



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. 2708/2015*, **

<i>Communication submitted by:</i>	Petr Berlinov (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	18 March 2015 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 21 December 2015 (not issued in document form)
<i>Date of adoption of Views:</i>	18 October 2021
<i>Subject matter:</i>	Holding the author responsible under the administrative procedure for participating in an unauthorized peaceful assembly
<i>Procedural issues:</i>	Exhaustion of domestic remedies; substantiation of claims; <i>ratione materiae</i>
<i>Substantive issues:</i>	Unlawful detention; right to a fair trial; freedom of opinion and expression; freedom of assembly
<i>Articles of the Covenant:</i>	9 (1) and (3), 14 (1); 19 (1) and (2), and 21
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2) (b)

1. The author of the communication is Petr Berlinov, a national of Belarus born in 1964. He claims that the State party has violated his rights under articles 9 (1) and (3), 14 (1), 19 (1) and (2) and 21 of the Covenant. 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 133rd session (11 October–5 November 2021).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Christopher Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Kobayash Kpatcha Tchamdja, Marcia V.J. Kran, Carlos Gómez Martínez, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.



Factual background¹

2.1 The author is a journalist and a member of the Belarusian Association of Journalists. On 5 November 2014, the author, together with other members of a local branch of the association in Vitebsk, took part in a gathering in support of the world solidarity campaign “Stand up for journalism”. The participants took photographs while standing in front of a graffiti wall and releasing paper birds from paper cages that symbolized oppressed journalistic freedom. On 6 November 2014, these photographs and accompanying articles were posted on the websites of the human rights centre “Viasna”² and the Association of Journalists.

2.2 On 13 November 2014, the Department of the Ministry of Internal Affairs of the Vitebsk Regional Executive Committee informed the Department of the Ministry of Internal Affairs for Zheleznodorozhny District in Vitebsk that, in the course of monitoring the content of Internet websites, the above-mentioned photographs were discovered. The Ministry further noted that, based on the results of an inquiry conducted by its officials, the author appeared in one of the photographs. On an unspecified date, a police officer drew up a report charging the author with having committed an administrative offence under article 23.34 (1) (violation of the established procedure for organizing or holding a public event) of the Code of Administrative Offences of Belarus.

2.3 The author was apprehended at 5.59 p.m. on Friday, 28 November 2014, and placed in a temporary detention facility until 1 p.m. on Monday, 1 December 2014.

2.4 On 3 December 2014, the Zheleznodorozhny District Court found the author guilty of an administrative offence under article 23.34 (1) of the Code of Administrative Offences, having established that he had failed to obtain a prior authorization for holding the gathering on 5 November 2014, and sanctioned him with three days of administrative detention. The court further noted, however, that the author had already served the full term of his administrative detention.

2.5 On 6 December 2014, the author submitted a cassation appeal to the Vitebsk Regional Court. He did not admit guilt, maintaining that he had not planned to participate in the gathering on 5 November 2014 but had merely approached acquaintances in the crowd. While distancing himself from any opinions expressed by the participants at the gathering, the author claimed, however, a violation by Belarus of his rights under articles 19 (1) and (2), 21 and 22 (1) of the Covenant. He further argued that, contrary to article 9 (1) and (3) of the Covenant, his detention had been arbitrary as it had not been based on a court order and, moreover, had not been justified by the need to protect any public interest. Lastly, the author argued that the purpose of the sanction imposed on him was to exonerate the police officers who had violated his rights by arbitrarily apprehending him. He claimed a violation of article 14 (1) of the Covenant in this respect.

2.6 On 12 December 2014, the Vitebsk Regional Court upheld the decision of the Zheleznodorozhny District Court on appeal. The Vitebsk Regional Court did not provide an assessment of whether the author’s detention had been justified. On 6 February 2015, the author submitted a request to the Chair of the Vitebsk Regional Court to initiate a supervisory review of the above-mentioned decisions. On 11 March 2015, the acting Chair of the Vitebsk Regional Court concluded that there were no grounds on which to initiate a supervisory review. On 18 March 2015, the author submitted a request to the Chair of the Supreme Court to initiate a supervisory review of the decisions. That request was rejected on 29 April 2015. The author submits that he has thus exhausted all available domestic remedies.

