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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. 3241/2018**, ***

Communication submitted by:	Andrei Tolchin (represented by counsel, Leonid Sudalenko)
Alleged victim:	The author
State party:	Belarus
Date of communications:	12 May 2017 (initial submissions)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 12 September 2018
Date of adoption of Views:	27 July 2022
Subject matter:	Imposition of a fine for participating in an unsanctioned peaceful meeting; freedom of expression
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Freedom of assembly; freedom of expression
Articles of the Covenant:	2 (2) and (3), 19 and 21
Articles of the Optional Protocol:	2 and 5 (2) (b)

1. The author of the communication is Andrei Tolchin, a Belarussian national born in 1949. He claims that the State party has violated his rights under articles 19 and 21, read in conjunction with article 2 (2) and (3) of the Covenant. The Optional Protocol entered into force for Belarus on 30 December 1992. He is represented by counsel.[1]

* Reissued for technical reasons on 10 February 2023.

** Adopted by the Committee at its 135th session (27 June–27 July 2022).

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

[1] The author has been represented by counsel only since the State party submitted its observations on admissibility and the merits.

Facts as submitted by the author

2.1 On 21 March 2017, the author posted an invitation on his Facebook page to participate in a peaceful rally, scheduled to take place on 25 March 2017 at 12 noon at Independence Square in the city of Gomel, to protest against the presidential decree "On prevention of social dependency". The author was then summoned to the Department of Internal Affairs of the Sovetsky district in Gomel, where a police charge was filed against him for violating article 23.34 (1) of the Code of Administrative Offences.

2.2 On 24 March 2017, the Sovetsky district court established that the author had violated the provisions of the law on mass events by publicly inviting people to participate in an unauthorized meeting, thereby committing an administrative offence under article 23.34 (1) of the Code of Administrative Offences. Consequently, the Sovetsky district court sentenced the author to eight days of administrative detention. He could not therefore participate in the peaceful gathering held on 25 March 2017, since he was still in detention. He was released only on 2 April 2017.

2.3 On 27 March 2017, the author appealed the decision to the Gomel regional court; the appeal was dismissed on 26 April 2017.

2.4 The author submits that he has exhausted domestic remedies, since in line with the Committee's jurisprudence, supervisory review procedures against court decisions which have entered into force do not constitute a remedy that has to be exhausted for purposes of article 5 (2) (b) of the Optional Protocol.[2]

Complaint

3.1 The author claims a violation of his rights under articles 19 and 21, in conjunction with article 2 (2) and (3) of the Covenant on the grounds that the authorities failed to explain why the restrictions imposed on his rights to freedom of expression and of peaceful assembly were necessary in the interests of national security or public safety, public order, the protection of public health or morals or the rights and freedoms of others, as required by article 19 (3) and the second line of article 21 of the Covenant. The author therefore considers the restrictions and imposed sanctions unlawful and disproportionate.

3.2 The domestic authorities wrongly considered that article 23.24 of the Code of Administrative Offences superseded the Covenant because article 27 of the Vienna Convention on the Law of Treaties provides that a party may not invoke the provisions of its internal law as justification for its failure to uphold the provisions of an international treaty. In addition, the domestic courts acted in breach of article 59 of the Constitution of Belarus, which binds them to take the necessary measures with a view to protecting individual rights and freedoms.

State party's observations on admissibility and the merits

4.1 By note verbale of 12 November 2018, the State party submitted its observations on the admissibility and merits of the complaint and noted that on 24 March 2017, the author was convicted by the Sovetsky district court of violating the provisions of the law on mass events concerning the organization of meetings, thereby committing an administrative offence under article 23.34 (1) of the Code of Administrative Offences. The ruling of the first instance court was upheld on appeal by the Gomel regional court on 26 April 2017. The State party submits that the author did not appeal the decisions of the court with the Prosecutor General or the Chair of the Supreme Court under the supervisory review procedures and therefore failed to exhaust all available domestic remedies. In that context, the State party concludes that the author submitted the present communication in violation of article 2 of the Optional Protocol.

4.2 The State party observes that the author's claims of a violation of articles 19 and 21, in conjunction with article 2 (2) and (3) are unsubstantiated. It further observes that the national legislation that provides for the right to freedom of peaceful assembly and of expression is coherent with the provisions of the Constitution of Belarus and does not

[2] Reference is made to *Schumilin v. Belarus* (CCPR/C/105/D/1784/2008), para. 8.3.

contradict the international norms that allow each State to introduce restrictions to the rights and freedoms of a person that are necessary in a democratic society and in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others, as foreseen under article 19 and 21 of the Covenant.

4.3 The State party further observes that the provisions of the law on mass events, along with regulating the organization and conduct of meetings, rallies, street processions or demonstrations, pickets and other mass events in Belarus are aimed at creating conditions for the realization of the constitutional rights of citizens and their freedoms.

4.4 The State party disagrees with the author's argument that the supervisory review procedure does not constitute an effective remedy and notes that in 2017, out of 3,766 appeals that were introduced under the supervisory review procedure, 3,665 were granted for review.

