



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 2016/2010

##### Views adopted by the Committee at its 115th session (19 October-6 November 2015)

<i>Submitted by:</i>	Leonid Sudalenko (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	23 May 2010 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 12 August 2010 (not issued in document form)
<i>Date of adoption of Views:</i>	5 November 2015
<i>Subject matter:</i>	Refusal of authorization to hold a peaceful assembly; freedom of expression; fair trial; effective remedy.
<i>Procedural issues:</i>	Admissibility <i>ratione materiae</i> ; exhaustion of domestic remedies
<i>Substantive issues:</i>	Freedom of expression; freedom of assembly; fair trial; effective remedy
<i>Articles of the Covenant:</i>	2 (2), 2 (3), 14 (1), 19 and 21
<i>Articles of the Optional Protocol:</i>	2, 3 and 5



## Annex

### **Views of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights (115th session)**

concerning

#### **Communication No. 2016/2010\***

*Submitted by:* Leonid Sudalenko (not represented by counsel)

*Alleged victim:* The author

*State party:* Belarus

*Date of communication:* 23 May 2010 (initial submission)

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

*Meeting* on 5 November 2015,

*Having concluded* its consideration of communication No. 2016/2010, submitted to it by Leonid Sudalenko under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication and the State party,

*Adopts the following:*

#### **Views under article 5 (4) of the Optional Protocol**

1. The author of the communication is Leonid Sudalenko, a national of Belarus born in 1966. He claims to be a victim of a violation by Belarus of his rights under articles 14 (1), 19 and 21, read in conjunction with article 2 (2) and (3), of the Covenant. The Optional Protocol entered into force for Belarus on 30 December 1992. The author is not represented by counsel.

#### **The facts as submitted by the author**

2.1 On 23 November 2009, the author filed an application with the Gomel City Executive Committee to hold a picket in one of the central squares in Gomel ("Uprising" Square) on 10 December 2009, in order to publicly express his personal opinion on the

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\* The following members of the Working Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Anja Seibert-Fohr, Dheerujlall Seetulsingh, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

Two opinions signed by two Committee members are appended to the present Views.

occasion of the anniversary of the adoption of the Universal Declaration of Human Rights on that day; Human Rights Day is a recognized festive day in Belarus.

2.2 On 2 December 2009, the Executive Committee, by decision No. 1410, refused to authorize the author to hold the picket. The basis for the refusal was the author's failure to comply with the requirements of decision No. 299 of the Executive Committee of 2 April 2008 on mass events in the city of Gomel, adopted on the basis of the Law on Mass Events in Belarus of 30 December 1997. The Executive Committee noted, firstly, that the author had planned to organize a picket outside the location designated for this purpose in decision No. 299 and, secondly, that he had not concluded the required contracts with the city service providers for the maintenance of security, medical assistance and cleaning.

2.3 On 7 December 2009, the author appealed the refusal of the Executive Committee to the Central District Court of Gomel, which rejected his appeal on 30 December 2009. On 22 January 2010, he appealed the decision of the District Court to the Regional Court of Gomel, which rejected his appeal on 23 February 2010. On 11 March and 19 April 2010, the author appealed the decision of the Regional Court to the Chair of the Regional Court and to the Chair of the Supreme Court, through the supervisory review procedure. Both appeals were dismissed, on 14 April 2010 and 15 May 2010 respectively.

2.4 In his complaints to the courts, the author claimed that the refusal of the Executive Committee limited his rights to freedom of expression and freedom of assembly as guaranteed by the Constitution of Belarus and the Covenant and that no explanation had been provided of why the restriction of his rights was necessary. The courts found that the refusal of the Executive Committee was lawful as it was based on decision No. 299.

2.5 In his complaint of 7 December 2009 to the District Court, the author requested the court to find Executive Committee decision No. 299 incompatible with both the Constitution of Belarus and the Covenant. He claimed that the limitations set out in the decision, namely the requirement to hold any assembly at a single designated location, in a remote part of a city with a population of 500,000, and to conclude contracts to pay city service providers violated the very essence of the rights in question. The District Court rejected this part of the author's claim on 14 December 2009, concluding that since decision No. 299 had been registered in the National Registry of Legal Acts, it could not be challenged in courts of general jurisdiction.