Complaint

3.1 The author claims that his three-day detention was arbitrary and, therefore, amounted to a violation of his rights under article 9 (1) and (3) of the Covenant. He argues, in particular,

¹ The facts on which the present communication is based have been reconstructed on the basis of the author’s incomplete account, the decisions of the Zheleznodorozhny District Court of Vitebsk, dated 3 December 2014, and of the Vitebsk Regional Court, dated 12 December 2014, as well as other supporting documents available on file.

² A local branch of the human rights centre “Viasna”, located in Vitebsk.

that his detention was neither based on a court order nor justified by the need to protect any public interest or the rights of others. He further maintains that the sanction imposed on him retrospectively was disproportionate to the gravity of the administrative offence allegedly committed by him.

3.2 The author also claims to be a victim of a violation of his rights guaranteed under article 14 (1) of the Covenant, since the administrative proceedings in his case did not comply with fair trial guarantees. He submits, in particular, that the courts of the State party failed to duly assess the facts of the case and therefore failed in their duty of impartiality and independence. The author further contends that the sanction imposed on him, that is, three days of administrative detention, was more severe compared to those imposed on other participants at the gathering on 5 November 2014, since the latter were sanctioned only with administrative fines.

3.3 The author further submits that the State party has violated his rights under articles 19 and 21 of the Covenant, as the sanction imposed on him for expressing his opinion through participation in a peaceful assembly was not justified on the grounds set out in articles 19 (3) and 21 of the Covenant.

3.4 In the light of the foregoing, the author asks the Committee to find a violation by the State party of his rights guaranteed under articles 9, 14, 19 and 21 of the Covenant and to request that the State party remedy the rights that have been violated in his case and provide compensation for the moral harm suffered.

State party's observations on admissibility and the merits

4.1 In a note verbale dated 24 February 2016, the State party recalls the facts on which the present communication is based and submits that, on 5 November 2014, the author participated in a public event conducted in violation of the procedures established by the Public Events Acts of Belarus of 30 December 1997 and was subsequently held responsible under the relevant administrative procedure. The legality and validity of holding the author responsible under the administrative procedure were reviewed by the domestic courts on a number of occasions. The courts concluded that the author's arguments regarding the alleged violations of international law in the course of administrative proceedings in his case were unfounded.

4.2 The State party submits that, pursuant to article 12.11 (3) of the Code of Administrative Offences, a decision that became executory could be appealed under the supervisory review procedure within six months from the date on which the decision in question came into force. The author, however, did not apply for supervisory review of the decisions of the domestic courts to the Prosecutor's Office and it could no longer be done by him due to the expiry of a six-month period established in article 12.11 (3) of the Code of Administrative Offences.

4.3 The State party maintains that, as required by article 14 of the Covenant, the author was given a fair hearing by a competent, independent and impartial tribunal established by law and that his right to have the decision holding him responsible under the administrative procedure reviewed by a higher tribunal was fully respected.

4.4 The State party further argues that there was no violation of the author's right to freedom of expression. It asserts that the procedure for organizing and holding public events, established by the Public Events Act, is aimed at creating conditions for the exercise of citizens' constitutional rights and freedoms while ensuring public safety and order.

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

5.1 On 1 April 2016, the author submitted his comments on the State party's observations. He notes that the State party has not provided any arguments justifying the lawfulness of holding him responsible under the administrative procedure for participating in a peaceful assembly and expressing his opinions. He reiterates his initial argument that, in violation of article 14 (1) of the Covenant, the courts of the State party have failed in their duty of impartiality by siding with the prosecuting authority and sanctioning him with three days of administrative detention merely for his participation in a peaceful assembly.

5.2 The author further submits that the State party has not contested that the gathering held on 5 November 2014 was peaceful in nature. He maintains that the State party has violated his rights under articles 19 (1) and (2) and 21 of the Covenant by imposing an unjustified restriction on the exercise of those rights.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 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.

