



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3105/2018\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	Andrei Mikhalenya, also on behalf of his son, Aleksei Mikhalenya (represented by counsel, Andrei Poluda)
<i>Alleged victims:</i>	The author and his son
<i>State party:</i>	Belarus
<i>Date of communication:</i>	30 January 2018 (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 1 February 2018 (not issued in document form)
<i>Date of adoption of Views:</i>	21 July 2021
<i>Subject matter:</i>	Imposition of the death penalty following an unfair trial
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life; torture; cruel, inhuman or degrading treatment or punishment; liberty and security of person
<i>Articles of the Covenant:</i>	6 (1)–(2), 7, 9 (1)–(4) and 14 (1)–(2) and (3) (a), (b), (d), (e) and (g)
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1.1 The author of the communication is Andrei Mikhalenya, a national of Belarus. The author's son, Aleksei Mikhalenya, also a national of Belarus, who was born in 1984, was at the material time detained on death row awaiting execution. The author claims that the State party has violated his son's rights under articles 6 (1)–(2), 7, 9 (1)–(4) and 14 (1)–(2) and (3) (a), (b), (d), (e) and (g) of the Covenant. He also claims that the State party violated his own

\* Adopted by the Committee at its 132nd session (28 June–23 July 2021).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Kobayuh Tchamdja Kpatcha, Héléne Tigroudja and Gentian Zyberi.

\*\*\* An individual opinion by Committee members Yadh Ben Achour and Héléne Tigroudja (concurring) is annexed to the present Views.



rights under article 7 of the Covenant. The Optional Protocol entered into force for Belarus on 30 December 1992. The authors are represented by counsel.

1.2 On 1 February 2018, pursuant to rule 94 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to carry out the death sentence imposed on the author's son while the case was under examination by the Committee.

1.3 On 17 July 2018, the Committee received information to the effect that the author's son had been executed despite the request for interim measures. On 19 July 2018, the Committee, again acting through its Special Rapporteur on new communications and interim measures, requested urgent clarification of the matter from the State party, drawing the State party's attention to the fact that failure to respect interim measures constituted a violation by States parties of their obligations to cooperate in good faith under the Optional Protocol. No response to this request has been received to date from the State party.

### **Facts as presented by the author**

2.1 On 17 March 2017, the author's son was sentenced to death by Gomel regional court for the murder of two people. The court took into account that he had three previous criminal convictions, including for a murder committed when he was a juvenile. According to the verdict of the court, on 4 March 2016 the author's son, while drunk, killed an elderly couple who were his neighbours. Although the author's son confessed to the killings, he argued that it was done in self-defence, as the couple had attacked him first, when he had gone to their house to ask for scissors.

2.2 On 27 March 2017, the author's son submitted an appeal to the Supreme Court of Belarus. On 6 and 16 June 2017, he supplemented his appeal with additional filings. On 30 June 2017, the Supreme Court confirmed the decision of the trial court. On 19 July 2017, the author submitted an appeal for a supervisory review to the first deputy Chair of the Supreme Court, which was denied on 8 August 2017. The author notes that the same deputy Chair of the Supreme Court was a member of the appellate court that had rejected the author's appeal on 30 June 2017.

2.3 On 16 August 2017, the author's son submitted another appeal for a supervisory review to the Chair of the Supreme Court. On 15 September 2017, a different deputy Chair of the Supreme Court referred to the decision dated 8 August 2017 and denied the second appeal as well. While the author's son also submitted an appeal for a presidential pardon, he did so without much hope that it would bring relief, because there had been only one case in the history of modern Belarus when the President had pardoned someone sentenced to death.

2.4 The author claims that, in addition to the above-mentioned appeals, his son submitted numerous other appeals to the Investigation Department of Belarus, the Supreme Court and the General Prosecutor's Office, but to no avail. The author claims that all the available domestic remedies have been exhausted.

### **Complaint**

3.1 The author claims that his son's rights under article 6 of the Covenant were violated because he was sentenced to death as a result of an unfair trial.

3.2 The author also claims that his son's rights under article 7 of the Covenant were violated because, during the time between his arrest and his first interrogation, the son was subjected to torture and psychological pressure, as a result of which he confessed to the charges against him.<sup>1</sup> The author further claims that the fact that his son was sentenced to death in itself constitutes torture and causes suffering to his family and close ones, in violation of article 7 of the Covenant.

