



# 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. 2147/2012\*, \*\*

<i>Communication submitted by:</i>	Yan Melnikov (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	21 February 2012 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 25 April 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	14 July 2017
<i>Subject matter:</i>	Administrative arrest for holding a peaceful assembly without prior authorization
<i>Procedural issues:</i>	State party's failure to cooperate; exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to peaceful assembly and freedom of expression; unlawful detention; fair trial; freedom from discrimination
<i>Articles of the Covenant:</i>	2 (1) and (3), 9 (1), 14 (1), 19, 21 and 26
<i>Articles of the Optional Protocol:</i>	1, 2 and 5 (2) (b)

1. The author is Yan Melnikov, a national of Belarus born in 1993. The author claims to be a victim of a violation by Belarus of his rights under articles 2 (1) and (3), 9 (1), 14 (1), 19, 21 and 26 of the Covenant. The author is not represented by counsel. The Optional Protocol entered into force for Belarus on 30 December 1992.

#### The facts as submitted by the author

2.1 The author is a member of an opposition party, Ruh Za Svabodu (Movement for Freedom).

\* Adopted by the Committee at its 120th session (3-28 July 2017).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Ahmed Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.



2.2 On 5 October 2011, at 5.15 p.m., the author was arrested by police in Minsk while distributing leaflets to passers-by concerning a public gathering scheduled to take place on 8 October at 1 p.m. in Friendship Park, Bangalore Square, Minsk.<sup>1</sup> The gathering aimed at discussing the worsening economic situation and socioeconomic problems in Belarus. It was organized in accordance with the procedure prescribed by law No. 411 of 12 July 2000 on republican and local assemblies,<sup>2</sup> which does not require any prior authorization. The author appends documentary evidence testifying that the gathering was organized by a group of citizens in accordance with this law.

2.3 After his arrest, the author was taken to the premises of the Department of Internal Affairs of Zavodskoy district where the commission of an administrative offence under article 23.24 (1) of the Code of Administrative Offences was registered. That article provides for the incurring of liability for violating the existing regulations on the organization and conduct of meetings, street rallies, demonstrations, other mass events or pickets.<sup>3</sup> A violation of the provision is punishable by a fine of up to 30 base salary units, or administrative arrest.

2.4 From 5 to 6 October 2011, the author was remanded in the temporary detention facility in Minsk.

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<sup>1</sup> An English translation of the text of the leaflet reads as follows:

Stop poverty and humiliation — Restore rights and respect.

According to article 21 of the Constitution of Belarus, every person shall enjoy the right to a dignified standard of living, including appropriate food, clothing and housing, and likewise a continuous improvement of necessary living conditions. The State shall guarantee the rights and liberties of the citizens of Belarus that are enshrined in the Constitution and the laws, and specified in the State's international obligations.

Assemblies are necessary because the authorities have brought Belarus to an economic crisis so that now its independence is at stake. We have invited representatives of the authorities to the assemblies: let them look into the people's eyes and tell us how to live on such salaries and retirement pensions.

The destiny of the country should be in the hands of its responsible citizens. Assemblies will elect representatives. The representatives will convey the citizens' claims to the authorities and negotiate with them on behalf of those who will participate in the assemblies.

Who is responsible for the economic collapse and impoverishment? Who promised stability and salaries of US\$ 500? Who is stealing from the people's pocket? All of us — the people of Belarus — have the right to call on all those responsible to implement their obligations.

On 8 October, in tens of Belarussian cities, citizens will get together to take part in mass assemblies. Come and join us; together, we will discuss and convey our suggestions to the authorities. The assemblies will be conducted in accordance with the Constitution and the law on republican and local assemblies.

We request: a halt in the increase in prices; indexing/linking salaries, retirement pensions, stipends and allowances to the increase in prices; guaranteeing deposits in national currency at the exchange rate of the Belarusian rouble on 1 January 2011; cancellation of forced short-term contracts; stimulation of business development and giving businessmen an opportunity to freely create new jobs; and ensuring that citizens can freely buy foreign currency and reimburse loans borrowed in a foreign currency in Belarusian roubles.

If the authorities are not able to govern the country and implement their pledges, they should retire.

Everyone to the assembly!

<sup>2</sup> Republican and local assemblies are a form of citizens' direct participation in the administration of public affairs and are convened as deemed necessary to discuss issues relating to the State and society at the republican or local level (art. 2). Republican assemblies are convened by the President of the Republic of Belarus (art. 7). Local assemblies are convened as deemed necessary by local councils of deputies, executive and administrative bodies or territorial self-governing bodies. Local assemblies may also be convened at the initiative of at least 10 per cent of citizens permanently residing in the respective territory (art. 11).