2.6 On 22 December 2009, the author appealed the decision of the District Court to the Regional Court. The Regional Court rejected the author's appeal on 14 January 2010. On 11 March 2010 and 22 March 2010 respectively, the author appealed the decision of the Regional Court to the Chair of the Regional Court and to the Chair of the Supreme Court, through the supervisory review procedure. The author's appeals were dismissed on 19 March 2010 and 6 May 2010, respectively.<sup>1</sup> The author submits that he has thus exhausted all effective domestic remedies.

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<sup>1</sup> In addition, on 11 March 2010, the author complained to the Chair of the Constitutional Court, challenging Executive Committee decision No. 299. On 26 March 2010, his complaint was returned to him without having been considered. The Constitutional Court explained to the author that under the domestic law individuals could not apply directly to the Constitutional Court but should pass through the authorities and officials empowered with that right, i.e., the President, the House of Representatives, the Council of the Republic, the Supreme Court, the High Administrative Court or the Council of Ministers.

**The complaint**

3.1 The author claims that the rejection by the national authorities of his request to hold a picket amounts to a violation of his rights under articles 19 and 21, read in conjunction with articles 2 (2) and 2 (3), of the Covenant. He claims that neither the Executive Committee nor the courts considered whether the limitations imposed on his rights under decision No. 299 were justified by reasons of national security or public safety, public order, the protection of public health or morals, or whether they were necessary for the protection of the rights and freedoms of others. He alleges that decision No. 299, restricting all mass events in Gomel to a single, remote location and the requirement that the organizers of the events conclude prior paid contracts with city service providers unnecessarily limits the rights under articles 19 and 21 of the Covenant. He also claims that the provisions of the Law on Mass Events enable the local executive authorities to decide on permanent locations for the holding of mass events without providing justification for such limitation.

3.2 The author also claims that the impossibility of challenging in a civil lawsuit the lawfulness of the legislative act before the courts of general jurisdiction deprives him of an effective remedy and amounts to a violation of article 14 (1), read in conjunction with article 2 (2) and (3), of the Covenant. In this context, the author asks the Committee to recommend to the State party that it align its legislation with the international standards set out in articles 19, 21 and 14 (1) of the Covenant and requests compensation for his expenses, including the court fees, and for non-pecuniary damages.

**State party's observations**

4.1 In a note verbale dated 25 January 2012, the State party reiterated its position expressed in the note verbale dated 6 January 2011 regarding unjustified registration of communications submitted by individuals who had not exhausted all available domestic remedies in the State party, including appealing to the Prosecutor's Office for supervisory review of a judgement having the force of *res judicata*, in violation of article 2 of the Optional Protocol. Additionally, the State party submits that upon becoming a party to the Optional Protocol, it agreed, under article 1 thereof, to recognize the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State party of any rights protected by the Covenant. It notes, however, that that recognition was undertaken in conjunction with other provisions of the Optional Protocol, including those establishing criteria regarding petitioners and the admissibility of their communications, in particular articles 2 and 5.

4.2 The State party maintains that, under the Optional Protocol, States parties have no obligation to recognize the Committee's rules of procedure or its interpretation of the provisions of the Optional Protocol, which could be effective only when undertaken in accordance with the Vienna Convention on the Law of Treaties. It submits that, in relation to the complaint procedure, States parties should be guided first and foremost by the provisions of the Optional Protocol and that references to the Committee's long-standing practice, methods of work and case law are not subjects of the Optional Protocol. It also states that any communication registered in violation of the provisions of the Optional Protocol will be viewed by the State party as incompatible with the Optional Protocol and will be rejected without observations on the admissibility or the merits, and that any decision taken by the Committee on such rejected communications will be considered by its authorities as "invalid". The State party considers that the present communication was registered in violation of the Optional Protocol.

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

5.1 In a letter dated 21 March 2012, the author submits that he does not consider the supervisory review before the Prosecutor's Office as an effective domestic remedy and refers to the Committee's case law on the matter.<sup>2</sup>

5.2 Regarding the State party's challenge of the Committee's rules of procedure, the author submits that the Committee interprets the provisions of the Covenant and that "the views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument".<sup>3</sup> According to the author, based on these, the State party must respect the Committee's decisions, as well as its "standards, practice, and methods of work".