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<sup>1</sup> The father does not provide any details as to how or when the defendant was tortured, or any other details. These claims are also absent from any of the complaints made to the courts in Belarus. The torture claims are first raised in the complaint to the Committee and focus on the claim that the mere fact of sentencing the author to death constitutes torture.

3.3 The author claims that his son's rights under article 9 of the Covenant were violated because he was arrested unlawfully and without cause. The bodies of the two elderly neighbours were reported to the police at 11.15 a.m. on 5 March 2016, which is also when the author's son was detained, which means that the police could not have obtained any evidence of his involvement in the crime before his arrest. The author claims that all the evidence, including his son's confession, was obtained after his arrest at 11.15 a.m. and before his interrogation at 9.59 p.m. Finally, the author claims that the warrant for his son's arrest was issued by the prosecutor on 10 March 2016 and that his son was taken before a judge only 11 months after his arrest, on 8 February 2017.<sup>2</sup>

3.4 The author claims that his son's rights under article 14 (1) of the Covenant were violated because the judge was biased against him and did not stop the prosecutor from expressing his personal negative opinion about the author's son during the trial.

3.5 The author claims that his son's rights under article 14 (2) of the Covenant were violated because, during the trial, the son was held in a metal cage and in handcuffs. Furthermore, even before his sentence had entered into force,<sup>3</sup> the son had to wear a prison uniform with the words "death row inmate" on it. During the trial, several mass media outlets reported on the son's case, called the son a murderer and, in citing some details of the case, referred to the press secretary of Gomel regional court.

3.6 The author claims that his son's rights under article 14 (3) (a), (b), (d), (e) and (g) of the Covenant were violated because the son was not informed about his rights when he was detained. Although the author's son was arrested at 11.15 a.m. on 5 March 2016 and his interrogation took place between 9.59 p.m. and 11.59 p.m. that same day, the court was not interested in knowing what had happened between the time of arrest and the first official interrogation. The author claims that his son was interrogated for two and a half hours at the local police station but there is no official record of the interrogation. The author's son was not provided with a lawyer during that time (between his arrest and the interrogation), despite the fact that the law requires that, in all cases of crimes of an especially grave nature, a lawyer must be provided from the moment of detention (the author claims that his son could not afford to hire his own lawyer). When the author's son was finally provided with a lawyer, he was not able to meet with him confidentially. The author also claims that his son was not able to study some of the case files before his trial and was not allowed to call or cross-examine several witnesses, including the experts who provided examination results in reports dated 22 March 2016 (DNA analysis), 4 April 2016 (autopsy results) and 16 May 2016 (blood spot analysis). A psychiatric examination of the author's son revealed that he had a slight mental disability with behavioural disorders and an addiction to alcohol.

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

4.1 In a note verbale dated 27 March 2018, the State party presented its observations on admissibility and the merits. The State party submits that the author's son was found guilty of the double murder committed in 2016. He was convicted and sentenced to death. He appealed to the Supreme Court of Belarus and, on 30 June 2017, the Supreme Court upheld the lower court's decision. In its decision, the Supreme Court stated that the verdict and sentence were lawful, justified and fair. On that date, the verdict and sentence became enforceable.

4.2 The Supreme Court decision of 30 June 2017 was appealed twice under the supervisory review procedure. Those appeals were rejected, on 8 August and 15 September 2017. The counsel for the author's son filed additional appeal requests under the supervisory review procedure, which were also rejected on 28 November 2017 and on 15 February and 15 March 2018. Under articles 404, 407 and 408 of the Code of Criminal Procedure, the author's son had the right to file a supervisory review request with the Prosecutor General

<sup>2</sup> In Belarus, a prosecutor has the right to issue an arrest warrant.

<sup>3</sup> Right after the verdict and sentence, the convicted is given a short window of time – usually ten days – to file an appeal, and during this time, the verdict and sentence are still pending, i.e. have not become enforceable – though the convicted person is remanded to prison, if the sentence involves confinement.

and the Chair and deputy Chairs of the Supreme Court. The Office of the Prosecutor General rejected the son's requests for intervention on 22 September 2017 and 8 January 2018.

