United Nations CCPR/C/119/D/2586/2015

International Covenant on Civil and Political Rights

Advance unedited version

Distr.: General
10 April 2017

Original: English

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2586/2015[*] [**]

Submitted by:	Ulyana Zakharenko and Elena Zakharenko (represented by counsel, Ms Raisa Mikhailovskaya, Head of "The Belorussian Documentation Centre", Latvia)
Alleged victims:	The authors, their deceased son and father respectively, Yuri Zakharenko
State party:	Belarus
Date of communication:	27 March 2014 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 11 March 2015 (not issued in document form)
Date of adoption of Views:	17 March 2017
Subject matter:	Enforced disappearance; right to life; torture, cruel, inhuman or degrading treatment or punishment; deprivation of liberty; effective remedy
Substantive issues:	Arbitrary deprivation of life; torture and ill-treatment; arbitrary deprivation of liberty; lack of proper investigation
Procedural issues:	Third party submission; Exhaustion of domestic remedies

[*] Adopted by the Committee at its 119th session (6 March-29 March 2017).

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

Articles of the Covenant: 2, paragraph 3, 6, 7, 9, 10 and 26

Article of the Optional Protocol: 5 (2) (b)

1. The authors of the communication are Ulyana Zakharenko, a Belarusian citizen born in 1924 and Elena Zakharenko, a German citizen born in 1975. They submit the communication on their own behalf and on behalf of Yury Zakharenko, a Belarussian citizen born in 1953,[1] their son and father, respectively. They claim a violation, by Belarus, of articles 6, 7, 9, 10 and 26 (in conjunction with article 2 (1)) of the Covenant with respect to Mr. Yuri Zakharenko, and a violation of their own rights under article 7 of the Covenant. The authors are represented by Ms Raisa Mikhailovskaya, Head of the Belorussian Documentation Centre in Latvia.[2] The Optional Protocol entered into force for Belarus on 30 December 1992.

The facts as presented by the authors

2.1 Mr. Zakharenko was a former Minister of Interior who was actively opposed to President Lukashenko. In the spring of 1999, the Office of the Gomel Department of the Ministry of Internal Affairs initiated criminal investigation against Mr. Zakharenko. The authors claim that he was placed under police surveillance with his phone tapped and recorded.[3]

2.2 On 7 May 1999, around 9.30 p.m., Mr Zakharenko was forcibly abducted by unidentified individuals on his way home in Minsk. According to the authors, he was forced to get into a car and driven to an unknown destination.

2.3 On 8 May 1999, Elena Zakharenko reported the disappearance of her father to the Department of the Oktyabrsk District of the Ministry of Internal Affairs in Minsk. On 12 and 19 May 1999, the Deputy Minister of Internal Affairs and the Head of the Criminal Police of the Ministry of Internal Affairs, respectively, requested the Prosecutor General to initiate a criminal investigation into the disappearance of Mr. Zakharenko. On 17 September 1999, the Prosecutor's Office of the city of Minsk initiated a criminal investigation under article 101 of the Criminal Code (murder). The investigation was launched more than four months from the initial reporting of Mr. Zakharenko's disappearance and following the disappearance of other political opponents, Mr. Gonchar and Krasovsky, on 16 September 1999.[4]

2.4 The authors submit that Mr. Zakharenko's enforced disappearance was politically motivated. According to the handwritten letter[5] of the Chief of the Criminal Police of Belarus, the Secretary of the Belarusian Security Council has ordered the murder of Mr Yuri Zakharenko, to be carried out by a special group headed by one colonel P., with the assistance of the Minister of Internal Affairs at the time, Mr. Yuri Sivakov. The latter had provided Colonel P. with the pistol,[6] which had been temporarily removed from a temporary confinement ward in the prison. According to the former head of the pre-trial

[1] Ms. Ulyana Zakharenko is the mother of Mr. Yury Zakharenko while Ms. Elena Zakharenko is his daughter.

[2] A power of attorney is attached to the submission. It is submitted that no authorisation is submitted by Mr. Zakharenko due to his alleged enforced disappearance.

[3] According to the authors, the investigation against Mr. Zakharenko was politically motivated due to his opposition activities. The official reason of investigation is not mentioned in the submission.

[4] See communication No. 1820/2008, *Irina Krasovskaya and Valeriya Krasovskaya v. Belarus*, views adopted on 26 March 2012, paras 2.4. and 2.6., referring to the disappearance of Mr. Zakharenko.

[5] A copy of the letter is on file.