6.2 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.

6.3 The Committee notes the claim of the State party that the author did not apply for supervisory review of the decisions of the national courts to the Prosecutor's Office. The Committee recalls its jurisprudence, according to which a petition to a prosecutor's office, dependent on the discretionary power of the prosecutor, 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.³ Accordingly, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

6.4 The Committee also notes the author's claim that his rights under article 14 (1) of the Covenant have been violated, since the courts of the State party failed to duly assess the facts of the case and therefore failed in their duty of impartiality and independence. The Committee observes, however, that it is generally for the courts of States parties to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice or that the court otherwise violated its obligation of independence and impartiality.⁴ In the present case, the Committee is of the view that the author has failed to demonstrate, for purposes of admissibility, that the conduct of the proceedings in his case was clearly arbitrary or amounted to a manifest error or denial of justice or to provide evidence that the courts otherwise violated their obligation of independence and impartiality. The Committee consequently considers that this part of the communication has not been sufficiently substantiated and thus finds it inadmissible under article 2 of the Optional Protocol.

6.5 The Committee notes that the author invokes a violation of article 9 (3) of the Covenant, because his detention from 28 November to 1 December 2014 was not based on a court order and was retrospectively endorsed by the Zheleznodorozhny District Court only on 3 December 2014. The Committee must therefore decide whether the author's administrative detention falls within the scope of article 9 (3) of the Covenant and whether this part of the communication is admissible under article 3 of the Optional Protocol. In this regard, the Committee recalls that, although criminal charges relate in principle to acts declared to be punishable under domestic criminal law,⁵ the concept of a "criminal charge"

³ See, for example, *Alekseev v. the 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.

⁴ See, Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 26. See also, inter alia, *Svetik v. Belarus* (CCPR/C/81/D/927/2000), para. 6.3; and *Cuartero Casado v. Spain* (CCPR/C/84/D/1399/2005), para. 4.3; and *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. 9.5.

⁵ Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 31.

must be understood within the meaning of the Covenant.⁶ In the present case, the author was punished for an administrative offence and sanctioned with three days of administrative detention. The Committee considers that such a penalty was aimed at sanctioning the author for his actions and serving as a deterrent for future similar offences – objectives analogous with the general goal of the criminal law.⁷ The Committee therefore finds that these claims fall under the protection of article 9 (3) of the Covenant.

6.6 The Committee considers that the author has sufficiently substantiated, for the purposes of admissibility, his claims under articles 9 (1) and (3), 19 and 21 of the Covenant. Accordingly, it declares this part of the communication admissible and proceeds with its consideration on the merits.

Consideration of the merits

7.1 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.

7.2 The Committee notes the author's claim that the State party has violated his rights guaranteed under articles 19 and 21 of the Covenant, because he was held responsible under the administrative procedure for participating in an unauthorized peaceful gathering in support of the world solidarity campaign "Stand up for journalism". The first issue before the Committee is, therefore, whether the application of article 23.34 (1) of the Code of Administrative Offences to the author's case, resulting in his conviction of an administrative offence and the subsequent sanctioning with three days of administrative detention, constituted a restriction within the meaning of article 19 (3) of the author's right to freedom of expression and the second sentence of article 21 of the Covenant on the right of peaceful assembly. The Committee notes that article 23.34 of the Code of Administrative Offences establishes administrative liability for "violation of the established procedure for organizing or holding a public event". The Committee observes, therefore, that there has been a restriction on the exercise of the author's rights guaranteed under articles 19 (2)⁸ and 21 of the Covenant.

7.3 The Committee must therefore determine whether the restriction imposed on the author's right to peaceful assembly was justified under any of the criteria set out in the second sentence of article 21 of the Covenant.