### **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; that it has no obligations regarding the recognition of the Committee's rules of procedure and regarding the Committee's interpretation of the Optional Protocol's provisions; and that if a decision is taken by the Committee on the present communication, it will be considered "invalid" by its authorities.

6.2 The Committee recalls that article 39 (2) of the Covenant authorizes it to establish its own rules of procedure, which the States parties have agreed to recognize. 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>4</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 the admissibility and of the merits of the communications, the State party has violated 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.

<sup>2</sup> Communication No. 1418/2005, *Iskiyaev v. Uzbekistan*, Views adopted on 20 March 2009.

<sup>3</sup> Reference is made to the Committee's general comment No. 33 (2008) on the obligations of States parties under the Optional Protocol.

<sup>4</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 and No. 869/1999, *Piandiong et al. v. the Philippines*, Views adopted on 19 October 2000, para. 5.1.

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.

7.3 The Committee takes note of the State party's objection that the author has failed to request the Prosecutor's Office to initiate a supervisory review of the domestic courts' decisions. The Committee recalls its jurisprudence, according to which a petition for supervisory review to a Prosecutor's Office requesting a review of court decisions that have taken effect does not constitute a remedy which has to be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.<sup>5</sup> Accordingly, it considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

7.4 The Committee takes note of the author's claim that his rights under article 14 (1), read in conjunction with article 2 (2) and (3), of the Covenant have been violated since the courts refused to consider his claim concerning the unlawfulness of decision No. 299 of 2 April 2008 of the Gomel City Executive Committee on mass events in Gomel City. In this regard, the Committee notes that under the national legislation, the legality of laws can be verified only by the Constitutional Court and not by the courts of general jurisdiction. Individuals can apply to the Constitutional Court through a number of authorities and officials. The Committee notes that the initiation of proceedings before a judicial body that manifestly lacks jurisdiction to deal with a matter cannot trigger a violation of the guarantees provided under article 14 (1) of the Covenant.<sup>6</sup> The Committee therefore concludes that this part of the communication is inadmissible *ratione materiae* under article 3 of the Optional Protocol.

7.5 The Committee notes the author's claim that his request to hold a picket was rejected by the local authorities and that neither the Executive Committee nor the courts considered whether the limitation imposed on his rights under decision No. 299 were justified. The author also claims that decision No. 299, adopted on the basis of the Law on Mass Events, unnecessarily limits the rights under articles 19 and 21 of the Covenant. The Committee further notes the author's claim that his rights under articles 19 and 21, read in conjunction with article 2 (2) and (3), of the Covenant were violated. In the absence of any information provided by the State party on the facts of this case, the Committee declares the communication admissible as far as it raises issues under articles 19 and 21, read alone and in conjunction with article 2 (2) and (3), of the Covenant, and proceeds with its examination of the merits.

#### *Consideration of the merits*

8.1 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.

8.2 The Committee notes the author's claim that Executive Committee decision No. 299 unduly restricts the right to freedom of expression and the right of peaceful assembly by imposing on the organizers of mass events an obligation to conclude paid contracts with city service providers and by allocating a single and remote location for all mass events to be held in Gomel, a city of 500,000 inhabitants. The Committee also notes the author's allegation that the formal application of decision No. 299 by the Executive Committee in

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

<sup>6</sup> See, for example, communication No. 1182/2003, *Karatsis v. Cyprus*, Views adopted on 25 July 2005, para. 6.5.

his case, without consideration of the need for the limitations on the exercise of his rights, constitutes an unjustified restriction on his rights under articles 19 and 21 of the Covenant.

8.3 The Committee recalls, first, that article 19 (3) of the Covenant allows certain restrictions only as provided by law and 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. The Committee refers to its general comment No. 34 (2011) on the freedoms of opinion and expression, which 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). 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>7</sup> The Committee recalls<sup>8</sup> that it is for the State party to demonstrate that the restrictions on the author's rights under article 19 were necessary and proportionate and that even if, in principle, States parties may introduce a system aimed at reconciling an individual's freedom to impart information and the general interest of maintaining public order in a certain area, such system must not operate in a way that is incompatible with article 19 of the Covenant.

8.4 The Committee recalls, next, 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, including the right to a stationary assembly (such as a picket) 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) is necessary in a democratic society, in the interests of national security or public safety, public order, 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.

