



# International Covenant on Civil and Political Rights

DistrGeneral  
21 December 2022

Original: English  
English, French and Spanish only

## Advance unedited version

### Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2903/2016<sup>1\*,2\*\*,3\*\*\*</sup>

<i>Communication submitted by:</i>	Nikolay Dedok <sup>4</sup> (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	5 August 2016 (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 13 December 2016
<i>Date of adoption of Views:</i>	19 October 2022
<i>Subject matter:</i>	Right not to be subjected to torture or to cruel, inhuman or degrading treatment; arbitrary arrest and detention; conditions of detention; fair trial, prohibition of discrimination.
<i>Procedural issue:</i>	Exhaustion of domestic remedies; substantiation of claims.
<i>Substantive issues:</i>	Arbitrary detention; right to be brought promptly before a judge; right to defence; right to be tried in one's presence.
<i>Articles of the Covenant:</i>	2 (1), 7, 9 (1) (3) (4), 10 and 14 (1), (2), (3)(d) and (e), 26
<i>Articles of the Optional Protocol:</i>	2, 3 and 5(2)(b)

<sup>1</sup> \* Adopted by the Committee at its 136th session (10 October – 4 November 2022).

<sup>2</sup> \*\* The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Shuichi Furuya, Carlos Gomez Martinez, Duncan Laki Muhumuza, Hernan Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Chongrok Soh, Kobaujah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

<sup>3</sup> \*\*\* The text of individual opinions by Committee members Yadh Ben Achour, Arif Bulkan, Kobauyah Tchamdja and Helene Tigroudja (partially dissenting), and by Committee member Gentian Zyberi (partially concurring, partially dissenting) are annexed to the present Views.

<sup>4</sup> Also known as Mikalai (Mikalay) Dziadok.



1. The author of the communication is Nikolay Dedok, a national of Belarus born in 1988. He claims that the State party has violated his rights under articles 2 (1), 7, 9 (1), (3), (4), 10, 14 (1), (2), (3)(d) and (e) and 26 of the International Covenant on Civil and Political Rights (the Covenant). The Optional Protocol entered into force for Belarus on 30 December 1992. The author is not represented.

### **Factual background<sup>5</sup>**

2.1 In 2009 – 2010, a number of criminal cases were initiated by various district departments of the Ministry of Interior in Belarus into hooliganism and intentional destruction or damage to property under, respectively, articles 339 and 218 of the Criminal Code of the Republic of Belarus. The cases were initiated in connection with the events, which took place in various districts of Minsk and other areas and were accompanied, among other things, by throwing lit pyrotechnic products, petrol bombs and containers with paint at various objects of state or private property. Perpetrators, who were wearing masks to hide their identities, filmed their actions on video and published the videos on the Internet. In particular, and in so far as relevant, on 30 January 2009, the Sovetsky District Department of the Ministry of Interior in Minsk opened criminal case no. 09011070308 against an unidentified person who, earlier on the same day, in a public place in Minsk, threw petrol bombs at a billboard with information on the Ministry of the Interior of the Republic of Belarus. On 25 December 2009 and 25 May 2010, the Leninsky District Department of the Ministry of Interior in Minsk instituted criminal cases against unidentified persons who, on 5 December 2009, threw containers filled with paint and a lit pyrotechnical torch (flare) at a casino in Minsk (case no. 09011023838); and, on 30 April 2010, set the front door of a bank in Minsk on fire (case no. 10011021426). On 21 September 2009, 5 May and 31 August 2010, the Tsentralny District Department of the Ministry of Interior in Minsk opened criminal cases against unidentified persons who, on 19 September 2009, threw an activated RGD-2b white smoke hand grenade into the fenced area around the building of the General Staff of the Ministry of Defense of the Republic of Belarus in Minsk (case no. 09011092633); on the night between 29 and 30 April 2010, broke windows of the Trade Union House in Minsk and threw a lit pyrotechnical torch (flare) inside the building (case no. 10011091242); and, on 30 August 2010, threw petrol bombs at the Russian Embassy in Minsk (case no. 10011092441). On 20 October 2010, the proceedings on the above-mentioned criminal cases were merged.

2.2 On 3 September 2010, the author was arrested in the framework of criminal case no. 10011092441 on suspicion of his involvement in the throwing of petrol bombs at the Russian Embassy in Minsk and causing damage to the car parked on the territory of the Embassy. He was placed in a temporary detention ward of the Main Department of the Interior of the Minsk City Executive Committee for 72 hours. Upon the expiration of this term, on 6 September 2010, he was arrested for the following 72 hours, without being actually released. The author was placed in the same temporary detention facility under a new arrest warrant in the framework of criminal case no. 10011091242 on suspicion of his involvement in breaking the windows of the Trade Union House in Minsk and throwing a lit pyrotechnical torch inside the building on the night between 29 and 30 April 2010. In a similar vein, the author was further arrested and detained from 9 to 12 September 2010 under a new arrest warrant in the framework of criminal case no. 10011021426 from 15 to 18 September 2010 - in the framework of criminal case no. 09011092633 from 18 to 21 September 2010 - in the framework of criminal case no. 09011023838 and from 21 to 24 September 2010 - in the framework of criminal case no. 09011070308. The author's arrest from 12 to 15 September 2010 took place in the framework of criminal case no. 10011020474 on suspicion of his involvement in a robbery, committed on 24 February 2010. In total, from 3 to 24 September 2010, the author was arrested under seven arrest warrants, of 72 hours' duration each, for a total period of 21 days, which he spent in the same temporary detention facility.

2.3 The author submits that during the period of his detention in the abovementioned facility, he was daily subjected to ill-treatment by law enforcement officers. In particular, he argues that he was threatened to be subjected to physical violence, including sexual violence by fellow inmates, that he would have problems with other inmates in the cell, and

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The author omits essential details of his case in his account, submitted in his complaint before the Committee. Documents provided by the author were used in this section.

would be placed in unbearable conditions while in detention.<sup>6</sup> He further submits that he was interviewed for a long time without interruption and without participation of his defense counsel.<sup>7</sup>

2.4 On 24 September 2010, the prosecutor of the Tsentralny District of Minsk authorized the author's placement in remand detention pending investigation of criminal case No. 09011092633 in relation to the events of 19 September 2009 (see para. 2.1 above). In substantiation of the decision, the prosecutor relied on the fact that the author was charged with an offence punishable by more than two years of imprisonment and, if at large, he could abscond, commit further offences, and obstruct the course of justice, including, through exerting unlawful influence on other participants in the criminal proceedings, concealment, or falsification of materials relevant to the case

2.5 On 28 September 2010, the author complained to the Minsk City Prosecutor, contending that, as from 3 September 2010, he was arrested on multiple occasions, without release, on suspicion of his involvement in crimes which he had not committed. He further complained that his remand detention was unjustified and requested to be released from custody under a written commitment not to leave.<sup>8</sup>

2.6 According to the author, on 28 September 2010, he challenged the decision of 24 September 2010 on his remand detention before the Tsentralny District Court of Minsk, requesting to ensure his personal attendance at the hearing. It transpires from a copy of the ruling by the Tsentralny District Court of Minsk, provided by the author, that on 15 October 2010, the court conducted a closed hearing on the author's complaint, which was attended by the author's defense counsel, however, the presence of the author was not ensured. The court rejected the complaint, having established that there were no procedural violations in ordering the author's remand detention and that the author was charged with an offence punishable by more than two years' imprisonment; if at large, he could obstruct the establishment of the truth in the case and abscond from justice. The author submits that his complaint against the above decision was rejected by the Minsk City Court on 26 October 2015<sup>9</sup>.