[6] The weapon in question was allegedly a special pistol used to carry out the executions of those on death row.

detention centre No. 1 (SIZO-1) in Minsk,[7] Mr. A. , the pistol was provided to the collaborators of Mr. Sivakov, Mr. K. and Mr. D.,[8] on 30 April and 16 September 1999 respectively. According to the authors, Messrs. Gonchar and Krasovsky were disappeared and murdered as was Mr. Zakharenko, and the same pistol has been used as the crime weapon on 16 September 1999[9]; the pistol in question was later returned to the pre-trial detention centre.

2.5 During the investigation, the Minister of Internal Affairs Mr. Sivakov and his collaborators Mr. K. and Mr. D. did not provide any plausible explanation for the removal of the pistol. On 22 November 1999, Colonel P. was arrested. The arrest warrant was signed by the then Chief of the Belarus State Security Committee, Mr. M. and sanctioned by the Prosecutor General. However, Colonel P. was released shortly after, presumably under the direct order of the President.

2.6 The former Prosecutor General of Belarus, requested the Prosecutor General of the Russian Federation for provision of special equipment for searching buried corpses. The new Prosecutor General of Belarus, Mr. Sh., however, withdrew the request and no search was ever conducted. The investigation team composed of the most experienced officials of the Prosecutor's office, the Ministry of Internal Affairs and the State Security Committee was suspended from the case, when the Prosecutor General Mr. B. and the Chief of the State Security Committee, Mr. M. were dismissed from their functions. Since November 2000, no real investigation in Mr. Zakharenko's case has been conducted.

2.7 In June 2002, Mr Zakharenko's wife requested the Court of the Oktyabrski district of the city of Minsk to declare Mr. Zakharenko dead *in absentia* as of the date of his abduction 7 May 1999. On 9 September 2002, the Court discontinued the examination of the application due to the fact that the preliminary investigation of the criminal case into the disappearance of Mr. Zakharenko had not been closed. The author's complaints against the Court's ruling were rejected.

2.8 On 22 January 2004, the authors as well as the relatives of other disappeared politicians, launched an application for a new criminal case to be initiated under article 128 of the Criminal Code (crimes against [the safety of the] humanity), but to no avail.

2.9 None of the claims submitted by the authors to the investigators were investigated and all their requests to the Prosecutor's Office were ignored. The authors submit that the investigation did not bring any outcome in the last 15 years since it is controlled by political powers that oppose it. Every three or four months, a letter is sent to the authors, confirming that the investigation is ongoing, but there is no proof that the investigatory work is being actually pursued.

2.10 In support of their claims, the authors refer to a memorandum by Mr. Christos Pourgourides, prepared for the Parliamentary Assembly of the Council of Europe (the PACE memorandum).[10] The memorandum concludes that the competent Belorussian authorities have not conducted adequate investigation into four disappearances, including Mr. Zakharenko's. On the contrary, it appears that the highest governmental authorities

[7] The SIZO No.1 also includes the death row where executions take place.

[8] The authors submit that this information is confirmed in the record on weapons and ammunition of the prison.

[9] The authors submit that their bodies were buried in the North cemetery of Minsk.

[10] The memorandum presents the results of the investigatory work on four disappearances in Belarus, including the disappearance of Mr. Zakharenko, carried out by the PACE Rapporteur, Christos Pourgourides. The memorandum was drafted following Mr. Pourgourides' visit to Belarus and a number of interviews with government officials.

have taken active steps to cover-up information and that the authorities might be involved in those disappearances.

2.11 The authors submit that they have exhausted all available domestic remedies even though they have been unreasonably prolonged. The disappearance of Mr. Zakharenko was reported to the Working Group on Enforced or Involuntary Disappearances. In the view of the authors, the proceedings before the Working Group do not, however, constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.

The complaint

3.1 With reference to the jurisprudence of the Committee[11] and its General Comment No. 6,[12] the authors claim that the State party has violated article 6 (1) of the Covenant in relation to Mr. Zakharenko, since it has failed to protect his life as it is highly likely that he was the victim of an extrajudicial killing committed by State officials.

3.2 They further claim a violation of article 7 of the Covenant with respect to both Mr. Zakharenko and themselves. Referring to the Committee's jurisprudence, they maintain that the enforced disappearance constitutes a cruel and degrading treatment for the victim but also for the victim's relatives due to their emotional stress and mental suffering.

3.3 The authors also claim a violation of article 9 of the Covenant, since the disappearance of Mr. Zakharenko represents an arbitrary and unlawful arrest by the State party's officials. They also note that Mr. Zakharenko was never brought before a judge and was unable to initiate proceedings before a court.

3.4 The authors further claim a violation of article 10 of the Covenant as the State party officials did not treat Mr. Zakharenko with humanity and respect for his dignity, but he was likely killed while in their hands.

