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Communication No. 2120/2011

Views adopted by the Committee at its 106th session (15 October–2
November 2012)

<i>Submitted by:</i>	Lyubov Kovaleva and Tatyana Kozyar (represented by counsel, Roman Kisliak)
<i>Alleged victims:</i>	The authors and Vladislav Kovalev, their son and brother respectively
<i>State party:</i>	Belarus
<i>Date of communication:</i>	14 December 2011
<i>Document references:</i>	Special Rapporteur's rules 92 and 97 decision, transmitted to the State party on 15 December 2011 (not issued in document form)
<i>Date of adoption of Views:</i>	29 October 2012
<i>Subject matter:</i>	Imposition of a death sentence after unfair trial
<i>Procedural issues:</i>	Standing to act on behalf of an alleged victim; State party's failure to cooperate and non-respect of the Committee's request for interim measures; insufficient substantiation of claims; non- exhaustion of domestic remedies
<i>Substantive issues:</i>	Arbitrary deprivation of life; torture and ill- treatment; arbitrary deprivation of liberty; right to be brought promptly before a judge; right to a fair hearing by an independent and impartial tribunal; right to be presumed innocent; right to adequate time and facilities for the preparation of his defence and to communicate with his counsel; right not to be compelled to testify against himself or to confess guilt; right to have his sentence and conviction reviewed by a higher tribunal; interim measures to avoid irreparable damage to the alleged victim; right to freedom of

thought, conscience and religion; violation of obligations under the Optional Protocol

Articles of the Covenant:

6, paragraphs 1 and 2; 7; 9, paragraphs 1 and 3; 14, paragraphs 1, 2, 3 (b), 3 (g) and 5; 18

Articles of the Optional Protocol:

1, 2 and 5, paragraph 2 (b)

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (106th session)

concerning

Communication No. 2120/2011*

Submitted by: Lyubov Kovaleva and Tatyana Kozyar
(represented by counsel, Roman Kisliak)

Alleged victims: The authors and Vladislav Kovalev, their son and brother respectively

State Party: Belarus

Date of communication: 14 December 2011

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

Meeting on 29 October 2012,

Having concluded its consideration of communication No. 2120/2011, submitted to the Human Rights Committee by Lyubov Kovaleva and Tatyana Kozyar 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 authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication are Lyubov Kovaleva and Tatyana Kozyar, both nationals of Belarus. They submit the communication on their own behalf and on behalf of Vladislav Kovalev, a national of Belarus born in 1986 (their son and brother, respectively) who at the time of submission of the communication was detained on death row after being sentenced to death by the Supreme Court of Belarus. The authors claim that Mr. Kovalev is a victim of violations by Belarus of his rights under article 6, paragraphs 1 and 2; article 7, article 9, paragraphs 1 and 3; and article 14, paragraphs 1, 2, 3 (b), 3 (g) and 5, of the International Covenant on Civil and Political Rights.¹ The authors also claim to be victims of a violation of articles 7 and 18 in their own respect. The authors are represented by counsel, Mr. Roman Kisliak.

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

¹ The Optional Protocol entered into force for Belarus on 30 December 1992.

1.2 When registering the communication on 15 December 2011, and pursuant to rule 92 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 Mr. Kovalev's execution while his case was under examination by the Committee. This request for interim measures of protection was subsequently reiterated on 27 January, 14 February, 1 March and 15 March 2012.

1.3 On 14 February 2012, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to examine the admissibility of the communication together with its merits.

1.4 On 15 March 2012, in reply to the State party's note verbale dated 15 March 2012,² the Chairperson of the Committee reiterated the Committee's request for interim measures, drawing the State party's attention to the fact that non-respect of interim measures constitutes a violation by States parties of their obligations to cooperate in good faith under the Optional Protocol to the Covenant.

1.5 On 19 March 2012, the authors notified the Committee that Mr. Kovalev's execution had been carried out. On the same day, the Committee issued a press release, deploring the execution.