2.7 According to the documents provided by the author, on 1 October 2010 and 15 February 2011,<sup>10</sup> the author was charged under articles 339 (2) and 218 (2) of the Criminal Code with aggravated hooliganism and intentional destruction of property committed in a generally dangerous manner. In particular, he was accused of three episodes of hooliganism, committed in a group, which involved throwing of an activated RGD-2b white smoke hand grenade into the fenced area around the building of the General Staff of the Ministry of Defense in Minsk, committed on 19 September 2009 in the course of an unauthorized protest organized in the vicinity of the Ministry; throwing of containers filled with paint and lit pyrotechnical torches (flares) at a casino in Minsk on 5 December 2009; and breaking windows of the Trade Union House in Minsk and throwing a lit pyrotechnical torch (flare) inside the building on the night between 29 and 30 April 2010. All the three episodes were allegedly committed by persons belonging to the anarchists' movement, including the author.

2.8 It transpires from the documents provided by the author<sup>11</sup> that, on 1 November 2010, the Deputy Minsk City Prosecutor extended the author's remand detention until 6 February 2011. On 21 January 2011, his detention was further extended until 6 March 2011. On 15 February 2011, the Deputy Prosecutor General extended the author's detention on remand until 6 May 2011.

2.9 On an unspecified date, the author's case was commissioned for trial before the Zavodskoy District Court of Minsk (the trial court). According to the author, on 4 May

<sup>6</sup> No further details provided.

<sup>7</sup> No further details provided.

<sup>8</sup> A copy of the author's complaint is provided; a copy contains a stamp of receipt dated 5 October 2010. The author does not provide information on the outcome of this complaint.

<sup>9</sup> A copy of the decision of the court of cassation is not provided.

<sup>10</sup> According to the author's account, as submitted in his complaint before the Committee, he was officially charged on 24 September 2010 and 4 May 2011.

<sup>11</sup> According to the author's account, as submitted in his complaint before the Committee, during the pre-trial investigation, his remand detention was extended on 12 October and 1 November 2010 - by the Minsk City Prosecutor, and on 15 February 2011 - by the Prosecutor General.

2011, when scheduling the trial in the case, the trial court further extended his remand detention.<sup>12</sup> A hearing in the author's case started on 18 May 2011.

2.10 On 28 April and 4 May 2011, the author and his father, respectively, submitted written motions requesting the trial court to authorize the participation of the author's father at the hearing in the capacity as the author's defender in accordance with article 44 (3) of the Code of Criminal Procedure.<sup>13</sup> According to the author, the motions were left without an answer. On 18 May 2011, during the hearing before the trial court, the author orally requested the admission of his father in the case as a defender. The trial court dismissed the motion on the grounds that the author's defense in the case was ensured by a professional defense counsel - counsel A.

2.11 It transpires from the trial records that during the hearing, the author pleaded not guilty, having stated that he had not taken part in the events of 19 September and 5 December 2009 and 29-30 April 2010 and did not commit the acts he was charged with. He claimed that, while in the temporary detention ward between 3 and 24 September 2010, he had been subjected to pressure by law enforcement officers exerted on him in order to force him to incriminate himself and others. In particular, he submitted that he was interviewed several times for the duration of 2 to 4 hours without drawing up a record; law enforcement officers threatened him with detention and a 4-years' prison term, as well as with physical force and problems in the detention facility.<sup>14</sup> Despite the pressure, he did not confess his guilt. It transpires from the documents provided by the author that, at the initiative of the trial court, the Minsk City Prosecutor's Office conducted a check into the allegations of the use of prohibited methods of investigation in the author's case. As a result, the Prosecutor's Office informed the trial court that the allegations were not confirmed and that there were no grounds for further actions.

2.12 On 27 May 2011, the trial court found the author guilty of aggravated hooliganism, committed in a group, repeatedly, having established his involvement in the three episodes of hooliganism committed on 19 September and 5 December 2009 and on the night between 29 and 30 April 2010 (see para. 2.7 above), and sentenced him under article 339 (2) of the Criminal Code to 4 years and 6 months' imprisonment in a general-regime correctional colony. The trial court acquitted the author of the charges under article 218 (2) of the Criminal Code due to the lack of corpus delicti.

2.13 The author lodged an appeal on points of facts and law with the Minsk City Court as a court of second instance (the court of cassation)<sup>15</sup>, reiterating that he did not take part in the events he was accused of, and that there was no evidence of his involvement in any political organisation or anarchist group.

2.14 On 8 July 2011, the Minsk City Court upheld the author's conviction on appeal, having found that his guilt was corroborated by the body of evidence obtained in the case, and that there had been no substantial procedural violations that would merit the quashing of the impugned decision on his conviction. The hearing took place without ensuring the author's personal attendance.

2.15 It follows from the documents provided by the author that his further complaints lodged in the framework of the supervisory review procedure were rejected on 4 November 2011 – by the Chair of the Minsk City Court,<sup>16</sup> and on 13 March and 14 August 2012 - by the Deputy Chairs of the Supreme Court. His subsequent supervisory review complaint lodged before the Minsk City Prosecutor was rejected on 21 December 2015.

2.16 On an unspecified date, the author was transferred for serving his prison sentence to correction facility IK-17 in Shklov, the Mogilev Region. According to the

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<sup>12</sup> The author does not provide a copy of the decision taken by the trial court on the extension of his remand detention. It does not transpire from the documents provided that the author appealed against this decision.

<sup>13</sup> Pursuant to article 44(3) of the Code of Criminal Procedure, a close relative or legal representative of an accused may be admitted by a court to participate in the case as a defender.

<sup>14</sup> No further details available.

<sup>15</sup> In accordance with the relevant provisions of the procedural legislation of the State party, as in force at the material time, an appeal on points of facts and law against a criminal conviction, which had not entered into legal force, was to be heard by a court of cassation as a court of second instance.

<sup>16</sup> According to the author's account, as submitted in his complaint before the Committee, his supervisory review complaint lodged with the Chair of the Minsk City Court was rejected by decision no. 4y-47 of 12 January 2012. No copy of that decision is provided.

author, in May 2012, he was placed in disciplinary confinement on several occasions and then transferred to a ward-type room. On 4 December 2012, the Shklovskiy District Court ordered the author's transfer for the remaining term of his sentence - 2 years, 2 months and 29 days, to a stricter regime correction facility (Prison No. 4 in Mogilev), due to a systemic breach of the prison rules. On 7 December 2012, the author was transferred to Prison no.4 in accordance with the court order.

2.17 On 13 January 2015, the Mogilev Inter-district Department of the Investigative Committee of the Republic of Belarus charged the author with malicious disobedience to the lawful orders of the prison administration – a crime under of Article 411 (1) of the Criminal Code, due to repeated violations of the prison rules committed while serving the prison sentence in prison no. 4 during the period between 7 December 2012 and 12 November 2014.

2.18 On 26 February 2015, the Leninsky District Court of Mogilev convicted the author under Article 411 (1) of the Criminal Code, having established his guilt in 16 episodes of the violation of the prison rules and disobedience to the lawful orders of the prison administration. The court sentenced the author to 1 year and 3 days' imprisonment in a strict regime correctional facility, taking into account the remaining period of the unexpunged sentence relating to his previous conviction of 27 May 2011. The hearing in the case was conducted in the framework of the offsite court session on the premises of prison no. 4 in Mogilev.