7.4 The Committee recalls that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is a fundamental human right that is essential for public expression of an individual's views and opinions and is indispensable in a democratic society. Such assemblies may take many forms, including demonstrations, protests, meetings, processions, rallies, sit-ins, candlelit vigils and flash mobs. They are protected under article 21 whether they are stationary, such as pickets, or mobile, such as processions or marches.⁹ No restriction to this right is permissible, unless it is imposed in conformity with the law or is necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), protection of public health or morals or protection of the rights and freedoms of others. When a State party imposes restrictions with the aim of reconciling an individual's right to assembly and the aforementioned interests of general concern, it should be guided by the objective of facilitating the right, rather than seeking unnecessary or disproportionate limitations to it.¹⁰ The State party is thus under an obligation to justify the limitation of the right protected by article 21 of the Covenant and to demonstrate that such limitation does not serve as a disproportionate obstacle on the exercise of that right.¹¹ Restrictions must not be

⁶ Human Rights Committee, general comment No. 32 (2007), para. 15. See also, *Osiyuk v. Belarus* (CCPR/C/96/D/1311/2004), para. 7.3; and *Zhagiparov v. Kazakhstan* (CCPR/C/124/D/2441/2014), para. 13.7.

⁷ *Volchek v. Belarus* (CCPR/C/129/D/2337/2014), para. 6.5.

⁸ *Laptsevich v. Belarus* (CCPR/C/68/D/780/1997), para. 8.1.

⁹ Human Rights Committee, general comment No. 37 (2020) on the right of peaceful assembly, para. 6.

¹⁰ *Ibid.*, paras. 36, 40–47.

¹¹ *Sudalenko and Poplavny v. Belarus* (CCPR/C/122/D/2190/2012), para. 8.5.

discriminatory, impair the essence of the right, or be aimed at discouraging participation in assemblies or causing a chilling effect.¹²

7.5 The Committee notes that, in the present case, the author was convicted of an administrative offence and sanctioned with three days of administrative detention in accordance with article 23.34 (1) of the Code of Administrative Offences because, in violation of the procedure established under the Public Events Act, he had failed to obtain a prior authorization for holding the gathering on 5 November 2014. The Committee observes in this regard that, while the restrictions imposed in the author's case, which relate to the requirement of seeking a prior authorization, were in accordance with the Public Events Act, neither the State party nor the national courts have provided any explanation as to why it was necessary for him – under domestic law and for one of the legitimate purposes set out in the second sentence of article 21 of the Covenant – to obtain authorization prior to joining a peaceful gathering held on 5 November 2014. Nor did the State party or the national courts explain how, in practice in the present case, the author and a few other individuals who were taking photographs while standing in front of a graffiti wall and releasing paper birds from paper cages could have violated the rights and freedoms of others or posed a threat to public safety or public order (*ordre public*). The Committee also recalls that any restrictions on participation in peaceful assemblies should be based on a differentiated or individualized assessment of the conduct of the participants and the assembly concerned. Blanket restrictions on peaceful assemblies are presumptively disproportionate.¹³ For these reasons, the Committee concludes that the State party failed to justify the restriction of the author's right to peaceful assembly and thus violated article 21 of the Covenant.

7.6 The next issue before the Committee is whether holding the author responsible under the administrative procedure for participating in an unauthorized peaceful gathering in support of the world solidarity campaign "Stand up for journalism" constitutes an unjustified restriction on his right to freedom of expression, as protected by article 19 (2) of the Covenant.

7.7 The Committee refers in this respect to its general comment No. 34 (2011) on the freedoms of opinion and expression, in which it stated, inter alia, that the freedom of expression is essential for any society and constitutes a foundation stone for every free and democratic society.¹⁴ It recalls that article 19 (3) of the Covenant allows for certain restrictions on the freedom of expression, but these should only be such as are provided by law and are necessary: (a) for respect of the rights or reputation of others; or (b) for the protection of national security or public order (*ordre public*), or of public health or morals. Any restriction on the exercise of such freedoms must conform to the strict tests of necessity and proportionality. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.¹⁵ Finally, any restriction on freedom of expression must not be overbroad in nature – that is, it must be the least intrusive among the measures that might achieve the relevant protective function.¹⁶ The Committee also recalls that it is for the State party to demonstrate that the restrictions on the author's rights under article 19 of the Covenant were necessary for one of the legitimate aims and that they were proportionate.¹⁷