4.3 The State party submits that the son also applied for a presidential pardon, which was still pending at the time of the submission of the communication. In accordance with article 175 of the Criminal Code, the execution of a death sentence is to be suspended while the request for pardon is examined.

4.4 Regarding the claims made under article 14 of the Covenant, the State party submits that they are unjustified and are not supported by the factual circumstances of the case. The author's son was provided with access to a fair, competent and independent tribunal, his appeal was considered with the participation of his lawyers and his rights were explained to him. His rights were also explained to him when he was arrested, which he acknowledged by signing a relevant statement on 5 March 2016. He was also told that he had a right to appeal his arrest and detention, but such an appeal was never filed. After the completion of the investigation, the author's son and his lawyer at the time studied the investigative case file and did not file any objections or petitions.

4.5 During the trial, both the prosecution and the defence had a chance to exercise their rights under the Code of Criminal Procedure. The author's son was represented by two lawyers.

4.6 The State party submits that the claims made under article 6 of the Covenant are equally unpersuasive. Article 6, which protects the right to life, states, inter alia, that no one should be arbitrarily deprived of his or her life. However, in countries where the death penalty has not been abolished, it can be imposed only for the commission of particularly grave crimes and on the basis of a final verdict by a competent court. Article 24 of the Constitution of Belarus similarly stipulates that the death penalty may be applied, until its abolition, as an exceptional measure for the most serious crimes. The court had considered all the circumstances of the case when imposing this penalty, such as concerns for public safety, the purposes and consequences of the actions of the defendant, and the character and personal traits of the defendant. The court had also considered aggravating factors such as the fact that the defendant was under the influence of alcohol during the commission of the crime.

4.7 Concerning the claims of unlawful arrest and detention, the State party submits that these procedures were carried out in accordance with the provisions of and within the time limits imposed by the Code of Criminal Procedure.

4.8 In the light of the above, the State party considers the communication to the Committee as unjustified in its entirety.

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

5.1 In a submission dated 12 July 2018, the author submits that the State party has failed to provide any specific rebuttal to his claims. The supervisory review procedure to which the State party refers is not considered to be an effective remedy and does not need to be exhausted for the purposes of the present communication. Nevertheless, the author's son and his counsel made every possible appeal in the hope of defending the son's rights. The supervisory review procedure is discretionary and depends on the will of the court or prosecutor to bring a protest. The hearing, if granted, is not open to the public. The Committee has long considered this remedy to be ineffective. The Committee has also considered the requests for pardons directed at the President to be an ineffective remedy.

5.2 In addition, under the supervisory review procedure, defendants and their lawyers are not informed of the results of appeals. Some defendants learn that their appeal was denied right before the sentence is carried out. The death penalty itself is carried out in secret, with the defendants, their lawyers and their families not being informed about the time and date of the execution.

#### **Lack of cooperation by the State party**

6.1 The Committee notes that the State party failed to respect the Committee's request for interim measures by executing the author's son before the Committee had concluded its consideration of the communication.

6.2 The Committee recalls that, under article 39 (2) of the Covenant, it is empowered to establish its own rules of procedure, which the States parties have agreed to recognize. The Committee observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation of any of the rights set forth in the Covenant (Optional Protocol, preamble and art. 1). Implicit in the adherence of a State to the Optional Protocol is the undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications and, after examination thereof, to forward its Views to the State party and to the individual concerned (art. 5 (1) and (4)). It is incompatible with its obligations under article 1 of the Optional Protocol for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of communications and in the expression of its Views.<sup>4</sup>

6.3 In the present case, the Committee observes that, when the author submitted the communication, on 31 January 2018, he informed the Committee that his son had been sentenced to death and that the sentence could be carried out at any time. On 1 February 2018, the Committee transmitted to the State party a request not to carry out the death sentence while the case was under examination by the Committee. In July 2018, the Committee received information that the author's son had been executed, despite the request for interim measures of protection. The Committee observes that it is uncontested that the execution in question took place, in total disregard of the request for interim measures of protection addressed to the State party.