2.19 The author appealed against the conviction before the second instance court, complaining, among other things, that his father was unlawfully denied access to the proceedings in his capacity as his defender. On 30 April 2015, the Mogilev Regional Court upheld the conviction on appeal, having dismissed the author's complaints as unfounded. Concerning the non-admission of the author's father as a defender, the court found that the author had been represented by a professional legal counsel,<sup>17</sup> therefore, his non-admission was justified.

2.20 The author's further complaint in the framework of the supervisory review procedure lodged before the Mogilev Regional Prosecutor's Office was rejected on 6 January 2016.

2.21 The author submits that throughout the periods of his arrest, remand detention and during the period of serving his both prisons sentences, he was subjected to torture and ill-treatment by either investigating authorities or officers of the penitentiary institutions. He provides an example of his alleged ill-treatment during the period of his detention from 3 to 24 September 2010 in the temporary detention ward described in para. 2.3 above. He further submits that during the entire period of his deprivation of liberty, the treatment he received from the administrations of the respective facilities was rude and humiliating; he was subjected to insults and threats (for example, in pre-trial detention facility SIZO no. 8 in Zhodzino, the administration demanded him to sit on the squat for a lengthy period of time; in correction facility IK-15 in Mogilev, he was forced to march in a circle under threat of being placed in a punishment cell

2.22 The author further submits, without providing further details, that he was held incommunicado for a long time; held handcuffed for many hours; was prohibited to move for a long time; was repeatedly kept in a "quarantine" cell, in which there were no living conditions provided; during his detention on the premises of the Tsentralny District Department of the Interior of Minsk,<sup>18</sup> the temperature in the cell was low and he was detained without access to food and toilet facilities for more than 12 hours; during his detention in SIZO no. 8 in Zhodino, law enforcement officers handcuffed him every time when he was taken outside the cell; the cell was the only place where he could wash and dry his personal belongings, which caused high humidity in the cell. There was no individual sleeping place provided while in pre-trial detention facilities. Drinking water was not provided or was of inadequate quality (the author specifies that only tap water was available in the cells. During his detention in correction facility IK-9 in Gorki, as well as in pre-trial detention facilities SIZO no. 8 in Zhodino and SIZO No. 1 in Minsk, there were frequent and prolonged water cuts. In 2011, while in SIZO No. 8, the water was cut for 4

<sup>17</sup> It transpires from the documents provided that during the hearing the author was represented by professional legal counsels M. and V.

<sup>18</sup> No information on the dates of detention is available.

days and drinking water was delivered to the cell 1-2 times a day, however, as the author submits, there was no possibility to use it due to the unavailability of any water containers, except for mugs. In IK-9 in Gorki, the water from the tap was dirty red in color and was unfit for drinking). The temperature in the cells was low, especially in punishment cells and ward-type rooms. The author submits in this context that, on 19 May 2015, he was placed in a cold punishment cell.<sup>19</sup> After having stayed there overnight, in view of the administration's ignoring his repeated requests for transfer, he inflicted self-harm, having cut his stomach and veins in his arms, in order to attract the attention of the administration to the conditions of his detention and ensure his transfer to another cell. He further submits that there was no natural light available in punishment cells; bedding and warm clothes were not provided. During the detention in the temporary detention ward, there was no possibility for walks provided. During his confinement in a ward-type room, he was held in a cell measuring 5 sq.m., along with another inmate.<sup>20</sup>

2.23 The author submits that he was subjected to frequent and unjustified transfers to different cells and correction facilities, indicating that, in total, he was held in 7 correction facilities throughout the entire period of his imprisonment. During transportation, transport vehicles were overcrowded; the conditions of transportation to court hearings were inappropriate (in particular, the departure took place at 5-6 a.m., with a return to the cell after 9-10 p.m.; as a result, hot meals and proper rest were not provided); while awaiting transportation, he was held for lengthy periods in transit cells, which were limited in size.<sup>21</sup>

2.24 The author submits that he was not provided with medical assistance during the entire period of deprivation of liberty.<sup>22</sup> Correspondence with relatives and friends was restricted; letters were confiscated if their contents referred to politics and conditions of detention; during his confinement in punitive cells and ward-type rooms, phone calls and visits from relatives were prohibited; during the period of serving his sentence in Prison no.8, he was only entitled to one short-term visit per year; while in IK no.17 in Schklov, he was unreasonably deprived of a long visit from his wife.

2.25 The author also submits that on several occasions, his counsel was not authorized to visit him in detention. He refers as an example to the incident of 2 July 2015, when the administration of correction facility IK-9 refused to allow his counsel to see him on the grounds that he had not submitted a relevant request. The author submits that the refusal was challenged before the head of the correction facility and to the Prosecutor's Office

2.26 The author submits that he repeatedly complained before domestic authorities about his torture and ill-treatment<sup>23</sup>. The above-mentioned facts have also been published in the media.<sup>24</sup> On 2 July 2015, an urgent appeal was submitted to, among others, the UN Special Rapporteurs on the situation of human rights in Belarus and on torture and other cruel, inhuman or degrading treatment or punishment.<sup>25</sup> The author indicates that his complaints and reports of human rights organizations about the above facts were not properly investigated by the authorities, the measures of protection at the national level proved to be ineffective.

2.27 It transpires from the documents provided by the author, that through the same decision of 6 January 2016 on the author's supervisory review appeal against his second criminal conviction (see para. 2.20 above), the Mogilev Regional Prosecutor's Office addressed the author's complaints lodged before the Office in relation to the bias on the part of the administrations of correction facilities IK-15, IK-17, IK-9 and Prison No. 4, inadequate material and living conditions in the punitive premises of these facilities, a

<sup>19</sup> The author describes the cold temperature in the cell as "the cell, where a person could not actually stay."

<sup>20</sup> No further details provided.

<sup>21</sup> No further details provided.

<sup>22</sup> No further details provided.

<sup>23</sup> The author does not provide copies of the respective complaints.

<sup>24</sup> Reference is made to online publications at: <https://charter97.org/ru/news/2015/5/27/153194> ; <https://spring96.org/be/news/78745>; <http://www.belhelcom.org/ru/node/19695> (page not found); <http://news.tut.by/politics/446447.html> (page not found).

<sup>25</sup> Reference is made to the following address: [http://www.lawtrend.org/wp-content/uploads/2015/07/Belarus\\_UrgAppeal\\_to-UN-SP\\_EU\\_PACE\\_2Jul2015\\_on-Dziadok\\_EN.pdf](http://www.lawtrend.org/wp-content/uploads/2015/07/Belarus_UrgAppeal_to-UN-SP_EU_PACE_2Jul2015_on-Dziadok_EN.pdf) The author does not provide information on the outcome of the appeal.

failure to provide medical assistance and a failure by the administration of correction facility IK-9 to ensure a meeting of the author with his lawyer.<sup>26</sup> The complaints were rejected as groundless. In particular, it was established that during the period of serving by the author of his prison sentence in the abovementioned institutions, he was held liable in disciplinary proceedings on 51 occasions in connection with systematic violations of the established order; including, on 2 occasions, he was transferred to a ward-type room and on 21 occasions - placed in a punishment cell. It was found that the disciplinary sanctions imposed on the author were lawful and reasonable, no bias in imposing the sanctions was established. As a result of a check carried out by the Prosecutor's Office into the allegations relating to inadequate material and living conditions in the abovementioned institutions, it was established that the conditions complied with the requirements of the Internal Regulations for Penitentiary Institutions.