The facts as presented by the authors

2.1 The authors submit that, on 30 November 2011, the Supreme Court of Belarus, acting as trial court, convicted Mr. Kovalev for commission of the following crimes: aggravated hooliganism; intentional destruction and damage of property committed by dangerous means; illegal acquisition, carrying, storing and selling explosives; storing, carrying and transporting an explosive device, committed repeatedly by a group of persons upon preliminary arrangement; failure to report the preparation of a particularly serious crime and of the person who committed such a crime and of his/her whereabouts; and aiding and abetting terrorist activities resulting in deaths, serious or other injuries, particularly large-scale damage or other serious consequences.

2.2 Mr. Kovalev was found guilty of these crimes purportedly committed between 2000 and 2011, including of aiding and abetting another defendant, Mr. K., in carrying out terrorist attacks on 11 April 2011 at Oktyabrskaya subway station in the city of Minsk. He was sentenced to death by shooting, without confiscation of property. At the time of submission of the communication, he was awaiting his execution in the investigation detention facility (SIZO) of the Belarus State Security Committee. On 7 December 2011, Mr. Kovalev prepared, in the presence of his lawyer, a power of attorney authorizing his mother, Ms. Kovaleva, to act on his behalf, and a written request for authentication of the document was lodged with the head of the SIZO. Although the lawyer was informed that the document would be ready the next day, it was never provided to him or Mrs. Kovaleva. She complained about this fact to the head of the SIZO, the president of the State Security Committee, the General Prosecutor and the Deputy President of the Supreme Court, to no avail.³

2.3 The authors submit that the decision of the Supreme Court of 30 November 2011 was not subject to appeal. On 7 December 2011, Mr. Kovalev submitted a request for pardon to the President of Belarus. The authors submit that, since both applications for supervisory review and for pardon are discretionary procedures, they had exhausted all available and effective domestic remedies.

The complaint

² See paragraphs 6.1–6.3.

³ Authors provided copies of the respective complaints.

3.1 The authors submit that Mr. Kovalev was arrested on 12 April 2011 and was detained pending trial from 12 April 2011 to 15 September 2011, when he was for the first time brought before a judge. They contend that a delay of more than five months before bringing him before a judicial officer was excessively long and did not meet the requirement of promptness set out in article 9, paragraph 3, of the Covenant, and thus violates Mr. Kovalev's rights under article 9, paragraphs 1 and 3, of the Covenant.

3.2 The authors also claim that, in violation of article 7 and article 14, paragraph 3 (g), of the Covenant, Mr. Kovalev was subjected to physical and psychological pressure with the purpose to secure a confession of guilt. Officers of the Department for Combating Organized Crime talked to him in the absence of a lawyer. As a result of pressure, Mr. Kovalev made self-incriminating statements that allegedly served as a basis for his conviction. Before the confrontation with the other defendant, the investigator told him that if he changed his testimony during the court hearing, the prosecutor would insist on death penalty or life sentence; however, if he admitted his guilt, he would serve a limited prison term.

3.3 Mr. Kovalev subsequently retracted his confession during the court hearings, claiming that he was innocent and had made self-incriminating statements under pressure.⁴ The authors claim that, with the exception of his self-incriminating testimony, the court was not presented with any other evidence in support of his guilt. The video of a man with a bag that was used as evidence in the case and that, according to the prosecution, portrays the other defendant carrying the explosive device was allegedly tampered with and cannot be deemed authentic. The authors also submit that the law enforcement authorities claimed that Mr. Kovalev's bodily injuries attested during the investigation (bruise marks on his head on the right temple and on the chin, bruises on his hands resulted from rigid blunt objects, as well as on his shoulders and knees)⁵ were sustained as a result of the force used in the course of the arrest operation. The authors claim, however, that no such force was used, since Mr. Kovalev was asleep when he was arrested and was woken up by masked officers.⁶ In substantiation of their argument that Mr. Kovalev had not sustained any bodily injuries during his arrest, the authors refer to a picture of him taken on 12 April 2011 following his arrest (part of the materials of the preliminary investigation),⁷ as well as to his videotaped testimony broadcasted on official television channels after his arrest, depicting him sitting on the floor of the apartment with his hands handcuffed behind his back. None of the injuries attested on 13 April 2011 by the forensic medical examination are visible either on the picture or on the videotape, which confirms the fact that Mr. Kovalev was subjected to pressure after his arrest, in violation of the prohibition of torture and his right not to be compelled to testify against himself or to confess guilt, as set forth in articles 7 and 14, paragraph 3 (g), of the Covenant.