8.5 In the present case, the author chose one of the central squares in Gomel for his picket to publicly express his opinion on Human Rights Day. The Committee notes that the national authorities rejected the author's request to organize a picket on the grounds that the planned location of the event was different from the only location permitted under decision No. 299 and because the author had failed to conclude contracts with city service providers. It also observes that from the material on file, it transpires that the national authorities have failed to demonstrate how a picket held in the location proposed by the author would jeopardize national security, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. It notes in particular that neither the decision of the Executive Committee to refuse the author's request to hold a picket nor the court decisions provide any explanation of why the restrictions imposed in decision No. 299 and applied in the author's case were necessary and justified.

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<sup>7</sup> Ibid., para. 22.

<sup>8</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.

8.6 The Committee further notes that the de facto prohibition imposed by decision No. 299 of an assembly in any public location in the entire city of Gomel, with the exception of a single remote area, unduly limits the right of assembly and the freedom of expression. It also notes that requesting the organizer of a one-person picket to contract additional services in order to hold a picket imposes a disproportionate burden on the right of peaceful assembly and the right to freedom of expression in the same context. In these circumstances, the Committee finds the formal application of decision No. 299 and the rejection by the State party's authorities of the author's request to hold a picket to be unjustified and concludes that the authors' rights under articles 19 and 21 of the Covenant have been violated.

8.7 In the light of this conclusion, the Committee decides not to examine the author's claims under articles 19 and 21, read in conjunction with article 2 (2) and (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 of the author's rights under articles 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. Accordingly, the State party is obligated, inter alia, to reimburse any expenses incurred by the author and to provide him with adequate compensation. 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 revise its legislation in accordance with its obligation under article 2 (2), in particular decision No. 299 of the Gomel City Executive Committee and the Law on Mass Events of 30 December 1997, as they have been applied in the present case, with a view to ensuring that the rights under articles 19 and 21 of the Covenant may be fully enjoyed in the State party.<sup>9</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 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 Belarusian and Russian in the State party.

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<sup>9</sup> See, for example, communications No. 1851/20008, *Sekerko v. Belarus*, Views adopted on 28 October 2013, para. 11; No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, para. 9; No. 1790/2008, *Govsha et al. v. Belarus*, Views adopted on 27 July 2012, para. 11; mutatis mutandis, No. 1969/2010, *Surgan v. Belarus*, Views adopted on 15 July 2015; and No. 1992/2010, *Sudalenko v. Belarus*, Views adopted on 27 March 2015, para. 10.



## Appendix I

### Individual opinion of Committee member Sarah Cleveland (concurring)

1. In the present communication, the author claims that the State party violated its obligations under articles 19 and 21, read in conjunction with article 2 (2), of the Covenant. The Committee notably finds this claim admissible, but ultimately does not examine it. I also believe that it was available to the Committee to find a violation of the relevant substantive articles in conjunction with article 2 (2).

3. The author of this communication was denied permission to hold pickets in a central square of Gomel on the anniversary of the adoption of the Universal Declaration of Human Rights, due to their failure to comply with decision No. 299 of the Executive Committee of Gomel, which was adopted pursuant to the Law on Mass Events in Belarus of 30 December 1997. This legal regime required prior authorization for all public gatherings in Gomel, a city of approximately 500,000 people; limited all gatherings not organized by State authorities to a single, remote, location; and required organizers of any such public events to enter into contracts, at their own expense, to ensure public safety and security, medical care and clean-up services. Although the authors challenged in domestic court the denial of their requests for permission to demonstrate, the courts upheld the denials as lawful under this legal framework.

4. In approximately 20 cases, this Committee has found that application of the Law on Mass Events of Belarus violated the rights of individuals under articles 19, 21 and/or 22 on freedom of expression, assembly and association. At least six of those cases also involved decision No. 299. In those cases, the Committee repeatedly called upon Belarus to review its legislation in order to bring its legal regime into line with the Covenant and to prevent similar violations in the future.<sup>a</sup>

5. In my view, the circumstances in these cases directly implicate the State party's obligations under article 2 (2) of the Covenant. That provision states:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