2.28 It further transpires from the decision of 6 January 2016 that an inquiry was conducted in relation to the incident relating to the self-harm of 20 May 2015 (see para. 2.22 above). It was established in this regard that, on 19 May 2015, the author was placed in a punishment cell of correction facility IK-9 for 7 days as a measure of disciplinary liability for violation of the facility's regulations. On 20 May 2015, the author deliberately self-injured himself with a pre-sharpened plastic button, explaining his actions by his unwillingness to be held in cell no. 16, located near the post of the controller on duty who exercised enhanced control over him. It was further established that the living area of cell no. 16 measured 7.5 square metres; the cell was equipped with two beds, two places for sitting, a washbasin, a sanitary unit separated by a screen; natural light in the cell was ensured through a window, and artificial light - through two electric lamps; the air temperature in the cells of IK-9 in the period from 18 to 20 May 2015 measured +18 degrees Celsius. It was also established that during the period of serving his prison sentence, the author was examined by doctors on numerous occasions; he was provided with the necessary medical assistance; he received prescribed treatment in accordance with his diagnosis; during his detention in the punishment cells, he was regularly examined by medical personnel. In relation to the complaint about the impeded access to a counsel, it was established that during the author's serving his sentence in IK-9 he had 5 meetings with his counsel. As a result of an inquiry into a complaint received from the author's legal counsel,<sup>27</sup> it was established that the duration of the visit granted on 25 June 2015 was unreasonably limited. In this connection, on 10 August 2015, the deputy prosecutor of the Mogilev Region issued an official warning to correction facility IK-9 responsible for the violation.<sup>28</sup>

2.29 According to the author, human rights organisations in Belarus consider him a political prisoner.<sup>29</sup> On 22 August 2015, he was granted a presidential pardon and released from serving his sentence. The author submits that he had not applied for pardon. He further claims that the investigation and arrests of suspects in his case – the “anarchists’ case”, were carried out during the campaign for the 2010 Presidential elections. As from 3 September 2010, some 50 persons were arrested based on their affiliation with opposition political groups. He claims that his second conviction was initiated by the authorities in order to psychologically force him to apply for pardon, threaten other political activists and calm down eventual protests in the view of the 2015 presidential elections.

## The complaint

3.1 The author claims a violation of his rights under articles 7, 9, 10, 14 and 26 of the Covenant, alleging that he is a victim of politically motivated persecution. The author also submits that the State party violates its obligations under article 2 (1) of the Covenant, as

<sup>26</sup> A copy of the actual complaint is unavailable. The scope of the issues raised by the author transpires from a brief summary in the decision of the Mogilev Regional Prosecutor's Office of 6 January 2016. The material provided by the author does not contain any other documents on the matter.

<sup>27</sup> The scope of the issues raised is unavailable as a copy of the actual complaint is not provided.

<sup>28</sup> The decision of 6 January 2016 of the Mogilev Regional Prosecutor contains information on the appeal procedure against the decision should the author disagree with its content. It does not transpire from the material provided by the author that he appealed against this decision.

<sup>29</sup> The author provides an opinion of the Belarusian Helsinki Committee recognising those convicted in the framework of the “anarchists’ case”, including the author, political prisoners. The author does not specify which political activity he is involved with. There is no indication in his account of the events submitted in the complaint form that he belongs to an anarchists’ movement or any other political movement.

the relevant provisions of the domestic legislation do not foresee the mandatory presence of an accused during consideration of his case on appeal before the second instance court (the court of cassation).

3.2 Under articles 7 and 10, he asserts that the conditions of his detention and prison transfer to the court premises and detention facilities were inhuman and degrading. He was subjected to torture, ill-treatment and psychological pressure as described above (see paras. 2.3 and 2.21 above). The author claims that he was subjected to the ill-treatment because of his political convictions, noting that the authorities refused to investigate his allegations, despite his complaints and publications in the media.

3.3 The author claims that his arrest and pre-trial detention were in violation of article 9 (1). He submits that he was detained for 72 hours in 7 consecutive instances, which accounted for 21 days of continuous detention, before his official indictment. During this time, his relatives were not informed of his whereabouts. The decisions on his remand detention were not sufficiently substantiated and did not take into account his personal circumstances. The author further claims that his remand in custody was sanctioned by the prosecutor, who is not authorized by law to exercise judicial power, as required by article 9 (3). After his remand detention was ordered on 24 September 2010, he was brought before the trial judge on 18 May 2011, i.e. with a delay of 8 months, which is not in conformity with the “reasonable time” requirement under article 9 (3). The review of his detention was carried out formally, without considering his personal circumstances. In violation of article 9 (4), the review took place in his absence.

3.4 The author further maintains that the court system in Belarus as such is not independent and refers to a number of reports in support of his claim.<sup>30</sup> He also claims that, in violation of article 14 (1), the trials in his two criminal cases were unfair as the judges did not behave impartially, for instance by making critical remarks, rejecting his motions and posing additional questions to prosecution witnesses and victims. The principle of equality of arms was violated. Hearings in his second criminal case were held in the prison and the public was not admitted

3.5 The author further claims that his right to be presumed innocent under article 14 (2) was not respected, as authorities made public statements in mass media about his involvement in the crime before his conviction became final. Furthermore, he was handcuffed and placed in a cage in the courtroom throughout the hearings relating to his case. He argues that the above testifies to the fact that he was persecuted by the authorities for his beliefs, views and social activism in violation of article 26 of the Covenant.

3.6 Under article 14 (3) (d), the author complains that immediately upon his arrests he was not provided with copies of the decisions which ordered the opening of criminal cases in the framework of which he was arrested; he was not provided either with the decisions on his status as a suspect in some of the respective criminal cases, nor was he provided with the arrest warrants. For several days, his lawyer could not access information as to which investigating authorities were in charge of the investigation in his case. The trial courts for no valid reason refused to grant his father – a professional lawyer with an extensive experience in the sphere of criminal justice, access to the proceedings in the capacity of his defender. The author further contends, referring to the incident of 2 July 2015 described in para. 2.25 above in substantiation of his claim, that on several occasions, his counsel was not authorized to visit him in a detention facility. Furthermore, he was not present at the review of his sentences in both criminal cases by the courts of cassation, which examined not only questions of law, but also questions of facts and evidence in his cases. His motions to ensure his attendance at the hearings were dismissed. The author submits in this respect that the relevant provisions of the domestic legislation, in particular Article 282 of the Code of Criminal Procedure, do not foresee the mandatory presence of the accused during consideration of the case on appeal before the second instance court (the court of cassation), which, in the author’s opinion, entails a violation by the State party of its obligations under article 2 (1) of the Covenant.

3.7 The author contends that, in breach of article 14 (3) (e), the trial court read out at the hearing statements of several prosecution witnesses, who did not attend the hearing,

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Reference is made to the Report of the Special Rapporteur on the independence of judges and lawyers, 8 February 2011 (E/CN.4/2001/65/Add.1); the Report of the OSCE Office for Democratic Institutions and Human Rights on Trial Monitoring in Belarus (March – July 2011).



whereas, according to the author, their presence was important for establishing the facts of the case and in order to eliminate inconsistencies. The court failed to ensure their presence at the hearing and the author had no opportunity to examine them, however, his conviction was based on their statements.