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

5.1 On 16 April 2020, the author noted that an appeal under the supervisory review procedure did not constitute an effective remedy because it was subject to the discretion of a prosecutor or a judge and did not entail consideration of the merits of a case. He concluded that all available and effective domestic remedies had thus been exhausted in his case.

5.2 Regarding the State party's statistics in relation to the number of cases reviewed under the supervisory review procedure, the author believes that this argument is groundless, since the State party failed to demonstrate how many of those cases involved the implementation of peoples' rights to freedom of expression and of assembly.

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 takes note of the State party's observations, in which the State party implies that the author has not exhausted the available domestic remedies, as his claims for a supervisory review have not been examined by the Prosecutor General or the Chair of the Supreme Court. The Committee also takes note of the author's argument that the supervisory review is a discretionary review process that does not constitute an effective remedy for the purposes of exhaustion of domestic remedies. In that context, the Committee recalls its jurisprudence, according to which a petition for supervisory review submitted to a prosecutor's office, dependent on the discretionary power of the prosecutor, requesting a review of court decisions that have taken effect constitutes an extraordinary remedy and thus does not constitute a remedy that must be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.[3] It also considers that filing with the Chair of a court a request for a supervisory review of court decisions that have entered into force and depend on the discretionary power of a judge constitutes an extraordinary remedy, and that the State party must show that there is a reasonable prospect that such a request would provide an effective remedy in the circumstances of the case.[4] In that regard, the State party notes that in 2017, out of 3,766 appeals that were introduced under the supervisory review procedure, 3,665 were granted for review (para. 4.4 above). However, the State party has failed to demonstrate how many of those cases involved the implementation of peoples' rights to freedom of

[3] *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.

[4] *Sekerko v. Belarus* (CCPR/C/109/D/1851/2008), para. 8.3; and *Schumilin v. Belarus* (CCPR/C/105/D/1784/2008), para. 8.3.

expression and of assembly. In the absence of further explanations by the State party in the present case, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication in relation to the author's claims under articles 19 and 21, read alone and in conjunction with article 2 (2) and (3) of the Covenant.

6.4 The Committee takes note of the author's claims that the State party violated his rights under articles 19 and 21, read in conjunction with article 2 (2) of the Covenant. The Committee reiterates that the provisions of article 2 cannot be invoked in a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by a 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.[5] 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 an examination of whether the State party has also violated its general obligations under article 2 (2), read in conjunction with articles 19 and 21 of the Covenant, to be distinct from an examination of the above-mentioned violation of the author's rights under articles 19 and 21. The Committee therefore considers that the author's claims in that regard are incompatible with article 2 of the Covenant and thus inadmissible under article 3 of the Optional Protocol.

6.5 The Committee further notes the author's claims under articles 19 and 21, read in conjunction with article 2 (3) of the Covenant. In the absence of any further pertinent information on file, the Committee considers that the author has failed to sufficiently substantiate his claims for the purposes of admissibility. Accordingly, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.6 The Committee finally notes that the author's claims as submitted raise issues under articles 19 and 21 of the Covenant, considers these claims sufficiently substantiated for the purposes of admissibility and proceeds with consideration of the merits.

Considerations of the merits

7.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's claims that his rights to freedom of expression and of assembly have been restricted in violation of articles 19 and 21 of the Covenant, as he was sentenced to administrative detention for posting an invitation to a peaceful rally to protest against the presidential decree "On prevention of social dependency". It also notes the author's claims that the authorities failed to explain why the restrictions imposed on his rights were necessary in the interests of national security or public safety, public order, the protection of public health or morals or the rights and freedoms of others, as required by article 19 (3) and the second line of article 21 of the Covenant, and the author therefore considers the restrictions and imposed sanction unlawful and disproportionate.

7.3 The Committee notes the author's claim that his right to freedom of peaceful assembly under article 21 of the Covenant was violated, since he was brought before domestic courts and sentenced to eight days of administrative detention for publicly inviting people to participate in a peaceful rally, scheduled to take place on 25 March 2017. It recalls that in its general comment No. 37 (2020), the Committee states that peaceful assemblies may in principle be conducted in all spaces to which the public has access or should have access, such as public squares and streets (para. 55). Peaceful assemblies should not be relegated to remote areas where they cannot effectively capture the attention of those who are being addressed, or of the general public. As a general rule, there can be no blanket ban on all assemblies in the capital city, in all public places except one specific location within a city or outside the city centre, or on all the streets in a city.

[5] See *Zhukovsky v. Belarus* (CCPR/C/127/D/2724/2016), para. 6.4; *Zhukovsky v. Belarus* (CCPR/C/127/D/2955/2017), para. 6.4; and *Zhukovsky v. Belarus* (CCPR/C/127/D/3067/2017), para. 6.6.