3.4 The authors further claim that the trial court was biased and violated the principle of independence and impartiality, in violation of article 14, paragraph 1, of the Covenant. They consider that the court was under pressure: the access in the court room, besides police officers, was controlled by other unidentified persons in civilian clothes, who refused to disclose their identity. They were allegedly obviously officers of intelligence services.

⁴ This fact is confirmed by the trial transcript (excerpts available on file).

⁵ Although the authors could not provide a copy of the report of the forensic medical examination of 13–25 April 2011 attesting these injuries, they provided a copy of a newspaper article published by *BelGazeta* in issue No. 40 (814) of 10 October 2011, which states, inter alia, that the defence lawyer drew the court's attention to Mr. Kovalev's injuries and read out the conclusion of the forensic medical examination, according to which he had bruise marks on the chin, on the right temple of his head, on his hands, forearm and knees, caused by rigid blunt objects.

⁶ Mr. Kovalev stated during the court proceedings that he was woken up by masked officers, this statement being recorded in the trial transcript (excerpt available on file).

⁷ The authors provided the picture in question.

They were checking the persons entering the court room and could refuse access to or even arrest persons who came to attend the trial. This created an atmosphere of fear and is an indication of the pressure exercised on the court, as well as of the violation of the principle of publicity of court proceedings. The court also violated the principle of impartiality and equality of arms by rejecting most of the requests of the defence, at the same time satisfying all the motions submitted by the prosecution.

3.5 Following Mr. Kovalev's arrest and before his conviction by the court, several State officials made public statements affirming his guilt, in violation of the principle of presumption of innocence. His guilt was also widely discussed in the official mass media, in particular the news agency BELTA (Belarusian Telegraph Agency), which presented to the public at large materials of the preliminary investigation as *fait accompli*⁸ long before the consideration of the case by the court, thus engendering among the public a negative attitude towards Mr. Kovalev, as if he was already a confirmed criminal. Moreover, he was kept in a metal cage throughout the court proceedings and the photographs of him behind metal bars in the court room⁹ were published in the local print media. Undoubtedly, such behaviour created a public negative attitude towards Mr. Kovalev and influenced the court in sentencing him to death. The authors recall that, according to paragraph 30 of the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial,¹⁰ defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. They claim that the above facts disclose a violation of Mr. Kovalev's presumption of innocence guaranteed under article 14, paragraph 2, of the Covenant.

3.6 The authors claim a violation of Mr. Kovalev's rights under article 14, paragraph 3 (b), of the Covenant. During the pretrial investigation, Mr. Kovalev was visited by his lawyer only once, and for the rest they met only during investigative actions. The lawyer did not have the opportunity to meet and talk to him confidentially. On 14 September 2011, on the eve of the court hearings, the lawyer was denied access to his client. Mr. Kovalev's requests for confidential meetings with his lawyer were rejected.¹¹ The lawyer was able to talk to Mr. Kovalev only before the start of court hearings when he was brought to the court and put in the cage, i.e. for not more than between three and five minutes. On three occasions, they were able to talk for half an hour, one hour and two hours respectively, as well as before the start of pleadings. The authors claim that, in the circumstances, Mr. Kovalev's right to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing, as set forth in article 14, paragraph 3 (b), of the Covenant, has been violated.

3.7 Furthermore, the authors also allege a violation of article 14, paragraph 5, of the Covenant. They submit that the sentence handed down by the Supreme Court is not subject to appeal, therefore the State party violated Mr. Kovalev's right to have his sentence and conviction reviewed by a higher tribunal.

⁸ The authors supplied, inter alia, a copy of an article published by BELTA on 18 August 2011, citing as a source law enforcement bodies. The article refers to the accused as "terrorists" and discloses extensive information about the acts committed by them as well as other details of the investigation.

⁹ Such photographs are available on file.

¹⁰ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI.

¹¹ The authors provided an excerpt from the trial transcript, confirming that Mr. Kovalev requested the court to give him the opportunity to communicate with his lawyer in private, since he had not had such a possibility before the initiation of court proceedings. The court declined this request, and Mr. Kovalev's lawyer then inquired about the possibility to communicate with the accused during the break, to which the presiding judge responded in the affirmative.