6.4 The Committee reiterates that, apart from any violation of the Covenant found against a State party in a communication, a State party commits serious violations of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views concerning the implementation of the obligations of the State party under the Covenant nugatory and futile.<sup>5</sup> In the present case, the author alleged that his son's rights under various provisions of the Covenant had been violated in a manner that directly reflected on the legality of his death sentence. Having been notified of the communication and the request by the Committee for interim measures of protection, the State party committed a serious violation of its obligations under the Optional Protocol by executing the alleged victim before the Committee had concluded its consideration of the communication.

6.5 The Committee recalls that interim measures under rule 94 of its rules of procedure, adopted in accordance with article 39 of the Covenant, are essential to the Committee's role under the Optional Protocol, in order to avoid irreparable damage to the victim of an alleged violation. Violation of that rule, especially by irreversible measures, such as, in the present case, the execution of the author's son, undermines the protection of Covenant rights through the Optional Protocol.<sup>6</sup>

## Issues and proceedings before the Committee

### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

<sup>4</sup> See, inter alia, *Piandiong v. Philippines* (CCPR/C/70/D/869/1999 and Corr.1), para. 5.1; *Maksudov v. Kyrgyzstan* (CCPR/C/93/D/1461, 1462, 1476 and 1477/2006), paras. 10.1–10.3; and *Yuzepchuk v. Belarus* (CCPR/C/112/D/1906/2009), para. 6.2.

<sup>5</sup> See, inter alia, *Idieva v. Tajikistan* (CCPR/C/95/D/1276/2004), para. 7.3; and *Kovaleva and Kozyar v. Belarus* (CCPR/C/106/D/2120/2011), para. 9.4.

<sup>6</sup> See, inter alia, *Saidova v. Tajikistan* (CCPR/C/81/D/964/2001), para. 4.4; *Tolipkhuzhaev v. Uzbekistan* (CCPR/C/96/D/1280/2004), para. 6.4; and *Kovaleva and Kozyar v. Belarus*, para. 9.5.

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 notes the State party's contention that the author's son failed to exhaust all domestic remedies available to him by not filing himself a supervisory review request with the Prosecutor General and the Supreme Court. The Committee observes that counsel for the author's son filed a number of such requests, all of which were rejected (para. 4.2). 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 effective remedy that has to be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.<sup>7</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>8</sup> In the case at hand, the State party has not shown, however, whether and in how many cases the petition to the president of the Supreme Court for supervisory review procedures were applied successfully in cases concerning the right to a fair trial. In such circumstances, and with regard to the supervisory review procedures, the Committee finds that article 5 (2) (b) of the Optional Protocol does not preclude it from considering the communication.<sup>9</sup>

7.4 With regard to the requirements laid down in article 5 (2) (b) of the Optional Protocol, the Committee also takes note of the State party's argument that the author had not exhausted all domestic remedies at the time of submission of the communication, in particular in view of the fact that his application for a presidential pardon was still pending. In this regard, and in the light of the information regarding the execution of the author's son, the Committee reiterates its previous jurisprudence, according to which the presidential pardon is an extraordinary and extrajudicial remedy,<sup>10</sup> and as such does not constitute an effective remedy for the purposes of article 5 (2) (b) of the Optional Protocol. Furthermore, in the present case, the pardon could not have constituted on its own a sufficient remedy for the violations alleged. Therefore, the Committee considers that, with regard to the presidential pardon, it is not precluded by article 5 (2) (b) of the Optional Protocol from considering the communication.

7.5 The Committee has noted the author's claims under articles 7 and 14 (1) and (3) (g) of the Covenant. In the absence of any further pertinent information on file, and due to the general nature of the claims brought forward by the author, however, the Committee considers that the author has failed to sufficiently substantiate these allegations for the purposes of admissibility. Accordingly, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.6 The Committee has also noted the author's allegations that the State party violated his son's rights under articles 9 (1)–(2) and (4) and 14 (3) (a)–(b) and (d) of the Covenant. In the absence of further information, however, 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.

7.7 The Committee considers that the author's remaining claims, raising issues under articles 6 (1)–(2), 9 (3) and 14 (2) and (3) (e) of the Covenant, have been sufficiently

<sup>7</sup> *Alekseev v. Russian Federation* (CCPR/C/109/D/1873/2009), para. 8.4.