7.4 The Committee further recalls that the right to freedom of peaceful assembly, as guaranteed under article 21 of the Covenant, is a fundamental human right, essential for public expression of an individual's views and opinions and indispensable in a democratic society. Article 21 of the Covenant protects peaceful assemblies wherever they take place: outdoors, indoors and online; in public and private spaces; or a combination thereof. 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.[6] The organizers of an assembly generally have the right to choose a location within sight and sound of their target audience[7] and no restriction to this right is permissible, unless it is (a) imposed in conformity with the law and (b) 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 freedom of peaceful 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.[8] The State party is thus under an obligation to justify the limitation of the right protected by article 21 of the Covenant.[9]

7.5 In the present case, the Committee must consider whether the restrictions imposed on the author's right to freedom of peaceful assembly are justified under any of the criteria set out in the second sentence of article 21 of the Covenant. According to the information available on file, the author was sentenced by the Sovetsky district court of Gomel to eight days of administrative detention for posting an announcement on his Facebook page inviting people to participate in a peaceful rally, in violation of the provisions of the law on mass events. In that context, however, the Committee notes that the domestic courts did not provide any justification or explanation as to how, in practice, the author's invitation to a peaceful event violated the interests of national security or public safety, public order *(ordre public)*, the protection of public health or morals or the protection of the rights and freedoms of others, as set out in article 21 of the Covenant. In that respect, the State party only refers to the fact that the provisions of the law on mass events, along with regulating the organization and conduct of meetings, rallies, street processions or demonstrations, pickets and other mass events in Belarus, are aimed at creating conditions for the realization of the constitutional rights of citizens and their freedoms (para. 4.3 above), but does not explain why, in the present case, those constitutional rights or freedoms were violated by the author's invitation to a peaceful rally as posted on his Facebook page. The State party also failed to show that any alternative measures were taken to facilitate the exercise of the author's rights under article 21.

7.6 In the absence of any further explanations by the State party, the Committee concludes that the State party has violated the author's rights under article 21 of the Covenant.[10]

7.7 The Committee further notes the author's claim that his right to freedom of expression has been restricted unlawfully, in that he was found guilty of an administrative offence and sanctioned to eight days of administrative detention for inviting people to a peaceful rally to protest against the presidential decree "On prevention of social dependency" in the city of Gomel. The issue before the Committee is therefore to determine whether the sanction imposed on the author by the domestic authorities for inviting people to a peaceful rally with an expressive purpose amounts to a violation of article 19 of the Covenant.

7.8 The Committee recalls its general comment No. 34 (2011), in which it stated, inter alia, that freedom of expression is essential for any society and constitutes a foundation stone

[6] General comment No. 37 (2020), para. 6.
[7] Ibid., para. 22.
[8] Ibid., para 36.
[9] See *Poplavny v. Belarus* (CCPR/C/115/D/2019/2010), para. 8.4.
[10] See, for example, *Malei v. Belarus* (CCPR/C/129/D/2404/2014), para. 9.7; *Tolchina et al. v. Belarus* (CCPR/C/132/D/2857/2016), para. 7.6; *Zavadskaya et al. v. Belarus* (CCPR/C/132/D/2865/2016), para. 7.6; *Popova v. Russian Federation* (CCPR/C/122/D/2217/2012), para. 7.6; and *Sadykov v. Kazakhstan* (CCPR/C/129/D/2456/2014), para. 7.7.

for every free and democratic society. It notes that article 19 (3) of the Covenant allows for certain restrictions on freedom of expression, including the freedom to impart information and ideas, only to the extent that those restrictions are provided for by law and only if they are necessary (a) for respect for 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. 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 and be proportionate to the interests being protected. The Committee recalls that the onus is on the State party to demonstrate that the restrictions on the author's rights under article 19 of the Covenant were necessary and proportionate.[11]

7.9 The Committee observes that sentencing the author to administrative detention for posting an invitation on his Facebook page to a peaceful, albeit unauthorized, rally with an expressive purpose raises serious doubts as to the necessity and proportionality of the restrictions on the author's rights under article 19 of the Covenant. The Committee observes in this regard that the State party has failed to invoke any specific grounds to support the necessity of such restrictions, as required under article 19 (3) of the Covenant.[12] Nor did the State party demonstrate that the measures selected were the least intrusive in nature or proportionate to the interests that it sought to protect. The Committee considers that in the circumstances of the case, the restrictions imposed on the author, although based on domestic law, were not justified pursuant to the conditions set out in article 19 (3) of the Covenant. It therefore concludes that the author's rights under article 19 of the Covenant have been violated.[13]

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 19 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. That 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 the fines and any legal costs incurred by him. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In that connection, the Committee notes that it has dealt with similar cases in respect of the same laws and practices of the State party in a number of earlier communications and thus requires the State party to revise its normative framework on public events, consistent with its obligation under article 2 (2) of the Covenant, with a view to ensuring that the rights under articles 19 and 21 of the Covenant may be fully enjoyed in the State party.

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.

[11] See, for example, *Androsenko v. Belarus* (CCPR/C/116/D/2092/2011), para. 7.3.

[12] See, for example, *Zalesskaya v. Belarus* (CCPR/C/101/D/1604/2007), para. 10.5.

[13] See, for example, *Toregozhina v. Kazakhstan* (CCPR/C/112/D/2137/2012), para. 7.5; *Zhagiparov v. Kazakhstan* (CCPR/C/124/D/2441/2014), para. 13.4; and *Shchetko and Shchetko v. Belarus* (CCPR/C/87/D/1009/2001), para. 7.5.