3.8 The authors also claim that Mr. Kovalev was sentenced to death after a trial conducted in violation of the fair trial guarantees set forth in article 14 of the Covenant. Therefore, in accordance with the Committee's established practice, this amounts to a violation of Mr. Kovalev's right to life under article 6 of the Covenant.

3.9 On 13 May 2012, after the execution of Mr. Kovalev had been carried out, the authors supplemented their initial communication to the Committee with new allegations. They claim that, by proceeding with the execution of Mr. Kovalev despite the Committee's request for interim measures to suspend his execution while his case is under consideration by the Committee, the State party violated the provisions of the Optional Protocol to the Covenant. They urge the Committee to recommend that the State party include a rule in its legislation that would provide for the suspension of the execution of a death sentence in a given case in view of the registration by the Committee of an individual communication alleging a violation of the right to life and the Committee's request for interim measures of protection, so as to prevent such violations in the future.

3.10 The authors further submit that the date of the execution was kept secret, and was not known as at 11 March 2012 when they visited Mr. Kovalev in the SIZO. The execution was carried out on 15 March 2012. Based on the practice of execution of capital sentences in Belarus, the authors believe that Mr. Kovalev was not informed beforehand of the date of the execution. Therefore they claim that Mr. Kovalev's situation of uncertainty about his fate from the date on which his death sentence was imposed (30 November 2011) until its execution (15 March 2012) caused him additional mental distress, in violation of article 7 of the Covenant. They request the Committee to find such practice of non-disclosure of the date of the execution unacceptable and contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, and to recommend that Belarus abolish this inhuman practice and bring it in line with its obligations under article 7 of the Covenant.

3.11 Furthermore, the authors submit that, from 13 March 2012 (when mass media published information about the consideration of Mr. Kovalev's application for pardon) to 17 March 2012 (when they received the letter of the Supreme Court informing them that the execution had been carried out) they had no information about Mr. Kovalev's whereabouts and whether he was alive or not. The lawyer was denied access to him. The authors therefore claim that the atmosphere of complete secrecy surrounding the date, time and place of the execution caused them severe mental suffering and stress, in violation of their rights under article 7 of the Covenant, and request the Committee to recommend that the State party abolish such practice of not informing relatives about the date of execution of persons sentenced to death.

3.12 Finally, the authors claim that, following the execution of Mr. Kovalev, the State party's authorities consistently refused to hand over his body for burial, invoking article 175, paragraph 5, of the Criminal Execution Code according to which relatives are not informed in advance of the date of execution, the body is not handed over and the place of burial is not disclosed.¹² They submit that they are Orthodox Christians and wish to bury Mr. Kovalev in accordance with their religious beliefs and rituals. The State party's authorities also refuse to disclose the location of Mr. Kovalev's grave. The authors therefore claim that the State party's refusal to hand over Mr. Kovalev's body for burial amounts to a violation of their rights under article 18 of the Covenant. This refusal prevented them from burying Mr. Kovalev in accordance with the requirements of the Orthodox Christianity, in violation of the right to manifest one's religion and to perform religious rites and rituals, as set forth in article 18 of the Covenant. They request the Committee to recommend that Belarus abolish the practice of not returning the body of executed persons to relatives and of concealing from relatives the location of the burial site.

¹² The authors provided copies of letters emanating from the Ministry of Interior, the Presidential Administration and the Prosecutor's office of Minsk city.

State party's observations on admissibility

4.1 By note verbale dated 24 January 2012, the State party contests the registration of the communication, claiming that it was registered in breach of article 1 of the Optional Protocol. The State party also submits that Mr. Kovalev had not exhausted domestic remedies, as required under the Optional Protocol. Although Mr. Kovalev filed a supervisory review application to the Supreme Court and lodged an application for presidential pardon, both applications were still pending before national authorities.

4.2 According to article 24 of the Constitution of Belarus, the death penalty may be applied in accordance with the law as an exceptional penalty for the most serious crimes and only in accordance with the verdict of a court of law. Pursuant to article 59 of the Criminal Code of Belarus, the death sentence may be applied as an exceptional measure for particularly serious crimes involving premeditated deprivation of life with aggravating circumstances. In this regard, Mr. Kovalev was sentenced to death following the judgment handed down by a court of law, in accordance with the Constitution, the Criminal Code and the Criminal Procedure Code of Belarus and therefore the imposed death penalty is not contrary to the international instruments to which Belarus is a party. According to national legislation, the execution of Mr. Kovalev was suspended until competent authorities decided on his applications for supervisory review and presidential pardon.