3.5 They also claim a violation of article 26 of the Covenant since Mr. Zakharenko was the victim of enforced disappearence (and had no equal and effective protection against discrimination on political grounds) due to his political opinions.

3.6 The authors also claim all of the above violations in conjunction with article 2(1). The Committee considers that, in fact, this claim raises issues under article 2 (3) of the Covenant.

State party's observations on admissibility

4.1 On 7 May 2015, the State party challenged the admissibility of the communication arguing that it was submitted by a third party, and not the individual himself, as required by article 1 of the Optional Protocol to the Covenant. The State party submits that the Committee does not have the competence to consider communications submitted by third parties.

[11] Communications No. 992/2001, *Bousroual v. Algeria* and No. 1820/2008, *Irina Krasovskaya and Valeriya Krasovskaya v. Belarus.*

[12] Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994), paragraph 4 stating that *"States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life".*

4.2 The State party also argues that the communication is inadmissible due to non-exhaustion of domestic remedies under article 5, paragraph 2 (b), of the Optional Protocol, without specifying which domestic remedies have not been exhausted by the authors. Based thereon, the State party submits that it will "suspend further consideration" of the present communication.

The author's comments on the State party's observations on admissibility

5.1 On 10 August 2015, the authors challenged the State party's argument that the communication was submitted by a third party arguing that Mr. Zakharenko had been missing since 16 years, that he should be legally considered as dead, and that he could not submit a communication. They further claim that no provision of the Optional Protocol prevents the authors to authorise a third person to act before the Committee as their representative.

5.2 The authors reiterate their position that they have exhausted all available domestic remedies, with regard to Mr. Yury Zakharenko under articles 6, 7, 9, 10 and 26 of the Covenant and under article 7 with regard to Ulyana Zakharenko's and Elena Zakharenko's claims. They further resubmit that all available domestic remedies that they have exhausted were in any case unreasonably prolonged. The disappearance of Mr. Zakharenko was reported to the Working Group on Enforced or Involuntary Disappearances. They note that the investigation and prosecution have not brought to any result over 16 years.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearance of Mr. Zakharenko has been reported to the Working Group on Enforced or Involuntary Disappearances. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.[13] Accordingly, the Committee considers that the examination of Mr. Zakharenko's case by the Working Group on Enforced or Involuntary Disappearances does not render the present communication inadmissible under this provision.

6.3 As to the State party's argument that the Committee cannot consider communications submitted to it by a third party, the Committee notes that nothing in the Optional Protocol prevents authors of communications from designating third parties as recipients of the Committee's correspondence on their behalf. The Committee further notes that it has been its longstanding practice that authors may designate representatives of their choice, not only to receive correspondence, but to represent them before the Committee.

[13] Communication No. 1811/2008, *Djebbar and Chihoub v. Algeria*, Views adopted on 31 October 2011, para. 7.2; see also communication No.1820/2008, *Irina Krasovskaya and Valeriya Krasovskaya v. Belarus*, Views adopted on 6 June 2012, para....

Similarly, it has been the longstanding practice of the Committee to allow relatives to bring proceedings for alleged victims, who have died, disappeared or prevented for other reasons from bringing a communication or designating a representative. Both modes of representation are reflected in Rule 96(b) of the Rules of Procedure. In the present case, the authors have presented a duly signed power of attorney for the counsel to represent them and Mr. Zakharenko - their son and father - before the Committee. The Committee therefore considers that for purposes of article 1 of the Optional Protocol, the communication has been presented by the alleged victims, through their duly designated representative. Accordingly, it is not precluded by virtue of article 1 of the Optional Protocol from examining the present communication.

6.4 Regarding the State party's argument that the authors have not exhausted available domestic remedies, the Committee takes note of the authors' claim that they have submitted a number of complaints regarding the disappearance of Mr. Zakharenko and that the investigation has been ongoing since 1999 without any result due to lack of effectiveness of the investigation conducted by the Prosecutor's Office. The Committee takes note in this regard of the complaints filed by the authors on 26 January 2004, 2 August 2004, 12 January 2005, 1 February 2009, 6 February 2009, 9 June 2010, 16 December 2010, unspecified date in February 2011, 30 April 2013, and others (to the Prosecutor of the city of Minsk, to the Investigator of serious cases of the Minsk Prosecutors Office and to the Prosecutor General). The Committee also notes that the State party has not furnished any details about the current state of the investigation and has not demonstrated that the continuing investigation is effective despite the apparent lack of any progress for many years, notwithstanding the serious and grave nature of the authors' allegations. A State party cannot avoid review of a communication merely by relying on the existence of an ongoing investigation when such an investigation is extremely prolonged and patently fruitless. Under these circumstances, the Committee considers that domestic remedies have been unreasonably prolonged[14] and ineffective. Accordingly, it finds that article 5, paragraph 2 (b), of the Optional Protocol does not preclude it from considering the communication.