3.8 The author asks the Committee to declare the communication admissible, to find a violation of articles 2 (1), 7, 9, 10 and 14 of the Covenant<sup>31</sup>; to recommend that the State party make full reparation and ensure effective remedies to him, put an end to his political persecution and provide him with full rehabilitation and monetary compensation. He also asks the Committee to recommend to the State party that the relevant provisions of the Code of Criminal Procedure be brought in conformity with the standards of the Covenant, in particular those guaranteed by articles 9 and 14 (3) (d), in what concerns the rights to be promptly brought before a judge or other officer authorized by law to exercise judicial power and to be tried in one's presence by a court of appeal.

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

4.1 By a note verbale dated 13 February 2017, the State party submitted its observations on admissibility and merits. The State party submits that the communication is inadmissible for non-exhaustion of domestic remedies as the author failed to lodge supervisory review appeals against the decisions in his cases before the Prosecutor General and his deputies and, in what concerns the decisions of the Leninsky District Court of Mogilev and the Mogilev Regional Court, - before the Chair of the Mogilev Regional Court and the Supreme Court. For the above reasons, the State party considers that the present communication constitutes an abuse of the right of submission and is inadmissible under Article 3 of the Optional Protocol.

4.2 Commenting on the complaints under article 14, the State party argues that the author's allegations are unfounded, as his right to a fair trial was duly ensured. The State party submits in this regard that, during the proceedings, the author and his counsel did not challenge the composition of the courts nor the courts' conduct. It further notes that offsite court hearings are held in compliance with all the rules of procedure and taking into account the location of such hearings, in particular the special regime of correction facilities that do not provide for the presence of other persons on their premises.<sup>32</sup> Throughout the criminal proceedings, the author's right to defense was ensured, he was represented by professional legal counsels – A., M. and V. In accordance with the relevant provisions of the Code of Criminal Procedure, the participation of a convict during the consideration of the case on appeal is not mandatory.

4.3 With regard to the author's complaints under article 9, the State party submits that his arrest as a suspect and the subsequent remand detention as a measure of restraint were in compliance with the procedure and deadlines established by the Code of Criminal Procedure.

4.4 In relation to the complaints under articles 7 and 10, the State party notes that neither at the preliminary investigation stage, nor after the judgment of 27 May 2011 did the Minsk City Prosecutor's Office receive any complaints from the author about psychological or physical pressure exerted on him by law enforcement officials. At the time when a decision on the author's placement in remand detention was taken, the author informed the prosecutor that he had no complaints in relation to the investigating authorities in his case. Having regard to the above, the Minsk City Prosecutor's Office did not establish grounds for conducting a check in accordance with articles 173-174 of the Code of Criminal Procedure in relation to the author's statement at the hearing before the trial court concerning the unlawful methods of investigation which were allegedly applied to him. Furthermore, the author did not complain about the conditions of his remand detention to the Minsk City Prosecutor's Office. At the request of the author, the Mogilev Regional Prosecutor's Office conducted a check in relation to his complaints about the bias on the part of the administration of the correction facilities where he was serving his prison sentence, inadequate material and living conditions in those facilities, the unreasonable transfer to solitary confinement, the failure to provide medical assistance and the failure to ensure his meeting with a lawyer. As a result, no violations of the relevant standards and

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The author does not refer to article 26 in this part of his communication.

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Reference is made to para. 29 of General Comment No. 32 (CCPR/C/GC/32).

norms were found, of which the author was notified on 6 January 2016 by the Prosecutor of the Mogilev Region.

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

5.1 On 20 April 2017, the author submitted his comments on the State party's observations. Commenting on the argument of the State party as to the non-exhaustion of domestic remedies, the author submits that he exhausted all available effective domestic remedies, however, did not receive protection of his rights at the domestic level. His appeals against the courts' decisions in his cases lodged in the framework of the supervisory review procedure were rejected. He further submits that supervisory review procedures do not constitute an effective domestic remedy to be exhausted.<sup>33</sup> In his case, the responses he received from the relevant authorities following examination of his supervisory review appeals lacked legal analysis and reference to the standards of the Covenant, which further testifies to the ineffectiveness of the supervisory review procedure.

5.2 In response to the State party's observations concerning the complaints under article 14, the author reiterates the arguments he presented in his initial submission to the effect that the fair trial guarantees were not respected in his criminal cases. In particular, he indicates that his right to be presumed innocent, the principle of equality of arms, the right to question prosecution witnesses testifying against him, the right to defense, as well as the right to be tried in his presence were violated. Commenting on the State party's argument as to the absence of a violation of his right to defense in the context of the non-admission of his father to the proceedings, the author submits that the arguments in that regard are unfounded, as his father, a professional lawyer, had detailed knowledge of the circumstances of his criminal case, and that, therefore, his participation in the proceedings, together with the already acting defense counsel, would have allowed to increase the efficiency of his defense.

5.3 The author further reiterates the arguments submitted in his initial submission in relation to the violation of his rights under article 9 of the Covenant.

5.4 With regard to the State party's observations relating to the issues raised under articles 7 and 10, the author notes that the arguments that he was not subjected to torture and cruel and inhuman treatment are unconvincing. He repeatedly reported at the domestic level about the use of torture and ill-treatment in relation to him during the preliminary investigation stage, trial and during serving his prison sentence. Nevertheless, the authorities failed to conduct a proper investigation into this information.

### **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 State party's argument that the author has failed to seek a supervisory review of the impugned decisions in his criminal cases by the Prosecutor General and his deputies and, in what concerns the decisions on his second criminal case, - before the Chair of the Mogilev Regional Court and the Supreme Court. The Committee also takes notes of the information and arguments from the author that he did lodge, unsuccessfully, appeals in the framework of the supervisory review procedure and that the supervisory review does not constitute an effective remedy for the purpose of exhaustion. In this context, the Committee recalls its jurisprudence according to which a petition for supervisory review to a prosecutor's office, dependent on the discretionary power of the prosecutor, against a judgment having the force of *res judicata* does not constitute an

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Reference is made to *Iskiyaev v. Uzbekistan* (CCPR/C/95/D/1418/2005), para. 6.1; *Tumilovich v. Russia*, ECHR, 47033/99, Decision, 22 June 1999.

effective remedy that has to be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.<sup>34</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>35</sup> The Committee notes that the State party does not provide any information or arguments to demonstrate that the supervisory review constitutes an effective domestic remedy in the circumstances of the case. In the absence of further explanations by the State party in the present case, the Committee considers that, in so far as the matter concerns the State party's argument as to the failure by the author to fully exhaust legal avenues available to him in the framework of the supervisory review procedure, it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication. The Committee also sees no grounds to consider the communication to be an abuse of the right of submission on the grounds invoked by the State party and, accordingly, finds that it is not prevented by the requirements of article 3 of the Optional Protocol from examining the complaint.

6.4 The Committee takes note of the author's allegations that the State party violated his rights under articles 9 (1), (3), 14 (1), (2), (3) (d) and 26 of the Covenant on account of arbitrary extensions and the excessive length of his remand detention, the lack of independence and impartiality of courts in his criminal cases, violation of the principle of equality of arms, the alleged non-admission of the public to the hearing of his second criminal case, the violation of his right to be presumed innocent, and of his right to defence in view of the alleged failure by the authorities to provide him with the documents related to his arrest and his status in the respective criminal proceedings, the alleged failure by the administration of detention facilities to ensure his meetings with a counsel, in particular as a result of the incident of 2 July 2015 (see para. 2.25 above), as well as on account of the failure to ensure his right to equal protection of the law against discrimination. The Committee notes that the material before it does not contain information to the effect that the respective claims were raised by the author before the competent domestic authorities and courts. In the absence of further information, the Committee is unable to establish whether domestic remedies have been exhausted with regard to these particular claims, and therefore considers that it is precluded by article 5 (2) (b) of the Optional Protocol from considering this part of the communication.