4.3 On 25 January 2012, the State party submits, with regard to the present communication together with around sixty other communications that, when becoming a State party to the Optional Protocol, it recognized the competence of the Committee under article 1, but that recognition of competence is done in conjunction with other provisions of the Optional Protocol, including those that set criteria regarding petitioners and admissibility of their communications, in particular articles 2 and 5 of the Optional Protocol. It maintains that under the Optional Protocol, the States parties have no obligations on the recognition of the Committee's rules of procedure and its interpretation of the Protocol's provisions, which "could only be efficient when done in accordance with the Vienna Convention of the Law on Treaties". It submits that "in relation to the complaint procedure the State Parties should be guided first and foremost by the provisions of the Optional Protocol" and that "references to the Committee's longstanding practice, methods of work, case law are not subject of the Optional Protocol". It further submits that "any communication registered in violation of the provisions of the Optional Protocol to the Covenant on Civil and Political Rights will be viewed by the State Party as incompatible with the Protocol and will be rejected without comments on the admissibility or on the merits". The State party further maintains that decisions taken by the Committee on such "declined communications" will be considered by its authorities as "invalid".

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

5.1 The authors provided their comments on 8 February 2012. They confirm that the communication was registered by the Human Rights Committee before the State party decided on Mr. Kovalev's applications for supervisory review and presidential pardon. They claim however that neither the request for pardon, nor the application for supervisory review to the Supreme Court constitute domestic remedies that must be exhausted before a communication is submitted to the Committee. The presidential pardon is a remedy of humanitarian character, and not a legal remedy. Also, the application for supervisory review cannot be regarded as an effective remedy, since the lodging of such an application does not automatically lead to its consideration. The convicted person requests the president of the court to file a protest motion. Only the protest filed at the request of the convicted person triggers the procedure of supervisory review of the court decision. Such a protest motion, if admitted, is considered by a collegial organ, the presidium of the court. However, the supervisory review application itself is considered by a single judge in the absence of public hearings, and therefore cannot be regarded as a remedy.

5.2 The authors further submit that, according to the Committee's established practice, only domestic remedies that are both available and effective must be exhausted. The Committee does not consider the requests for pardon and supervisory review applications as domestic remedies that must be exhausted before a communication is submitted. According to the Committee's jurisprudence, presidential pardons are an extraordinary remedy and as such do not constitute an effective remedy for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.¹³

5.3 On 29 February 2012, the authors informed the Committee that the Supreme Court had dismissed Mr. Kovalev's supervisory review application on 27 February 2012.

State party's further observations on admissibility and merits

6.1 In a note verbale of 15 March 2012, the State party claimed that the communication was inadmissible, since it was submitted to the Committee by third parties and not by the alleged victim himself. With reference to article 1 of the Optional Protocol to the Covenant, it submits that the Republic of Belarus has recognized the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any rights set forth in the Covenant. The Optional Protocol did not approve the competence of the Committee to provide an interpretation of article 1 which deviates from the language agreed by States parties. The Vienna Convention on the Law of Treaties (1969) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) stipulate that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Only subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions shall be taken into account and no such agreement was concluded. Accordingly, the Optional Protocol and its provisions cannot be substituted for the Committee's rules of procedure and its practice because it deprives the Optional Protocol of its object and purpose.

6.2 As regards the merits of the case, the State party submits that Mr. Kovalev was sentenced to death by the Supreme Court of Belarus, the highest judicial instance in Belarus. Article 6, paragraph 2, of the Covenant, stipulates that a sentence of death may be imposed only for the most serious crimes in accordance with the law in force. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

6.3 With regard to the Committee's request not to execute Mr. Kovalev while his communication is pending before the Committee, the State party notes that such a request is beyond the mandate of the Committee and is not binding in terms of its international legal obligations. Accordingly, the Criminal Code is the only source of criminal law in Belarus. It recalls that Mr. Kovalev lodged a supervisory application to the Supreme Court and applied for presidential pardon. In accordance with national legislation, the death penalty cannot be carried out until such applications are considered.