<sup>8</sup> *Gelazauskas v. Lithuania* (CCPR/C/77/D/836/1998), para. 7.4; *Sekerko v. Belarus* (CCPR/C/109/D/1851/2008), para. 8.3; *Protosko 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; and *P.L. v. Belarus* (CCPR/C/102/D/1814/2008), para. 6.2.

<sup>9</sup> See, inter alia, *Kostenko v. Russian Federation* (CCPR/C/115/D/2141/2012), para. 6.3; and *Dorofeev v. Russian Federation* (CCPR/C/111/D/2041/2011), para. 9.6.

<sup>10</sup> *Singarasa v. Sri Lanka* (CCPR/C/81/D/1033/2001), para. 6.4; *Chisanga v. Zambia* (CCPR/C/85/D/1132/2002), para. 6.3; *Kovaleva and Kozyar v. Belarus*, para. 10.4; and *Selyun v. Belarus* (CCPR/C/115/D/2289/2013), para. 6.3.

substantiated for the purposes of admissibility and proceeds to their examination on the merits.

*Consideration of the merits*

8.1 The Committee has considered the case in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

8.2 Regarding the claims that the author's son's rights under article 9 (3) of the Covenant were violated, the Committee recalls that, in accordance with article 9 (3), anyone arrested or detained on a criminal charge must be brought promptly before a judge or other officer authorized by law to exercise judicial power. The Committee also recalls that, while the exact meaning of "promptly" may vary depending on objective circumstances, delays should not exceed a few days from the time of arrest. In the view of the Committee, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances.<sup>11</sup> The Committee takes note of the author's unchallenged allegations that his son was apprehended on 5 March 2016 and that he was officially notified of his placement in pretrial detention by a prosecutor on 10 March 2016 but was not brought before a judge until 8 February 2017. The Committee recalls that, in its general comment No. 35 (2014), it stated that it was inherent to the proper exercise of judicial power that such power should be exercised by an authority that was independent, objective and impartial in relation to the issues dealt with, and that a public prosecutor could not be considered as an officer authorized to exercise judicial power within the meaning of article 9 (3).<sup>12</sup> In these circumstances, the Committee considers that the facts before it show that the author's son was not brought promptly before a judge or other officer authorized by law to exercise judicial power, as required under article 9 (3) of the Covenant. Accordingly, the Committee concludes that the above-mentioned facts reveal a violation of the rights of the author's son under article 9 (3) of the Covenant.

8.3 The Committee also notes the allegations that the principle of presumption of innocence was not respected in the author's son's case, because he was handcuffed and kept in a cage during the court hearings and because he wore special clothing for death row inmates before the sentence had entered into force. In this respect, the Committee recalls its jurisprudence, as also reflected in paragraph 30 of its general comment No. 32 (2007), according to which the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, the guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt and requires that persons accused of a criminal act must be treated in accordance with that principle. In the same general comment, the Committee also states that defendants should normally not be shackled or kept in cages during trial, or otherwise presented to the court in a manner indicating that they may be dangerous criminals, and that media should avoid news coverage undermining the presumption of innocence.<sup>13</sup> On the basis of the information before it and in the absence of any other pertinent information or argumentation from the State party concerning the prevalence of the practice of handcuffing and keeping in cages defenders charged with criminal offences and its application in the present case, including the need to keep the author's son handcuffed and in a cage throughout the court trial, the Committee considers that the facts as presented demonstrate that the right of the author's son to be presumed innocent, as guaranteed under article 14 (2) of the Covenant, was violated.

8.4 In addition, the Committee considers the author's claims that his son's rights to call, obtain the attendance of and examine witnesses were violated by the fact that several forensic experts provided testimonies during the investigation but were not called to or questioned in court. Regarding the ability of a person to compel attendance of witnesses and of examining and cross-examining them, the Committee recalls that this guarantee is important for ensuring

<sup>11</sup> See the Committee's general comment No. 35 (2014), para. 33.

<sup>12</sup> *Ibid.*, para. 32.