6.5 The Committee also notes the author's claims, submitted under articles 7 and 10, concerning the conditions of his detention, prison transfer, lack of medical assistance and impeded contacts with family and friends throughout the entire period of his deprivation of liberty, as described in paras. 2.22 – 2.25 above. The Committee notes the conflicting arguments received from the parties as to whether these claims were raised before the competent domestic authorities in relation to each stage of the author's deprivation of liberty, namely his arrest, remand detention and the period of serving his prison sentence. The Committee observes in this connection that the documents provided by the author do not contain information on the domestic proceedings the author undertook in relation to his respective complaints relating to the periods of his arrest and remand detention. Consequently, in the absence of further information, the Committee is unable to establish whether domestic remedies have been exhausted with regard to this particular part of the complaint. The Committee, therefore, considers that it is precluded by article 5 (2) (b) of the Optional Protocol from considering this part of the communication.

6.6. In what concerns the alleged claims relating to the period of the author's serving his prison sentence in the correctional institutions of the Mogilev Region, the Committee notes that, as it follows from the documents provided by the author, the issues were partially raised before the Mogilev Regional Prosecutor's Office (see paras. 2.27 – 2.28 above). The Committee observes, however, that the material before it does not allow to establish the detailed scope of the issues raised by the author at the domestic level, in particular in what concerns the material and living conditions in the facilities and the author's allegations as to the lack of medical assistance. The Committee further observes that an inquiry was conducted into the issues raised by the author in his respective

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*Alekseev v. Russian Federation* (CCPR/C/109/D/1873/2009), para 8.4.

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*Gelazauskas v. Lithuania*, para 7.4; *Sekerko v. Belarus* (CCPR/C/109/DR/1851/2008), para. 8.3; *Protsko and Tolchin v. Belarus* (CCPR/C/109/D/1919-1920/2009), para. 6.5; *Schumilin v. Belarus* (CCPR/C/105/D/1784/2008), para. 8.3; *P.L. v. Belarus*, (CCPR/C/102/D/1814/2008), para. 6.2.

complaint and a detailed answer was given to the author in the Prosecutor's response of 6 January 2016 (paras. 2.27 – 2.28 above). The Committee further notes that, in refuting the author's respective allegations, the State party refers to the specific information detailed in that response (see para. 4.4 above). In the absence of any other pertinent information in that regard from the author, the Committee considers that the author has failed to sufficiently substantiate this part of his claims for purposes of admissibility. In the light of the above, the Committee considers the author's respective claims are inadmissible under article 2 of the Optional Protocol, as they are insufficiently substantiated.

6.7 The Committee further notes the author's claim submitted under articles 7 and 10 that throughout the period of his deprivation of liberty he was subjected to torture and ill-treatment by law enforcement officials. The Committee notes the State party's argument that no complaints to that effect were received from the author by the competent domestic authorities. The Committee, observes in this respect that the documents provided by the author reveal that he partially raised the respective complaints at the hearing before the trial court, where he argued, with no further substantiation available, that during the period of his detention from 3 to 24 September 2010 he was subjected to ill-treatment by law-enforcement officials with the aim of extracting a confession from him and forcing him to incriminate other suspects (see para. 2.11 above). The Committee notes, however, that the author made general statements and failed to provide concrete and factual details to substantiate his claims. Accordingly, the Committee considers that the author failed to substantiate his claims for the purpose of admissibility and declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.8 The Committee notes that the author alleges the failure by the State party to discharge its obligations under article 2 (1) of the Covenant and recalls in this connection its jurisprudence, according to which the provisions of article 2 of the Covenant, which lay down general obligations for States parties, cannot, in and of themselves, give rise to a claim in a communication under the Optional Protocol. The Committee therefore considers that the author's contentions in this regard are inadmissible under article 2 of the Optional Protocol.<sup>36</sup>

6.9 The Committee further notes the author's claim about a violation of his rights under article 14 (3) (e) on account of the failure to ensure his right to confront prosecution witnesses. The Committee observes, however, that the information and explanation provided by the author in substantiation of his respective complaint is of a general nature and therefore considers that the claim has been insufficiently substantiated, for purposes of admissibility. It is thus also inadmissible under article 2 of the Optional Protocol.

6.10 The Committee considers that the author's remaining claims under articles 9 (1), (3), (4) and 14 (3) (d) of the Covenant relating to his arbitrary arrest and placement in remand detention, the alleged violation to his right to defence in view of the refusal by the court to admit his father in the proceedings as his defender and the failure to ensure his attendance at the hearing on appeal before the second instance courts (the courts of cassation) have been sufficiently substantiated for the purpose of admissibility. Accordingly, it declares these claims admissible and proceeds to their consideration on 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 claim under article 9 (1) of the Covenant to the effect that he was arrested under 7 separate arrest warrants, which accounted for 21 days of continuous detention before he was placed in remand detention and officially charged. The Committee notes the State party's argument that the author's arrest as a suspect was in compliance with procedural requirements under the Code of Criminal Procedure. The Committee recalls that article 9 (1) requires that deprivation of liberty must not be arbitrary, and must be carried out with respect for the rule of law.<sup>37</sup> The Committee notes that this requirement applies, inter alia, to the way the law is applied in particular circumstances of a

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<sup>36</sup> See *Basso v. Uruguay* (CCPR/C/99/D/1887/2009), para. 9.4; *A.P. v. Ukraine*, (CCPR/C/105/D/1834/2008), para. 8.5.

<sup>37</sup> General Comment no. 35, para. 10.

case, which must not be arbitrary. An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality<sup>38</sup>. The Committee considers that in the present case, the practice of multiple successive arrests, resulting in continuous deprivation of liberty without formal indictment and independent judicial scrutiny, although being formally in accordance with procedural requirements established by domestic law, contains elements of arbitrariness, which are incompatible with requirements of article 9 (1) of the Covenant.

7.3 The Committee also notes the author’s claim under article 9 (1), that the choice of the pretrial constraint measure applied to him in the form of his remand in custody did not take into account the individual circumstances of his case. The Committee notes that the decision on the author’s placement in remand detention was based on the fact that he was charged with an offence punishable by more than two years of imprisonment, as well as on the inference of a general character that, if at large, he could abscond, commit further offences and obstruct the course of justice (see para. 2.4 above). The author challenged the above decision before the competent court, which rejected his complaint, on the sole ground of the absence of procedural violations in adopting the contested decision, as well as reiterating, in a general manner, the arguments put forward in the contested decision, relating, in particular, to the risk of the author’s absconding and obstructing the establishment of the truth in the case (see para. 2.6 above). In this regard, the Committee recalls its approach that remand in custody on criminal charges must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. Courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case.<sup>39</sup> Turning to the circumstances of the present case, the Committee observes that, making general inferences as to the danger of the author’s absconding and the risk of his obstructing the course of justice, the domestic authorities did not indicate any factual basis for such fears, nor justified their respective decisions through making an assessment of the author’s individual circumstances, including his personality, as well as the possibility of preventing the risk through application of less intrusive measures of restraint available under domestic legislation. The State party, therefore, has not demonstrated that the required individualised assessment of risks, as well as of alternatives to pretrial detention was ensured in the present case. Consequently, and taking into account the findings in para. 7.2 above, the Committee, is of the opinion that the facts as presented reveal a violation of the author’s rights under article 9 (1) of the Covenant.