Authors' further submissions

7.1 On 19 March 2012, the authors notified the Committee that on 17 March 2012 they had received a letter from the Supreme Court, dated 16 March 2012, informing them of the execution of Mr. Kovalev.

7.2 On 30 March 2012, the authors provided additional information. They submit that on 11 March 2012 they were granted permission for a meeting with Mr. Kovalev, this being the last time they had seen him alive. On 13 March 2012, local mass media published

¹³ Communication No. 1132/2002, *Chisanga v. Zambia*, Views adopted on 18 October 2005, para. 6.3.

information, according to which Mr. Kovalev's application for pardon had been considered, without however indicating the outcome. On 13 and 14 March 2012, Mr. Kovalev's lawyer was denied access to him, without any explanations. In the evening of 14 March 2012, mass media reported that the President of Belarus refused to grant pardon to Mr. Kovalev and the other defendant.

7.3 On 15 March 2012, Ms. Kovaleva travelled to Minsk in order to find out the fate of her son. On the same day, the lawyer's attempt to obtain a meeting with Mr. Kovalev again failed and he was told that Mr. Kovalev had been transferred, without any further details about his whereabouts being provided. On 15 March 2012, Mrs. Kovaleva submitted a written application to the President of Belarus, requesting the suspension of her son's execution for at least one year in order for the Human Rights Committee to take a decision on his communication.

7.4 On 16 March 2012, Ms. Kovaleva, together with the lawyer of Mr. Kovalev, attempted to obtain information on his whereabouts and whether he was alive. However, they could not obtain any such information from authorities. On 17 March 2012, Mrs. Kovaleva received a letter from the Supreme Court, dated 16 March 2012, informing her of the execution of her son. On 28 March 2012, she obtained the death certificate which indicates 15 March 2012 as the date of death.

State party's further submission

8. By note verbale dated 19 July 2012, the State party informed the Committee that it discontinued proceedings regarding the present communication and will dissociate itself from the Views that might be adopted by the Human Rights Committee.¹⁴

Issues and proceedings before the Committee

The State party's failure to cooperate and to respect the Committee's request for interim measures

9.1 The Committee notes the State party's submission: that there are no legal grounds for the consideration of the present communication insofar as it is registered in violation of article 1 of the Optional Protocol, because the alleged victim did not present the communication himself and has failed to exhaust domestic remedies; that it has no obligations regarding the recognition of the Committee's rules of procedure and its interpretation of the Protocol's provisions; and that decisions taken by the Committee on the above communications will be considered by its authorities as "invalid".

9.2 The Committee recalls that article 39, paragraph 2 of the International Covenant on Civil and Political Rights authorizes it to establish its own rules of procedure, which the States parties have agreed to recognize. The Committee further observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights 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 concerned (art. 5, paras. 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

¹⁴ The State party also provided the Committee with a DVD documentary film, "Subway", containing materials related to the investigation of the criminal charges against the alleged victim and the other defendant, including statements made by them during the investigation.

consideration and examination of the communication, and in the expression of its Views.¹⁵ The Committee observes that, by failing to accept the Committee's determination whether a communication shall be registered and by declaring beforehand that it will not accept the determination of the Committee on the admissibility and the merits of the communication, the State party violates its obligations under article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights.

9.3 Furthermore, the Committee observes that, when submitting the communication on 14 December 2011, the authors informed the Committee that at that point Mr. Kovalev was on death row. On 15 December 2011, the Committee transmitted to the State party a request not to carry out Mr. Kovalev's execution while his case was under consideration; this request for interim measures was reiterated several times. On 19 March 2012, the authors notified the Committee that Mr. Kovalev's execution had been carried out and later provided a copy of the death certificate indicating 15 March 2012 as the date of his death, but not disclosing the cause of his death. The Committee notes that it is uncontested that the execution in question took place despite the fact that a request for interim measures of protection had been duly addressed to the State party and reiterated several times.

9.4 Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or to 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 nugatory and futile. In the present case, the authors allege that Mr. Kovalev was denied his rights under various articles of the Covenant. Having been notified of the communication and the Committee's request for interim measures, the State party breached its obligations under the Protocol by executing the alleged victim before the Committee concluded its consideration of the communication.