7.8 In the present case, the Committee observes however that neither the State party nor the national courts have provided any explanation as to how the restrictions imposed on the author in the exercise of his right to freedom of expression were justified pursuant to the conditions of necessity and proportionality set out in article 19 (3) of the Covenant. Nor did the State party demonstrate that the restriction applied was the least intrusive among those which might have achieved the relevant protective function. In the absence of any explanation

¹² Human Rights Committee, general comment No. 37 (2020), para. 36.

¹³ Ibid., para. 38.

¹⁴ Human Rights Committee, general comment No. 34 (2011) on freedoms of opinion and expression, para. 2.

¹⁵ Ibid., para. 22. See also *Turchenyak et al. v. Belarus* (CCPR/C/108/D/1948/2010), para. 7.7; and *Korol v. Belarus* (CCPR/C/117/D/2089/2011), para. 7.3.

¹⁶ Human Rights Committee, general comment No. 34 (2011), para. 34.

¹⁷ See, for example, *Pivonos v. Belarus* (CCPR/C/106/D/1830/2008), para. 9.3; *Olechkevitch v. Belarus* (CCPR/C/107/D/1785/2008), para. 8.5; and *Androsenko v. Belarus* (CCPR/C/116/D/2092/2011), para. 7.3.

by the State party in that regard, the Committee considers that the restriction imposed on the author, although based on domestic law, was not justified under the conditions set out in article 19 (3) of the Covenant. It therefore concludes that the author's rights under article 19 (2) of the Covenant have been violated.

7.9 In the light of the above findings by the Committee on the unjustified nature of the restrictions of the author's rights under articles 19 and 21 of the Covenant, and in the absence of any justification from the State party as why it was necessary and proportionate to sanction the author with administrative detention for exercising his rights under the Covenant, almost one month after his participation in the event in question, the Committee also finds that the deprivation of liberty to which the author was subjected was arbitrary in nature and violated his rights under article 9 (1) of the Covenant.¹⁸ The Committee recalls that arrest or detention as punishment for the legitimate exercise of the rights guaranteed by the Covenant, including freedom of opinion and expression and freedom of assembly, is arbitrary.¹⁹

7.10 Regarding the author's claim under article 9 (3) of the Covenant that his detention from 28 November to 1 December 2014 was not based on a court order and it was retrospectively endorsed by the Zheleznodorozhny District Court of Vitebsk only on 3 December 2014, the Committee notes its position, indicated in its general comment No. 35 (2014), that 48 hours is ordinarily sufficient to prepare an individual for the judicial hearing and that any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances.²⁰ The Committee notes that not only should this requirement apply equally to cases involving prolonged administrative detention, but also that it should be even stricter in cases of minor offences, such as the present case. In the absence of information from the State party on the existence of any exceptional circumstances in the present case to justify a delay in bringing the author before a judge, the Committee finds a violation of article 9 (3) of the Covenant.²¹

8. 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 9 (1) and (3), 19 (2) and 21 of the Covenant.

9. 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 provide the author with adequate compensation, including to reimburse any legal costs incurred by the author. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future, in particular by reviewing its national legislation on public events and the implementation thereof in order to make it compatible with its obligations under article 2 (2) of the Covenant to adopt measures able to give effect to the rights recognized under articles 19 and 21.

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 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.

¹⁸ See, for example, *Melnikov v. Belarus* (CCPR/C/120/D/2147/2012), para. 8.8.

¹⁹ Human Rights Committee, general comment No. 35 (2014), para. 17.

²⁰ *Ibid.*, para. 33.

²¹ In October 2018, the Committee recommended that the State party bring its administrative detention legislation and practices into compliance with article 9 of the Covenant, taking into account the Committee's general comment No. 35 (2014), see [CCPR/C/BLR/CO/5](#), para. 34.