization of citizens' constitutional rights and freedoms, public safety and order in the streets, squares or other public venues where such events take place.¹

4.7 The State party declares that, in the light of the above considerations, the authors' allegations that their administrative liability constituted a violation of their rights under articles 19 and 21 of the Covenant are unfounded.

Authors' comments on the State party's submission

5.1 By letters of 22 November 2010 (received in March 2013), the authors submitted their comments on the State party's observations. They maintain that they have exhausted all available domestic remedies as they have both submitted cassation appeals against the decisions of the courts of first instance. According to them, only cassation appeals are effective, as they always result in an assessment of the merits of a case. Supervisory review appeals are ineffective because they are left to the discretion of an official, and even if they take place, they do not result in a reconsideration of the facts and evidence of the case but are limited to issues of law only. The authors note that, according to the Committee, remedies should not only be accessible but also effective. The authors add that no individual complaint to the Constitutional Court is possible in Belarus.

5.2 Mr. Tolchin adds that he complained to the Chairperson of the Supreme Court under the supervisory review proceedings, but his complaint was not examined as he did not pay the State tax required for the review; he contends that he was unable to pay it at the time. Mr. Protsko notes that he also complained to the Chairperson of the Supreme Court under the supervisory review proceedings, but that his complaint was examined by a Deputy Chairperson of the Supreme Court who rejected his appeal.

5.3 Mr. Tolchin points out that the statistical data on supervisory review proceedings in administrative cases that the State party submitted do not indicate how many of those cases involved administrative prosecution of public or political activists on clearly political grounds. He expresses doubts that these figures relate to civil and political rights, and explains that he is unaware of the existence in the past 10 years of any instance in which the Supreme Court or the Prosecutor General's Office have sought the annulment of an administrative case related to the civil and political rights of Belarusian citizens.

¹ The State party adds that article 9 of this Law lists the locations where mass events cannot take place. Local authorities are responsible for stipulating permanent sites for mass events and for indicating the sites on which no such events can take place, and making corresponding announcements through the mass media.

5.4 The authors consider that all the available domestic remedies for the purposes of article 5, paragraph 2 (b), of the Optional Protocol have been exhausted in their cases.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 As required by article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under any other procedure of international investigation or settlement.

6.3 As to the issue of exhaustion of domestic remedies, the Committee takes note of the State party's argument that the authors failed to appeal against their apprehension and administrative prosecution before the Ministry of Internal Affairs; that they failed to request that the Prosecutor's Office initiate a supervisory review; that the first author failed to submit a supervisory review complaint to the Chairperson of the Supreme Court; and that the second author failed to submit his request for supervisory review by the Chairperson of the Supreme Court with the requisite State tax.

6.4 The Committee notes that the State party has not provided any explanation as to how a complaint to the Gomel Department of Internal Affairs or to the Ministry of Internal Affairs would constitute an effective remedy in the authors' cases, for the purposes of exhaustion of domestic remedies. Accordingly, the Committee considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining the communications on this ground.

6.5 The Committee further notes the authors' claim that supervisory review proceedings are neither effective nor accessible. The Committee notes the State party's objections in this respect, particularly the statistics provided to demonstrate that supervisory review was effective in a number of instances involving administrative cases. However, the Committee notes that the State party has not indicated whether the supervisory review procedure has been successfully applied in cases concerning freedom of expression or the right to peaceful assembly and, if it has, in how many cases. The Committee recalls its jurisprudence, according to which the State party's supervisory review of court decisions that have been enforced does not constitute a remedy which has to be exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.² In the light of this, the Committee considers that it is not precluded by the requirements of article 5, paragraph 2 (b), of the Optional Protocol from examining the present communications.

6.6 The Committee considers that the authors have sufficiently substantiated their claim of a violation of their rights under article 19, paragraph 2, and article 21 of the Covenant. Accordingly, it declares the communications admissible, and proceeds with its consideration of the merits.

² See, for example, communication No. 1808/2008, *Kovalenko v. Belarus*, Views adopted on 17 July 2013, para. 7.3; communication No. 1785/2008, *Oleshkevich v. Belarus*, Views adopted on 18 March 2013, para. 7.3; communication No. 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communications in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.2 The first issue before the Committee is whether the seizure of the leaflets and the fine imposed on the first author and the five days' administrative detention to which the second author was sentenced for distributing leaflets about two planned peaceful public events to commemorate those who had died in the Chernobyl accident constitute violations of the authors' rights under article 19, paragraph 2, of the Covenant.