9.5 The Committee recalls that interim measures under rule 92 of its rules of procedure adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the rule, especially by irreversible measures such as, as in the present case, the execution of Mr. Kovalev, undermines the protection of Covenant rights through the Optional Protocol.¹⁶

Consideration of admissibility

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

10.2 The Committee takes note of the State party's argument that the communication is inadmissible since it was submitted to the Committee by third parties and not by the alleged victim himself. In this respect, the Committee recalls that rule 96 (b) of its rules of procedure provides that a communication should normally be submitted by the individual personally or by that individual's representative, but that a communication submitted on behalf of an alleged victim may, however, be accepted when it appears that the individual in question is unable to submit the communication personally.¹⁷ In the present case, the

¹⁵ See, inter alia, communications No 869/1999, *Piandiong et al. v. the Philippines*, Views adopted on 19 October 2000, para. 5.1, and No. 1041/2001, *Tulyaganova v. Uzbekistan*, Views adopted on 20 July 2007, paragraphs 6.1–6.3.

¹⁶ See, inter alia, communications No. 964/2001, *Saidova v. Tajikistan*, Views adopted on 8 July 2004, para. 4.4; No. 1044/2002, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, paras. 6.1–6.3; No. 1280/2004, *Tolipkhuzhaev v. Uzbekistan*, Views adopted on 22 July 2009, para. 6.4.

¹⁷ See also communication No. 1355/2005, *X. v. Serbia*, inadmissibility decision of 26 March 2007, para. 6.3.

Committee notes that the alleged victim was being detained on death row at the time of submission of the communication, and that, although he prepared and signed a power of attorney authorizing his mother to act on his behalf, the administration of the SIZO failed to authenticate it, despite several complaints being lodged with relevant domestic authorities (see para. 2.2 above). In the circumstances, the failure to provide a power of attorney cannot be attributable to the alleged victim or to his relatives. The Committee further recalls that, where it is impossible for the victim to authorize the communication, the Committee has considered a close personal relationship to the alleged victim, such as family ties, as a sufficient link to justify an author acting on behalf of the alleged victim.¹⁸ In the present case, the communication was submitted on behalf of the alleged victim by his mother and his sister, who have presented a duly signed power of attorney for the counsel to represent them before the Committee. The Committee therefore considers that the authors are justified by reason of close family connection in acting on behalf of Mr. Kovalev. Accordingly, the Committee is not precluded by article 1 of the Optional Protocol from examining the communication.

10.3 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

10.4 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party's argument that Mr. Kovalev had not exhausted all domestic remedies at the time of submission of his communication in view of the fact that his applications for supervisory review and for presidential pardon were still pending before national authorities. In this regard, the Committee notes that Mr. Kovalev's application for supervisory review and presidential pardon were rejected on 27 February 2012 and 14 March 2012 respectively, and reiterates its previous jurisprudence, according to which a supervisory review is a discretionary review process¹⁹ and presidential pardons are an extraordinary remedy²⁰ and as such none of them constitute an effective remedy for the purposes of article 5, paragraph 2 (b), of the Optional Protocol. Therefore, the Committee is not precluded by article 5, paragraph 2 (b), of the Optional Protocol, from considering the communication.

10.5 In the absence of any information or evidence in support of the authors' claim that Mr. Kovalev's rights under article 9, paragraph 1, of the Covenant have been violated, the Committee finds this claim insufficiently substantiated, for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

10.6 The Committee considers that the remaining allegations raising issues under article 6, paragraphs 1 and 2; article 7, article 9, paragraph 3; and article 14, paragraphs 1, 2, 3 (b)

¹⁸ See *Official Records of the General Assembly, Thirty-third Session, Supplement No. 40 (A/33/40)*, para. 580. See also, inter alia, communications No. 5/1977, *Bazzano v. Uruguay*, Views adopted on 15 August 1979, para. 5; No. 29/1978, *E. B. v. S.*, decision on admissibility adopted on 14 August 1979; No. 43/1979, *Drescher v. Uruguay*, Views adopted on 21 July 1983, para. 3.