<sup>3</sup> Article 8 of the Public Events Act forbids anyone to produce and disseminate information materials concerning events if the event has not yet been authorized. Under article 5 of the Act, organizers of public events are required to obtain prior authorization from the local executive authorities to conduct a gathering 15 days before the event is held.

2.5 On 6 October 2011, the author was brought before the Zavodskoy District Court. He was represented by counsel of his choice. He did not admit guilt, maintaining that he was imparting information concerning the upcoming assembly, which did not require prior authorization in accordance with the law on republican and local assemblies. However, the court found the author guilty under article 23.34 (1) of the Code of Administrative Offences and imposed five days' administrative detention, beginning on 5 October at 5.15 p.m. The court rejected the author's argument on the ground that the leaflets referred to "mass assemblies", and held that the author had failed to comply with the Public Events Act which requires obtaining prior authorization from a local executive committee before organizing such an event. The author claims that the conditions of his arrest were unbearable and that he had to sleep on the floor in freezing and unsanitary conditions.

2.6 On 7 October 2011, counsel lodged an appeal, reiterating the author's argument concerning the applicability of the law on republican and local assemblies and pointing out that, as per article 3 (2) of the Public Events Act, the Act is not applicable to the procedure for organizing and conducting events in accordance with the procedure prescribed by law No. 411. Counsel stressed that the grounds for the author's arrest were unclear in the circumstances and that it was also unclear how the policeman who had apprehended the author had determined that the assembly was in fact an event that required the prior authorization of the authorities. On 18 October, the Minsk City Court upheld the decision of the district court on appeal. The city court did not consider whether the author's detention was lawful and justified. The author's application for supervisory review was rejected by a decision of 20 January 2012 of the Chair of the Minsk City Court, who found no grounds to review the case.

2.7 The author contends that he has exhausted all available and effective domestic remedies.

2.8 The author asks the Committee to acknowledge a violation of his Covenant rights and to request the State party to provide compensation for unlawful arrest.

### **The complaint**

3.1 The author claims that the State party has violated his rights under articles 2 (1), (3) and 14 (1) of the Covenant. He asserts that the administrative proceedings initiated against him did not constitute a fair trial because the court based its review of his case on the formal aspects and failed to explain why his activities came under the Public Events Act rather than under the law on republican and local assemblies. Furthermore, he claims that the court proceedings were in violation of article 26 of the Covenant as they were conducted because of his political views and because he was organizing a gathering critical of the economic and political regime.

3.2. The author further claims that the State party has violated his rights under article 9 (1) of the Covenant as he was unlawfully detained for five days in unbearable conditions.

3.3. Lastly, he maintains that the State party has violated his rights under article 21 of the Covenant as his right to peaceful assembly was restricted without justification.

### **State party's observations on admissibility**

4.1 By a note verbale of 20 July 2012, the State party challenged the registration of the communication and its admissibility. It argues that the author failed to exhaust all available domestic remedies as he did not apply for supervisory review of the domestic courts' decisions. In particular, he did not apply to the Chair of the Supreme Court and the Office of the Prosecutor General. The State party submits that there are no legal grounds for the consideration by the State party of the communication either on admissibility or on the merits. Therefore, the State party discontinues the proceedings in relation to the communication and will "dissociate itself from the Views that might be adopted by the Committee".

4.2 By a note verbale of 4 January 2013, the State party reiterated its position regarding admissibility of the communication.

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

5.1 On 25 October 2012, the author challenged the State party's observations on admissibility. He notes that the State party has provided no arguments explaining why his communication should be declared inadmissible.

5.2 He further submits that, according to the jurisprudence of the Committee<sup>4</sup> and the European Court of Human Rights,<sup>5</sup> the supervisory review proceedings cannot be considered an effective domestic remedy.

5.3 The author refers to the Committee's position regarding the State party's failure to cooperate.<sup>6</sup>

5.4 The author claims a violation of his rights under article 19 of the Covenant as the right to freedom of expression is closely linked to his rights under article 21. He was imparting information about a public assembly which aimed at raising important socioeconomic issues such as inflation, price increases and business incentives. He was found guilty because he had distributed leaflets and invited the public to attend an event. He maintains that the State party breached his rights under articles 19 and 21 by imposing an unjustified restriction thereon.

**Issues and proceedings before the Committee***Lack of cooperation from the State party*

6.1 The Committee notes the State party's assertion that there are no legal grounds for the 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 communication, its authorities will dissociate themselves from the Committee's Views.

6.2 The Committee 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 art. 1). Implicit in a State's adherence to the Optional Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications and, after examination, to forward its Views to the State party and to the individual (art. 5 (1) and (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of a communication and in the expression of its Views.<sup>7</sup> It is up to the Committee to determine whether a case should be registered. By failing to accept the competence of the Committee to determine whether a communication shall be registered and by declaring outright that it will not accept the Committee's determination of admissibility and the merits of the communications, the State party is violating its obligations under article 1 of the Optional Protocol.

*Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 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.

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<sup>4</sup> See communication No. 1418/2005, *Iskiyaev v. Uzbekistan*, Views adopted on 20 March 2009.

<sup>5</sup> See European Court of Human Rights, *Tumilovich v. Russia* (application No. 47033/99), decision of 22 June 1999.

<sup>6</sup> See communication No. 1226/2003, *Korneenko v. Belarus*, Views adopted on 20 July 2012, para. 8.2.

<sup>7</sup> See, for example, communications Nos. 1867/2009, 1936/2010, 1975/2010, 1977/2010-1981/2010 and 2010/2010, *Levinov v. Belarus*, Views adopted on 19 July 2012, para. 8.2; No. 2019/2010, *Poplavny v. Belarus*, Views adopted on 5 November 2015, para. 6.2; No. 2139/2012, *Poplavny and Sudalenko v. Belarus*, Views adopted on 3 November 2016, para. 6.2.

7.3 The Committee takes note of the State party's argument that the author has failed to request the Chair of the Supreme Court and the Office of the Prosecutor General to initiate a supervisory review of the decisions of the domestic courts. 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 a remedy that has to be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.<sup>8</sup> It also considers that filing requests for supervisory review with the president of a court directed against 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 requests would provide an effective remedy in the circumstances of the case.<sup>9</sup> In the present case, the Committee notes that the State party has not provided any further observations following the rejection by the Chair of the Minsk City Court of the author's application for supervisory review. Accordingly, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the communication.

7.4 The Committee notes the author's claim concerning his conditions of detention in the temporary detention facility in Minsk. It observes that the author's allegations, if substantiated, may have warranted consideration as to whether the State party violated article 10 of the Covenant. However, in the circumstances and based on the material made available to it, the Committee considers that this claim is insufficiently substantiated for the purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

7.5 As to alleged violations of article 14 (1), read in conjunction with articles 2 (1) and 26 of the Covenant, the Committee considers that the claim that the author was denied the right to a fair hearing because of his political stance is insufficiently substantiated for purposes of admissibility, and is thus inadmissible under article 2 of the Optional Protocol.

7.6 Finally, the Committee considers that the author's remaining claims, which raise issues relating to articles 9, 14 (1) read in conjunction with article 2 (3), 19 and 21 of the Covenant have been sufficiently substantiated for purposes of admissibility. It therefore declares those claims admissible and proceeds with the examination of the merits.

#### *Consideration of the merits*

8.1 The Committee has considered the present 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.

8.2 The Committee notes the author's claim that the State party has violated his rights under articles 19 and 21 of the Covenant by imposing an unjustified restriction thereon. The issue before the Committee is whether the author's arrest by the police in a public space while distributing leaflets about an upcoming gathering to discuss socioeconomic problems in the country, finding him guilty of an administrative offence for not obtaining prior authorization to hold the gathering and sentencing him to five days' administrative detention constitute a violation of the author's rights under articles 19 and 21. The Committee observes that the State party has submitted no observations on the merits of the communication and that, in these circumstances, due weight must be given to the author's allegations. In the light of the material before it, the Committee considers that the State party imposed limitations on the author's rights, in particular on his right to impart information and ideas of all kinds, as prescribed under article 19 (2) of the Covenant, and his right of peaceful assembly, as prescribed under article 21. Therefore, the Committee

<sup>8</sup> See communications No. 1873/2009, *Alekseev v. Russian Federation*, Views adopted on 25 October 2013, para. 8.4; No. 1929/2010, *Lozenko v. Belarus*, Views adopted on 24 October 2014, para. 6.3; and No. 2016/2010, *Sudalenko v. Belarus*, Views adopted on 5 November 2015, para. 7.3.

<sup>9</sup> See communications No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted on 17 March 2003, para. 7.4; No. 1851/2008, *Sekerko v. Belarus*, Views adopted on 28 October 2013, para. 8.3, Nos. 1919-1920/2009, *Protsko and Tolchin v. Belarus*, Views adopted on 1 November 2013, para. 6.5; No. 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3; and No. 1814/2008, *P.L. v. Belarus*, decision of inadmissibility adopted on 26 July 2011, para. 6.2.

must determine whether the restrictions imposed on the author's rights can be justified under article 19 (3) and the second sentence of article 21.