7.4 Regarding the author’s claim that his remand detention was sanctioned by a prosecutor, who was not authorized by law to exercise judicial power, as required by article 9 (3) of the Covenant, the Committee recalls that the above-mentioned provision entitles a detained person charged with a criminal offence to control of his or her detention by judicial entities. It is inherent in the proper exercise of judicial power that it be exercised by an authority that is independent, objective and impartial in relation to the issues dealt with.<sup>40</sup> The Committee observes that the author’s placement in remand detention was authorised by the Tsentralny District Prosecutor of Minsk; his remand detention was subsequently extended by the Deputy Minsk City Prosecutor and the Deputy Prosecutor General (see paras. 2.4 and 2.8 above). The Committee is, therefore, not satisfied that the prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an officer authorized by law to exercise judicial power within the meaning of article 9 (3) of the Covenant,<sup>41</sup> and concludes that the facts as submitted reveal a violation of the author’s rights under article 9 (3). In the light of this finding, the Committee decides not to examine separately the claims raising issues under article 9 (4) of the Covenant.

<sup>38</sup> Ibid., para. 12.

<sup>39</sup> Ibid., para. 38., See, *Alphen v. Netherlands* (CCPR/C/39/D/305/1988), para. 5.8.

<sup>40</sup> *Andrei Sannikov v. Belarus* (CCPR/C/122/D/2212/2012), para.6.6; *Kulomin v. Hungary* (CCPR/C/50/D/521/1992), para. 11.3; *Platonov v. Russian Federation* (CCPR/C/85/D/1218/2003), para. 7.2.

<sup>41</sup> General comment No. 35 (2014), para. 32.

7.5 The Committee notes the author's claim that his right to defence guaranteed by article 14 (3) (d) was violated in that the participation of his father at the hearing in his two criminal cases as his defender was not authorised. The Committee observes that, in light of the material before it (see para. 2.10 above), the admission of the author's father was requested in accordance with article 44 (3) of the Code of Criminal Procedure providing for discretionary powers of the court to admit in the proceedings a close relative or legal representative of an accused in the capacity as a defender. The Committee further notes that the admission of the author's father was refused on the grounds that the author's defence was ensured by professional legal counsels. The Committee also notes that at no point throughout the criminal proceedings did the author raise an issue of ineffectiveness of his defence ensured by his counsels. The Committee recalls in this respect that guarantees under article 14 (3) (d) refer to two not mutually exclusive types of defence, which is the right of all accused of a criminal charge to defend themselves in person or through legal counsel of their own choosing.<sup>42</sup> In view of the above and taking into account that the author was represented by professional counsels of his own choosing, whose efficiency is not at dispute, the Committee considers that the issue raised does not disclose a violation of the author's right under article 14 (3) (d) of the Covenant.

7.6 The Committee finally notes the author's allegation of a violation of his rights under article 14 (3) (d) on account of the failure by the courts to ensure his attendance at the hearings on his appeals lodged on points of facts and law before the second instance courts (the courts of cassation). The Committee notes the explanation provided by the State party that the relevant provisions of the Code of Criminal Procedure do not envisage a mandatory participation of a convict during the consideration of the criminal case on appeal. The Committee recalls in this regard that under article 14 (3) (d) accused persons are entitled to be present during their trial and that proceedings without the accused being present may only be permissible if it is in the interest of the proper administration of justice, such as when accused persons decline to exercise their right to be present having been informed of the proceedings sufficiently in advance.<sup>43</sup> The Committee finds that article 14 (3) (d), which provides the accused with a right to be tried in his or her presence, applies to the present case, since under the appeal proceedings the court examines the case as to the facts and the law and makes a new assessment of the issue of guilt and innocence.<sup>44</sup> In the absence of any other relevant information from the parties, the Committee concludes that the facts as described by the author disclose a violation of article 14 (3) (d) of the Covenant.

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), (3) and 14 (3) (d) 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 reimbursement of any legal costs incurred. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

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.

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<sup>42</sup> General Comments no. 32, para. 37.

<sup>43</sup> General comment No. 32 (2007), para. 36.

<sup>44</sup> *Dmitry Tyan v. Kazakhstan* (CCPR/C/119/D/2125/2011), para. 9.3; *Dorofeev v. Russian Federation* (CCPR/C/111/D/2041/2011), para. 10.6.

## Annex I

**Individual Opinion by Committee Members Yadh Ben Achour, Arif Bulkan, Kobauyah Tchamdja and Hélène Tigroudja (partially dissenting).**

1. We agree with the majority of the Committee that the author suffered several breaches of his rights under Articles 9 and 14 of the Covenant, but disagree with their finding that there was no violation of the author's right to defend himself through legal assistance of his own choosing pursuant to article 14(3)(d) thereof. In justifying this conclusion, the majority relied upon a domestic provision – article 44(3) of the Code of Criminal Procedure of Belarus – which confers a *discretion* on the Court to allow a close relative or legal representative of an accused in the capacity as a defender during the proceedings. The majority reasoned that the court's discretion was properly exercised since the author was already represented by professional counsel of his own choosing, whose effectiveness was never challenged by him. As we will contend, not only did the majority misinterpret article 14(3)(d), but they also restricted its scope in ways unjustified by the text. Ultimately, and most regrettably, the majority seemed not to grasp that Covenant rights take precedence over domestic legislation.

2. The material portion of Article 14(3)(d) confers on every person charged with a criminal offence the right “to defend himself in person or through legal assistance of his own choosing”. Despite the disjunctive syntax, these distinct elements have been interpreted as not being mutually exclusive.<sup>45</sup> In simpler terms, this means a criminally accused person can enjoy both rights – to defend himself/herself in person *and* to have legal assistance – there is no need to choose one or the other. As explained in General Comment 32, it ensures that even while professionally represented, an accused person retains “the right to instruct their lawyer on the conduct of their case”, albeit within the limits of professional responsibility. This explanation indicates not just the importance attached to representation, but also how pivotal the accused person is to the overall conduct of his or her own defence. As the Committee has put it in another context, the right of control over one's own defence is the “cornerstone of justice”.<sup>46</sup>

3. Admittedly, the right of legal representation is not absolute. This Committee has recognised that in the interests of justice a court may impose counsel on an accused, such as where an accused obstructs the proceedings, or is grossly incompetent, or where his or her questioning of witnesses may be too distressing for them.<sup>47</sup> Ultimately, the guiding principle as always is that “any restriction of the accused's wish to defend himself must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice.”<sup>48</sup> Or, as the committee has said – in a different context but underscoring the identical principle – the right to counsel “should not be restricted unless it is absolutely necessary for the administration of justice”, as where an accused person abuses the right.<sup>49</sup>

4. It is this standard of necessity, rationality and reasonableness which is missing from the majority's evaluation of the author's claim. The majority relied on the fact that the author requested his father pursuant to a provision in the domestic Criminal Code, and reasoned that the court's discretion was correctly exercised because the author was already being defended by professional legal counsels, whose effectiveness he did not challenge. However, it is unclear from where the majority divined this limitation of ineffectiveness as a prerequisite for permitting an additional counsel/relative, as no such requirement appears in the text and no rationale was supplied for it. Even if the author's counsel were not ineffective, what harm would be caused by allowing his father, who has a legal background,

<sup>45</sup> General Comment 32, para. 37 (CCPR/C/GC/32).