6. The Committee has long recognized that article 2 establishes accessory obligations and cannot independently serve as the basis for a claim of a violation under the Optional Protocol.<sup>b</sup> Instead, a violation of article 2 must arise in conjunction with the violation of another substantive article of the Covenant. As we recognized in general comment No. 31 (2004) on the the nature of the legal obligation on States parties to the Covenant, article 2 (2) also allows States to achieve compliance through means that are consistent with their own "domestic constitutional structures".<sup>c</sup> However, States parties also may not invoke

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<sup>a</sup> See, for example, communications No. 1851/2008, *Sekerko v. Belarus*, Views adopted on 28 October 2013), para. 11; No. 1948/2010, *Turchenyak and others v. Belarus*, Views adopted on 24 July 2013, para. 9 and No. 1790/2008, *Govsha et al. v. Belarus*, Views adopted on 27 July 2012, para. 11.

<sup>b</sup> See, for example, communication No. 2202/2012, *Castañeda v. Mexico*, Views adopted on 18 July 2013, para. 6.8.

<sup>c</sup> See general comment No. 31, para. 13.

their domestic law to justify a failure to perform or give effect to obligations under the Covenant.<sup>d</sup> To the contrary, where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees.<sup>e</sup>

7. In *Poliakov v. Belarus*, the Committee established that article 2 can be the basis for a claim for a violation under the Optional Protocol, in conjunction with another article, when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim.<sup>f</sup>

8. This concept of a "distinct violation" of article 2 that nevertheless arises in conjunction with the violation of another substantive article of the Covenant can be understood in the light of the Committee's long-standing approach to article 2 (3). That provision requires States parties to make reparation to individuals whose Covenant rights have been violated.<sup>g</sup> The Committee has applied article 2 (3) in two ways. First, in any case in which the Committee finds a violation of the Covenant, article 2 (3) imposes an obligation on the State party to provide appropriate reparation to the victim. The Committee thus invokes article 2 (3) as the basis for a remedial paragraph in any Views in which the Committee finds a violation, since the Committee's finding of a violation triggers the remedial obligations of the State party under article 2 (3) to provide full reparation.

9. Second, an individual may establish a violation in conjunction with article 2 (3) when a State has been on notice of serious human rights violations committed within its jurisdiction and where the State has persistently failed to fulfil its obligations to provide the victim with a remedy. For example, in cases involving past violations such as torture, extrajudicial killings and enforced disappearance, the State party is obligated to investigate and bring perpetrators to justice<sup>h</sup> and to compensate victims. When the State party has persistently failed in this obligation, an individual can establish a "distinct violation" of article 2 (3), in conjunction with the relevant substantive article of the Covenant, such as article 6 or 7.<sup>i</sup>

10. In the present cases, consistent with the first approach to article 2 (3) above, the Committee's remedial paragraph (para. 10) expressly invokes the State party's obligations under article 2 (2) as the basis for directing the State party to revise its legislation to conform it to the obligations under the Covenant.<sup>j</sup> I agree with this decision.

11. Moreover, consistent with our approach to violations of article 2 (3), I believe it is also available to the Committee to find a violation in conjunction with article 2 (2) in situations where, as here, a State's standing legislation, or the standing interpretation of the laws by a State's highest court, has persistently and systematically been the source of a Covenant violation and the State party has failed to comply with its binding obligation

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<sup>d</sup> Ibid., para. 4.

<sup>e</sup> Ibid., para. 13.

<sup>f</sup> See communication No. 2030/2011, *Poliakov v. Belarus*, Views adopted on 17 July 2014, para. 7.4.

<sup>g</sup> See general comment No. 31, para. 16.

<sup>h</sup> Ibid., para. 18.

<sup>i</sup> See, for example, communication No. 1997/2010, *Rizvanović v. Bosnia and Herzegovina*, Views adopted on 21 March 2014, paras. 9.6-9.7.