8.3 The Committee refers to its general comment No. 34 (2011) on the freedoms of opinion and expression, in which it states that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person and that such freedoms are essential for any society (para. 2). They constitute the foundation stone for every free and democratic society (para. 22). The Committee recalls that article 19 (3) of the Covenant allows certain restrictions only as provided by law and are necessary (a) for the respect of the rights and reputation of others and (b) for the protection of national security or public order (*ordre public*) or 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.<sup>10</sup> The Committee also recalls<sup>11</sup> 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 and proportionate.<sup>12</sup>

8.4 The Committee notes that the author was sanctioned for imparting information about a local assembly on the basis of the finding by national authorities and the district court that he had failed to obtain prior authorization for the organization of such an event, in violation of the Public Events Act. The Committee notes the author's explanation and supporting documents that authorization from local authorities was not required for holding a local assembly, which was organized under the law on republican and local assemblies rather than the Act. The Committee notes from the material on file that the State party's authorities rejected the author's claim as unsubstantiated solely on the ground that the leaflets he distributed referred to the eventual gathering as a "mass assembly". It also notes that neither the State party nor the domestic courts have provided any explanations as to why such restrictions were justified pursuant to the conditions of necessity and proportionality set out in article 19 (3) of the Covenant, and whether the penalty imposed, i.e. five days' administrative arrest, even if based on law, was necessary, proportionate and in compliance with any of the legitimate purposes listed in this provision. In the absence of any explanation by the State party, the Committee concludes that the rights of the author under article 19 (2) of the Covenant have been violated.

8.5 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 the public expression of an individual's views and opinions and indispensable in a democratic society. This right entails the possibility of organizing and participating in a peaceful assembly in a public location. The organizers of an assembly generally have the right to choose a location within sight and sound of their target audience 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 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. The State party is thus under the obligation to justify the limitation of the right protected by article 21 of the Covenant.<sup>13</sup>

8.6 In the present case, the Committee must consider whether the restrictions imposed on the author's right to freedom of assembly are justified under any of the criteria set out in

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<sup>10</sup> See general comment No. 34, para. 22. See also, for example, communications No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, para. 7.7; No. 2089/2011, *Korol v. Belarus*, Views adopted on 14 July 2016, para. 7.3; and *Poplavny and Sudalenko v. Belarus*, para. 8.3.

<sup>11</sup> See, for example, communications No. 1830/2008, *Pivonos v. Belarus*, Views adopted on 29 October 2012, para. 9.3; and No. 1785/2008, *Olechkevitch v. Belarus*, Views adopted on 18 March 2013, para. 8.5.

<sup>12</sup> See, for example, communications No. 2092/2011, *Androsenko v. Belarus*, Views adopted on 30 March 2016, para. 7.3; and *Poplavny and Sudalenko v. Belarus*, Views adopted on 3 November 2016, para. 8.3.

<sup>13</sup> See *Poplavny v. Belarus*, para. 8; and *Poplavny and Sudalenko v. Belarus*, para. 8.5.

the second sentence of article 21 of the Covenant. The Committee notes in the light of the information available on file that the national authorities and the district court have not provided any justification or explanation as to how, in practice, the local assembly that the author intended to convene would violate 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.<sup>14</sup>

8.7 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.<sup>15</sup> In line with these precedents, the Committee concludes that, in the present case, the State party has violated the author's rights under article 21 of the Covenant.

8.8 In the light of the above finding on the unjustified nature of the restrictions of the author's rights under articles 19 and 21, and in the absence of arguments by the State party which explain why it was necessary and proportionate to impose a sentence of administrative arrest on the author for exercising his rights under the Covenant, the Committee finds also 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. The Committee recalls that arrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant, including freedom of opinion and expression and freedom of assembly, is arbitrary.<sup>16</sup>

8.9 In the light of these conclusions, the Committee will not separately consider the author's claims regarding the alleged violation of article 14, read separately and in conjunction with article 2 (3) 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 Belarus of articles 9, 19 and 21 of the Covenant.

10. In accordance with 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. In the present case, the State party is under an obligation to provide reimbursement of any legal costs incurred by the author as well as adequate compensation and appropriate measures of satisfaction. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the Committee reiterates that the State party should review its legislation, in particular the Public Events Act of 30 December 1997, as it has been applied in the present case, with a view to ensuring that the rights under articles 9, 19 and 21 of the Covenant may be fully enjoyed in the State party.<sup>17</sup>

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 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.

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<sup>14</sup> See *Poplavny and Sudalenko v. Belarus*, para. 8.6.

<sup>15</sup> See, for example, *Poplavny and Sudalenko v. Belarus*, para. 10; and communications Nos. 2108-2109/2011, *Basarevsky and Rybchenko v. Belarus*, Views adopted on 14 July 2016, para. 11; and No. 2082/2011, *Levinov v. Belarus*, Views adopted on 14 July 2016, para. 10.

<sup>16</sup> See general comment No. 35 (2014) on liberty and security of person, para. 17.

<sup>17</sup> See, for example, *Sekerko v. Belarus*, para. 11; *Turchenyak et al. v. Belarus*, para. 9; and communication No. 1790/2008, *Govsha et al. v. Belarus*, Views adopted on 27 July 2012, para. 11.