7.3 The Committee recalls that article 19, paragraph 2, of the Covenant requires States parties to guarantee the right to freedom of expression, including the freedom to impart information. The Committee refers to 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. They are essential for any society and constitute the foundation stone for every free and democratic society.³ Any restrictions on the exercise of these freedoms must conform to strict tests of necessity and proportionality.⁴ Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.⁵

7.4 The Committee notes that the seizure of the leaflets, the fine imposed on the first author and the detention of the second author constitute restrictions on the exercise of the right to impart information. Therefore it must consider whether the restrictions imposed on the authors' rights in the present communications are justified under the criteria set out in article 19, paragraph 3, of the Covenant.

7.5 The Committee recalls that article 19, paragraph 3, of the Covenant allows certain restrictions, but only as provided by law and necessary: (a) for respect of the rights or reputation of others; or (b) for the protection of national security or of public order (ordre public), or of public health or morals. The Committee notes that if the State imposes a restriction, it is for the State party to demonstrate that the restriction on the rights under article 19, paragraph 2, of the Covenant was necessary in the case in question, and that even if, in principle, States parties may introduce a system aimed at reconciling an individual's freedom to impart information and the general interest of maintaining public order in a certain area, the system must not operate in a way that is incompatible with the object and purpose of article 19 of the Covenant.⁶

7.6 The Committee notes the authors' claim that the authorities have failed to explain, for the purposes of article 19, paragraph 3, of the Covenant, why it was necessary to restrict their right to impart information about peaceful assemblies and subject them to administrative proceedings for respect of the rights or reputations of others or for the protection of national security or of public order (ordre public), or of public health or morals.

³ See the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, para. 2, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), annex V.

⁴ *Ibid.*, para. 22.

⁵ *Ibid.*, para. 22. See also, for example, communication No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, para. 7.7.

⁶ See, for example, communication No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, para. 7.8.

7.7 The Committee notes the State party's explanation that both authors were subject to administrative prosecution because, by distributing leaflets, they breached the provisions of article 23.34, paragraph 1, of the Code of Administrative Offences regulating the organization or holding of mass events. The Committee notes that both authors were sanctioned for disseminating information about planned commemorations which had not been authorized by the local authorities, as required under the Law on Mass Events. The Committee notes that, under the Law on Mass Events, no information about a planned meeting must be disseminated before the meeting has been officially authorized by the competent local authorities, and that the failure to observe this regulation constitutes an administrative offence under the Law. In this connection, the Committee further notes the State party's explanation that the Law on Mass Events not only regulates the organization and holding of mass events, meetings, rallies, demonstrations, picketing and other events, but also seeks to provide the conditions for the realization of the constitutional rights and freedoms of citizens in order to ensure public safety and order in public venues where such events take place. However, the Committee notes that the State party has failed to demonstrate that the fines imposed on the first author and the detention of the second author, regardless of the fact that they were based on a law, were necessary for one of the legitimate purposes under article 19, paragraph 3, of the Covenant.

7.8 The Committee recalls that restrictions must not be overbroad and that the principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.⁷ The Committee observed in its general comment No. 34 that, when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.⁸ As the Gomel Regional Court failed to examine the issue of whether restricting the authors' right to impart information was necessary for the purposes of article 19, paragraph 3, of the Covenant, and in the absence of any other pertinent information on file to justify the authorities' decisions, the Committee considers that in the present case the State party has failed to demonstrate that the restrictions imposed on the authors' rights meet the criteria set out in article 19, paragraph 3, of the Covenant. The Committee therefore concludes that the authors are victims of a violation by the State party of their rights under article 19, paragraph 2, of the Covenant.

7.9 In the light of this conclusion, the Committee decides not to examine separately the authors' claims under article 21 of the Covenant.

8. 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 information before it discloses a violation by the State party of the authors' rights under article 19, paragraph 2, of the Covenant.

9. 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, in the form of the reimbursement of the current value of the fine and any legal costs incurred by the authors, as well as adequate compensation, including for the five days of arrest. The State party is also under an obligation to prevent similar violations in the future. To this end, it should

⁷ See the Committee's general comment No. 34 (2011), para. 34. See also communication No. 1128/2002, *Marques v. Angola*, Views adopted on 29 March 2005, para. 6.8 and communication No. 1157/2003, *Coleman v. Australia*, Views adopted on 17 July 2006, para. 7.3.

⁸ See the Committee's general comment No. 34 (2011), para. 35.

review its legislation, particularly the Law on Mass Events, and its implementation, to ensure its compatibility with article 19 of the Covenant.

10. 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 or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when 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.]