<sup>j</sup> See general comment No. 31, para. 17 ("[T]he purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures . . . to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.").

under article 2 (2) to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

12. The Committee repeatedly has found that Belarus' relevant legal framework — in these cases article 5 of the Law on Mass Events and decision No. 299 — violates the freedoms of expression, assembly and association under the Covenant. We repeatedly have called upon the State party to review its legislation in the light of these violations. The State party has equally persistently failed to fulfil its “unqualified and immediate” obligation to change its domestic law to meet the standards imposed by the Covenant.<sup>k</sup>

13. Persistent failure by a State party to conform its laws to give effect to rights under the Covenant constitutes a failure to comply with article 2 (2) and should, in my view, be understood to give rise to a “distinct violation” of the Covenant — a violation of the State party's obligations under article 2 (2), in conjunction with the relevant substantive article. Other equivalent contexts in which a finding of a violation in conjunction with article 2 (2) would be appropriate could include certain conscientious objector cases, where the Committee has repeatedly found violations of article 18 as a result of a State party's failure to adopt legislation providing for civilian alternatives to military service and has repeatedly recommended review of the relevant legislation<sup>l</sup> as well as standing laws imposing a mandatory death penalty.<sup>m</sup>

14. Recognizing a violation in conjunction with article 2 (2) in contexts of structural and systemic failure by the State to adopt remedial legislation would underscore to the State party, and particularly to relevant lawmakers, the Committee's concern that the source of the violation lies with the State's legal framework and the State's distinct obligation under article 2 (2) to conform its domestic laws to give effect to Covenant rights.<sup>n</sup> Finding such a violation of article 2 (2) in turn would enhance human rights protection for the individual by underscoring the State's obligation to prevent future recurring violations.

15. This approach would also accord with that of other human rights bodies. Pursuant to article 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights has adopted a similar approach in its pilot judgement procedure, in which the Court identifies in its judgement systemic or structural problems with the State party's legal framework that gave rise to the violation and the remedial measures that the State must adopt, including revision of legislation.<sup>o</sup> The Court

<sup>k</sup> See general comment No. 31, para. 14.

<sup>l</sup> See communication No. 2179/2012, *Kim v. the Republic of Korea*, Views adopted on 15 October 2014, para. 9 (finding violations regarding 50 Jehovah's Witnesses sentenced to prison for refusing military service).

<sup>m</sup> See communication No. 1406/2005, *Weerawansa v. Sri Lanka*, Views adopted on 17 March 2009 (finding that the statutory mandatory death penalty violated article 6).

<sup>n</sup> In this regard, a finding of a violation in conjunction with article 2 (2) could also be coupled with a specific recommendation by the Committee in its concluding paragraph that the Views be brought to the attention of the relevant lawmaking authorities. The Committee on the Elimination of Discrimination against Women has recognized the important role of legislatures in preventing and remedying systemic human rights violations. See “National parliaments and the Convention on the Elimination of All Forms of Discrimination against Women”, statement on the relationship of the Committee with parliamentarians, available from [www.ohchr.org/Documents/HRBodies/CEDAW/Statements/Parliamentarians.pdf](http://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/Parliamentarians.pdf).

<sup>o</sup> See, for example, European Court of Human Rights, application No. 31443/96, *Broniowski v. Poland*, judgement of 22 June 2004, paras. 3-4 (finding the violation “originated in a systemic problem connected with the malfunctioning of domestic legislation” and holding that “the respondent State must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question”); rule 61 (3) of the Rules of Court of the European Court of Human

has applied this approach to address persistent failures of the State to introduce remedial legislation. The Inter-American Court of Human Rights has also long identified situations that require revision of the domestic legal framework and, particularly in circumstances of failure of the State to take such action, has found a violation or failure to comply with article 2 of the American Convention on Human Rights in relation to the relevant substantive articles.<sup>P</sup>

16. Accordingly, while I support the Committee's explicit request in paragraph 10 that the State party revise its legislation pursuant to article 2 (2), I believe that it was available to the Committee, and that human rights protection could have been enhanced, by finding a violation in conjunction with article 2 (2) under the circumstances in these cases.

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Rights (2015) (the pilot judgement shall "identify both the nature of the structural or systemic problem ... as well as the type of remedial measures which the Contracting Party concerned is required to take".).

<sup>P</sup> Inter-American Court of Human Rights, *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, judgement of 25 October 2012, para. 403 (8) ("The State has failed to comply with the obligation to adapt its domestic law to the American Convention on Human Rights, contained in Article 2, in relation to Articles 8 (1)...."); *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile*, judgement of 5 February 2001, para. 98 ("[T]he norms of Chilean domestic legislation ... have still not been adapted to the provision of the American Convention.... Consequently, Chile must adopt the appropriate measures to reform its domestic laws".) and para. 103 (4); *Case of Suárez-Rosero v. Ecuador*, judgement of 12 November 1997), paras. 90 and 110 (5) (finding a violation of article 2 in relation to article 7(5)).