<sup>46</sup> Correia de Matos v Portugal CCPR/C/86/D/1123/2002 at para. 7.3.

<sup>47</sup> Ibid, at para. 7.4.

<sup>48</sup> Ibid.

<sup>49</sup> Y.M. v Russian Federation CCPR/C/116/D/2059/2011, para 9.4.

to participate in an official capacity, if that could enhance the effectiveness of the defence? Absent any harm, the discretion should have been exercised in the author's favour.

5. The majority purported to reinforce this finding by acknowledging that article 14(3)(d) refers to "two not mutually exclusive types of defence, which is the right of all accused of a criminal charge to defend themselves in person or through legal counsel of their own choosing". This clarification, however, contradicts their finding, for as explained above, it emphasises that an accused is entitled to defend himself in person *and* to retain counsel – in other words, it highlights the importance of facilitating representation by multiple means if desired. Had the spirit of this rule prevailed, it would have enabled the participation of the author's father in the proceedings in the absence of any good reason to deny same.

6. Notably, the author's request was not random but was integrally connected to the conduct of his defence. It was motivated by the fact that his father – a trained lawyer – had detailed knowledge of the circumstances and his participation was sought to enhance the effectiveness of the defence. Given that he possessed both legal knowledge and a personal stake in the matter, it is reasonable to assume that the author's father would have been well placed to instruct the lawyers and to guide and/or oversee their conduct of the defence during the trial. In the absence of some articulated reason to preclude his involvement – such as its impact upon the duration of the proceedings or the efficiency of the trial itself – then the benefit to the accused would easily justify granting the request. At no time, however, was any balancing exercise conducted before denying the father access to the proceedings, whether by the courts during trial, by the State party in its reply, or by the majority in its reasons.

7. But not only did the majority ignore the failure of the State party to justify the limitation on the author's right to counsel, they went further by supplying a reason, though without explaining how that reason satisfied the standard of having a sufficiently serious purpose and not impacting negatively on the author's defence. By deferring to the discretion as exercised by the domestic court, the majority undermined a right that is pivotal to criminal trials and crucial for securing equality of arms and overall fairness, in the process subjugating the Covenant to domestic legislation. For these reasons, we respectfully disagree with the majority and find that by refusing the author's request for his father to have access to the proceedings in the capacity as a legal defender, the State party violated the author's right under article 14(3)(d) of the Covenant .



## Annexe II

### **Individual opinion by Committee member Gentian Zyberi, (partially concurring, partially dissenting)**

1. I am agreed with the Committee's findings on Article 9. This individual opinion clarifies my position with regard to article 14(3)(d) concerning the admission the author's father in the proceedings as his defender and concerning the presence of the author during the proceedings on appeal.

#### **Non-admission the author's father in the proceedings as his defender**

2. I am agreed with the Committee's finding of a non-violation of article 14(3)(d) in this case when it concerns the refusal by the court to admit the author's father in the proceedings as his defender. The admission of the author's father was requested in accordance with article 44(3) of the Code of Criminal Procedure providing for discretionary powers of the court to admit in the proceedings a close relative or legal representative of an accused in the capacity as a defender (para. 7.5).

3. The Committee explains that at no point throughout the criminal proceedings did the author raise an issue of ineffectiveness of his defence ensured by his counsels and that he was represented by professional counsels of his own choosing (para. 7.5). However, when assessing a decision by domestic courts, the Committee's standard position is that the application of domestic legislation and assessment of facts and evidence is in principle for national organs, unless it can be ascertained that the domestic proceedings were arbitrary or amounted to a denial of justice.<sup>50</sup> The Committee should have explicitly included this test and used it in its assessment.

4. In this case, the domestic court decision not to allow the author's father in the proceedings as his defender was refused on the grounds that the author's defence was ensured by professional legal counsels. This decision does not seem to be arbitrary, nor could it be said that it amounts to a denial of justice, given the author was represented by professional counsel of his own choosing. It must be noted that this is not an instance of denial of access to a lawyer, or even denial of choice,<sup>51</sup> but an issue whether another person (in this case a family member) should have been included under another category than legal counsel, namely that of a defender.

#### **Presence of the author during the proceedings on appeal**

5. The Committee should have dismissed this part of the complaint as not substantiated, or not have found a violation on the merits.

6. The author explains (para. 3.6) and the State party confirms (para. 4.2) that Article 282 of the Belarussian Code of Criminal Procedure does not foresee the mandatory presence of the accused during consideration of the case on appeal before the second instance court. Despite the author's claim that his motions to ensure his attendance at the hearings were dismissed, there is no documentation that the author requested explicitly to attend these proceedings and was denied by the court.<sup>52</sup> Nor has the author explained how his absence at the appeal proceedings negatively affected his defence, given he was represented by

<sup>50</sup> Simms v. Jamaica, Communication No. 541/1993, para. 6.2; Arenz et al. v. Germany, Communication No. 1138/2002, para. 8.6; Arutyunyan v. Uzbekistan, Communication No. 917/2000, para 5.7; Fernández Murcia v. Spain, Communication No. 1528/2006, para. 4.3.

<sup>51</sup> See Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (criminal) limb, especially para. 478 (Guide on Article 6).

<sup>52</sup> Different from Dmitry Tyan v. Kazakhstan, Communication No. 2125/2011, para. 9.3, where the author's request to attend the appeal proceedings was denied; or from Dorofeev v. Russian Federation, Communication No. 2041/2011, para. 10.6, where the author, accused of serious crimes one of which triggered the death penalty, participated in the cassation hearing through a video conference connection.

professional legal counsel of own choosing. Hence, the Committee should have dismissed this part of the complaint as not substantiated.<sup>53</sup>

In addressing this issue on the merits (para. 7.6), the Committee recalls that under article 14(3)(d) accused persons are entitled to be present during their trial and that proceedings without the accused being present may only be permissible if it is in the interest of the proper administration of justice, such as when accused persons decline to exercise their right to be present having been informed of the proceedings sufficiently in advance.<sup>54</sup> While this is correct as far as it goes, at issue is the author's presence during the appeal proceedings,<sup>55</sup> not at the trial phase where he was present.

When it comes to the issue of being present in proceedings on appeal, it seems that State parties to the Covenant have chosen various approaches. The personal attendance of a defendant does not take on the same crucial significance for an appeal hearing as it does for a trial hearing.<sup>56</sup> That said, while being mindful and respectful of domestic legal practices and traditions, the Committee needs to ensure that such access is facilitated as much as possible, and above all, not arbitrarily denied when requested. Such participation is especially important in the case of an increase of sentence, reversal of an acquittal, or more generally, where the issues at stake in the appeal proceedings are of crucial importance and require an author's personal presence. That does not seem to have been the case here.

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<sup>53</sup> See Pinchuk v. Belarus, Communication No. 2165/2012, para. 7.5.

<sup>54</sup> General Comment No. 32 (2007), para. 36.

<sup>55</sup> See Schabas, Nowak's CCPR Commentary, 3rd revised edition (N.P.Engel, Publisher, 2019), pp. 396-399, especially para. 81. For an overview of the position of the European Court of Human Rights see Guide on Article 6 (n 2), section V(B)(2)(c) 'Presence at the appeal hearing', pp. 59-61, paras. 297-306.

<sup>56</sup> Guide on Article 6 (n 2), especially para. 300.