<sup>13</sup> See also *Pustovoit v. Ukraine* (CCPR/C/110/D/1405/2005), para. 9.2.

an effective defense by the accused and their counsel.<sup>14</sup> However, the right of the accused to obtain the examination of witnesses on his or her behalf is not absolute. It is only a right to have witnesses admitted that are relevant for the defence and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings.<sup>15</sup>

8.5 In the present case, the Committee notes that the submissions from the author, including those regarding the initial sentence and verdict, reveal that all of the experts that provided multiple examination results, including in reports dated 22 March 2016 (DNA analysis), 4 April 2016 (autopsy results) and 16 May 2016 (blood spot analysis), were not called to testify in court and that, therefore, counsel for the author's son were unable to question or cross-examine them. The Committee notes that the State party does not provide pertinent explanations for the unavailability during the court hearings of the expert witnesses, who provided important forensic information. The Committee therefore considers that, in the circumstances of the present case, and in the absence of pertinent explanations from the State party, the State party violated the rights of the author's son under article 14 (3) (e).<sup>16</sup>

8.6 The Committee notes the statement by the State party that the death penalty is not prohibited when imposed for the most serious crimes (see para. 4.6 above). This is provided for in article 6 (2) of the Covenant. The Committee recalls that the term "the most serious crimes" must be read restrictively and appertain only to crimes of extreme gravity involving intentional killing.<sup>17</sup> The author's son was sentenced to death after a conviction for murder, which qualifies as a most serious crime. However, the Covenant also provides that stringent fair trial requirements must be met before the death penalty may be imposed, to comply with article 6 of the Covenant.<sup>18</sup>

8.7 The author claims that his son's right to life, protected under article 6 of the Covenant, was violated, since he was sentenced to death after an unfair trial. In that respect, the Committee recalls its jurisprudence, according to which the imposition of a sentence of death upon the conclusion of a trial in which the provisions of article 14 of the Covenant have not been respected constitutes a violation of article 6 of the Covenant.<sup>19</sup> The Committee recalls that, in cases of trials leading to the imposition of the death penalty, scrupulous respect of the guarantees of fair trial is particularly important.<sup>20</sup> In addition, the Committee also recalls that violation of the fair trial guarantees provided for in article 14 of the Covenant in proceedings resulting in the imposition of the death penalty would render the sentence arbitrary in nature, and in violation of article 6 of the Covenant. Such violations might involve failure to respect the presumption of innocence, which may manifest itself in the accused being placed in a cage or handcuffed during the trial.<sup>21</sup> In the light of the Committee's findings of a violation of article 14 (2) and (3) (e) of the Covenant, with respect to the failure to respect the presumption of innocence and the inability of the author's son to cross-examine expert witnesses, the Committee concludes that the final sentence of death and the subsequent execution of the author's son did not meet the requirements of article 14 and that, as a result, his right to life under article 6 of the Covenant was also violated.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of the rights of the author's son under articles 6, 9 (3) and 14 (2) and (3) (e) of the Covenant. The Committee also concludes that,

<sup>14</sup> General comment No. 32 (2007).

<sup>15</sup> See *Allaberdiev v. Uzbekistan* (CCPR/C/119/D/2555/2015), para. 8.8.

<sup>16</sup> See also *Dugin v. Russian Federation* (CCPR/C/81/D/815/1998), para. 9.3; and *Rouse v. Philippines* (CCPR/C/84/D/1089/2002), para. 7.5.

<sup>17</sup> General comment No. 36 (2018), para. 35.

<sup>18</sup> *Ibid.*, para. 41.

<sup>19</sup> General comment No. 32 (2007), para. 59. See also *Levy v. Jamaica* (CCPR/C/64/D/719/1996), para. 7.3; *Kurbanova v. Tajikistan* (CCPR/C/79/D/1096/2002), para. 7.7; *Shukurova v. Tajikistan* (CCPR/C/86/D/1044/2002), para. 8.6; *Idieva v. Tajikistan*, para. 9.7; *Khoroshenko v. Russian Federation* (CCPR/C/101/D/1304/2004), para. 9.11; *Gunan v. Kyrgyzstan* (CCPR/C/102/D/1545/2007), para. 6.5; and *Grunov and Grunova v. Belarus* (CCPR/C/123/D/2375/2014-CCPR/C/123/D/2690/2015), para. 8.6.

<sup>20</sup> General comment No. 32 (2007), para. 59.

<sup>21</sup> General comment No. 36 (2018), para. 41.



by not respecting its request for interim measures, the State party violated its obligations under article 1 of the Optional Protocol.