6.5 The Committee considers that the authors' claims are sufficiently substantiated for purposes of admissibility, and therefore proceeds with their consideration on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes the authors' claim that articles 6, 7, 9, 10 and 26 of the Covenant have been violated by the State party because of the enforced disappearance of Mr. Zakharenko and that it is highly likely that he was the victim of an extrajudicial killing committed by State officials[15]. The Committee notes that the State party has not submitted any information to refute the detailed allegations of the authors concerning the time of the abduction and the alleged murder, the weapon used, the identity of the suspected killer and the involvement of State officials in the act. In these circumstances, due weight must be

[14] See, inter alia, communications No. 1560/2007, *Marcellana and Gumanoy v. Philippines*, Views adopted on 30 October 2008, para. 6.2; No. 1250/2004, *Lalith Rajapakse v. Sri Lanka*, Views adopted on 14 July 2006, paras. 6.1 and 6.2; No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 8.3; and No.1820/2008, *Irina Krasovskaya and Valeriya Krasovskaya v. Belarus*, Views adopted on 6 June 2012, para. 7.4.

[15] See paragraph 3.1 above.

given to the allegations and it must be assumed that the events occurred as described by the authors.[16] Consequently, the Committee finds a violation by the State party of the rights of Mr. Zakharenko under articles 6, 7 and 9 of the Covenant.

7.3 The Committee further recalls its general comment No. 31, according to which States must establish appropriate judicial and administrative mechanisms for addressing claims of rights violations (para. 15), and that criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by articles 6 and 7 of the Covenant.[17] In the present case, the Committee observes that the numerous complaints filed by the authors have not led to specific information concerning the fate and whereabouts of Mr. Zakharenko, nor to the arrest or prosecution of a single perpetrator. The Committee further observes not only the failure of the State to conduct a proper investigation but also the failure to explain at which stage the investigation proceedings are, 16 years after the disappearance of Mr. Zakharenko. In the absence of an explanation of the lack of progress in the investigation by the State party, and in view of the information before it, the Committee concludes that the State party has also violated its obligations under articles 6, 7 and 9, read in conjunction with article 2 (3) of the Covenant, for failure to properly investigate and take appropriate remedial action regarding the disappearance of Mr. Zakharenko.

7.4. The Committee also accepts the authors' uncontested claim that the failure of the State party to promptly and effectively investigate the disappearance of Mr. Zakharenko has significantly exacerbated their emotional stress and caused them mental suffering, resulting in a violation of their rights under article 7 of the Covenant.[18]

7.5. In view of these conclusions, the Committee decides not to examine separately the authors' claims relating to the violation of Mr. Zakharenko under articles 10 and 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is therefore of the view that the facts as submitted before the Committee reveal a violation by Belarus of Mr. Zakharenko's rights under articles 6, 7 and 9 read alone and in conjunction with article 2 (3), and of the authors' rights under article 7 of Covenant.

9. In accordance with article 2(3) (a) of the Covenant, the State party is under an obligation to provide the authors 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: (a) conduct a thorough and effective investigation into the authors' allegations and provide adequate information about the results of its inquiries; and if confirmed, (b) prosecute, try and punish the perpetrators, (c), and provide adequate compensation to the authors for the violations suffered. The State party is also under an obligation to take all necessary steps to prevent the occurrence of similar violations in the future.

[16] See communication No. 1058/2002, *Vargas v. Peru*, Views adopted on 26 October 2005, para. 6.1.

[17] See also communications No. 1619/2007, *Pestaño v. Philippines*, Views adopted on 23 March 2010, para. 7.2; No. 1447/2006, *Amirov v. Russian Federation*, Views adopted on 2 April 2009, para. 11.2; No. 1436/2005, *Sathasivam and Saraswathi v. Sri Lanka*, Views adopted on 8 July 2008, para. 6.4; and No.1820/2008, *Irina Krasovskaya and Valeriya Krasovskaya v. Belarus*, Views adopted on 6 June 2012, para. 8.3.

[18] Cf. communications No. 1159/2003, *Sankara v. Burkina Faso*, Views adopted on 28 March 2006, para. 12.2, and No. 2185/2012, *Dakhal et al. v. Nepal*, Views adopted on 17 March 2017, para. 11.8; .

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 or not 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 in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in Belarusian and Russian in the State party.