## Appendix II

[Original: Spanish]

### **Individual opinion of Committee member Víctor Manuel Rodríguez-Rescia (partly dissenting)**

1. Although I agree with the finding regarding the admissibility and merits of communication No. 2016/2010 in relation to a violation of articles 19 and 21 of the Covenant against the author, I consider that an assessment should have been made of whether there was also a violation of the two rights (freedom of expression and of public and peaceful demonstration) in conjunction with article 2 (2) of the Covenant (positive and negative obligations to adopt legislative or other measures or to refrain from adopting legislative or other measures which impede or hamper the exercise of the rights established in the Covenant), by reason of the existence in Belarus of a domestic law in direct contradiction to articles 19 and 21.

2. Notwithstanding the comments that appear below, I recognize that in dealing with this communication the Committee has made progress in relation to the way it has resolved similar cases involving this State in the past: firstly, because it upheld the possibility of finding a violation of article 2 (2) in conjunction with articles 19 and 21 — although in the end it did not do so, adhering to the formula in paragraph 8.7 — and also because, for the first time, it expressly cited article 2 (2) to justify review of the norms challenged as part of the remedies.

3. My understanding is that the facts of this communication are related not only to the implementation of the law (the restrictions imposed by Executive Committee decision No. 299 of 2 April 2008 on mass events in the city of Gomel, adopted on the basis of article 5 of the Law on Mass Events of Belarus dated 30 December 1997), but also to its very existence, which is the source of numerous resultant violations. Until these provisions are repealed under Belarus internal procedures to bring them into line with Covenant standards, there will be a continuing series of repeat cases in communications such as the present one.

4. I believe that the author has sufficiently substantiated the fact that violations of his rights under articles 19 and 21 are closely related to the existence of these norms. Consequently, the Committee should have exercised its power to assess the compliance with the Covenant of the relevant part of the Law on Mass Events (particularly its article 5) in considering its action on the communication and to declare a violation of article 2 (2), read in conjunction with articles 19 and 21.

5. An examination shows that the challenged text contravenes the Covenant by laying down the following requirements for granting permits to hold public demonstrations: (a) it is the local executive authorities that decide on permanent locations for holding mass events and, in the present case, the place selected is far from public areas (a square at 48 Yubileynaya Street in the city of Gomel); and (b) the law concerned imposes various restrictions that make it practically impossible to grant permits for public demonstrations, for instance the requirement to conclude contracts with city service providers for the maintenance of security, medical assistance and cleaning at the event, which is contrary to the standards of necessity and proportionality for regulating the exercise of the rights of freedom of expression and assembly and also constitutes a violation of article 2 (2) of the Covenant, read in conjunction with its articles 19 and 21.

6. These requirements have direct effects which make it virtually impossible to exercise the right of public demonstration and, hence, the implicit freedom of expression. Persons who can afford to conclude private cleaning, medical assistance and security contracts have a better chance of being granted permission to demonstrate than others who cannot, which entails discriminatory treatment between persons with financial means and those without; since cleaning, security and health services are public in nature, and intrinsic to the exercise of public authority in connection with public demonstrations, they should be provided as an inherent guarantee of such potential and effective exercise. None of the requirements justifies the existence of the restrictive provisions in the context of valid limitations in a democratic State based on the rule of law, in this case ensuring respect for the rights or reputations of others and protection of national security or public safety, public order or public health or morals or the rights and freedoms of others (art.19 (3) (a) and (b), read in conjunction with art. 21).

7. Although the Committee took account of the restrictions in considering its finding of a violation of articles 19 and 21, it was to address the implementation of the law but not to challenge the existence of the provisions concerned, which is the crux of the matter. The Committee should have done so in accordance with its authority under article 2 (2).

8. While I agree with the reasoning of paragraph 10 on remedies, I consider that it should have resulted from a substantive consideration of the facts, the norms that are challenged here being an inherent violation of the Covenant articles mentioned. In my opinion, the Committee should not only have called for a review of those norms (effect/conclusion) but should first have addressed the underlying cause of the review, namely the existence of the law frequently mentioned above.

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