10. 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. In the present case, the State party is under the obligation to provide adequate compensation to the author for the violations suffered by his son. The State party is also obligated, inter alia, to take all steps necessary to prevent similar violations from occurring in the future.

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 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.

## Annex

### Joint opinion of Committee members Yadh Ben Achour and H el ene Tigroudja (concurring)

1. While we fully concur with the position of the Committee on the substance of the claims and with its conclusion (para. 9),<sup>1</sup> in other words that the facts disclose a violation of the right to life, the right to individual liberty and the right to a fair trial, we hereby express our discomfort on a procedural but critical aspect of the case regarding the non-implementation by Belarus of the interim measures issued by the Committee and the lack of cooperation of the State throughout the process.
2. In February 2018, the Committee requested the State party not to carry out the death sentence imposed on the author’s son while the case was under examination by the Committee (para. 1.2). However, several months after the request, the Committee was informed that the author’s son had been executed (para. 1.3). Belarus provided no clarification for such a blatant violation of the interim measures and its duty to cooperate with the Committee.
3. Our discomfort arises from the fact that the wrongful behaviour of Belarus has not been well captured by the Committee in its Views – nor has it been well captured in other decisions either – and it is time for the Committee to modify and clarify its position. Under the heading “Lack of cooperation by the State party”, which is located before the section headed “Issues and proceedings before the Committee”, the State’s acts are analysed. In paragraph 6.4, the Committee uses strong language to qualify the State’s acts and reiterates that a State party commits serious violations of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views concerning the implementation of the obligations of the State party under the Covenant nugatory and futile. This is in line with its previous jurisprudence and the position of other international courts, tribunals and bodies addressing States’ international obligation to respect interim or precautionary measures.<sup>2</sup>
4. Therefore, there is no legal justification for separating the section on lack of cooperation from the section on issues and proceedings. On the contrary, doing so blurs the legal reasoning of the Committee and the message sent to States parties. At the end of paragraph 9, the Committee concludes that, by not respecting its request for interim measures, the State party violated its obligations under article 1 of the Optional Protocol. This clearly demonstrates that the Committee did indeed find a violation of an international procedural obligation, namely the obligation of States parties to the Optional Protocol to provide effective access to the individual complaints mechanism of the Committee. Consequently, the non-implementation of the interim measures should have been addressed in the section on issues and proceedings.<sup>3</sup> Procedural obligations are international obligations that States are responsible for implementing.
5. Some scholars have explicitly called for the improvement of judicial practices and, especially, stressed that “international adjudicators should indicate legal consequences of

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<sup>1</sup> Unless otherwise indicated, the paragraph numbers in parentheses refer to the Views of the Committee.

<sup>2</sup> See European Court of Human Rights, *Mamatkulov and Askarov v. Turkey*, application Nos. 46827/99 and 46951/99, Judgment, 4 February 2005, paras. 99 ff. See also the Nijmegen principles and guidelines on interim measures for the protection of human rights, drafted by a group of scholars in 2021 (available at [www.ru.nl/law/ster/research/nijmegen-principles-and-guidelines-on-interim/read-the-nijmegen-principles-2021/](http://www.ru.nl/law/ster/research/nijmegen-principles-and-guidelines-on-interim/read-the-nijmegen-principles-2021/)).

<sup>3</sup> In fact, in other Views adopted at the same session, the Committee adopted a different approach and included the paragraphs on lack of cooperation and on the non-implementation of interim measures in the issues and proceedings section. See, for example, *F.F.J.H. v. Argentina* (CCPR/C/132/D/3238/2018).

non-compliance and the type of remedy required for such breach”.<sup>4</sup> Considering the grave and irreversible consequences of the breach of interim measures in cases involving the death penalty, it is time for the Committee to adopt a clear, consistent and legally reasoned position on this critical issue.

6. We therefore consider that, in the present case, such a critical issue should have been included in a specific paragraph in the section of the Views on issues and proceedings, as well as in the part on remedies. The Committee should have clearly spelled out the consequences for the State of violating this particular obligation under the Optional Protocol.

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<sup>4</sup> Nijmegen principles and guidelines on interim measures for the protection of human rights.