¹⁹ See the Committee's general comment No. 32, paragraph 50: "A system of supervisory review that only applies to sentences whose execution has commenced does not meet the requirements of article 14, paragraph 5, regardless of whether such review can be requested by the convicted person or is dependent on the discretionary power of a judge or prosecutor"; and, for example, communications No. 836/1998, *Gelzauskas v. Lithuania*, Views adopted on 17 March 2003, para. 7.2; No. 1100/2002, *Bandajevsky v. Belarus*, Views adopted on 28 March 2006, para. 10.13; No. 1344/2005, *Korolko v. Russian Federation*, inadmissibility decision of 25 October 2010, para. 6.3; No. 1449/2006, *Umarov v. Uzbekistan*, Views adopted on 19 October 2010, para. 7.3.

²⁰ See communications No. 1033/2001, *Singarasa v. Sri Lanka*, Views adopted on 21 July 2004, para. 6.4; No. 1132/2002, *Chisanga v. Zambia*, Views adopted on 18 October 2005, para. 6.3.

and (g), and 5, of the Covenant in respect of Mr. Kovalev, and under articles 7 and 18 in respect of the authors themselves, have been sufficiently substantiated, for purposes of admissibility, and proceeds to their examination on the merits.

Consideration of the merits

11.1 The Human Rights Committee has considered this communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

11.2 The Committee notes the authors' claims under articles 7 and 14, paragraph 3 (g), of the Covenant that Mr. Kovalev was subjected to physical and psychological pressure with the purpose of eliciting a confession of guilt and that, although he retracted his self-incriminating statements during court proceedings, his confession served as a basis for his conviction. In this regard, the Committee recalls that once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially.²¹ It further recalls that the safeguard laid down in article 14, paragraph 3 (g), of the Covenant must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.²² As it transpires from the decision of 30 November 2011, the Supreme Court considered that Mr. Kovalev changed his statements in order to mitigate his punishment, stating that the confessions of the accused and other evidence were obtained in strict compliance with the criminal procedure norms and were thus admissible as evidence. However, the State party has not presented any information to demonstrate that it conducted any investigation into these allegations. In these circumstances, due weight must be given to the authors' claims and the Committee concludes that the facts before it disclose a violation of Mr. Kovalev's rights under articles 7 and 14, paragraph 3 (g), of the Covenant.²³

11.3 As to the authors' claim that Mr. Kovalev was arrested on 12 April 2011 and was brought for the first time before a judge only on 15 September 2011, i.e. after more than five months from the arrest, the Committee notes that the State party failed to address these allegations. While the meaning of the term "promptly" in article 9, paragraph 3, must be determined on a case-by-case basis, the Committee recalls its general comment No. 8 (1982) on the right to liberty and security of persons²⁴ and its jurisprudence,²⁵ pursuant to which delays should not exceed a few days. The Committee therefore considers the delay of

²¹ See the Committee's general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 14.

²² See, for example, the Committee's general comment No. 32, para. 41; communications No. 330/1988, *Berry v. Jamaica*, Views adopted on 4 July 1994, para. 11.7; No. 1033/2001, *Singarasa v. Sri Lanka*, Views adopted on 21 July 2004, para. 7.4; No. 1769/2008, *Bondar v. Uzbekistan*, Views adopted on 25 March 2011, para. 7.6.

²³ See, for example, the Committee's general comment No. 32, para. 60; communications No. 1401/2005, *Kirpo v. Tajikistan*, Views adopted on 27 October 2009, para. 6.3; No. 1545/2007, *Gunan v. Kyrgyzstan*, Views adopted on 25 July 2011, para. 6.2.

²⁴ *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, para. 2.

²⁵ The Committee found that, in the absence of any explanations by the State party, a delay of three days in bringing a person before a judge did not meet the requirement of promptness within the meaning of article 9, paragraph 3 (see communication No. 852/1999, *Borisenko v. Hungary*, Views adopted on 14 October 2002, para. 7.4). The Committee also concluded that a delay of one week in a capital case cannot be deemed compatible with article 9, paragraph 3 (see communication No. 702/1996, *McLawrence v. Jamaica*, Views adopted on 18 July 1997, para. 5.6).

five months before bringing Mr. Kovalev before a judge to be incompatible with the requirement of promptness set forth in article 9, paragraph 3, and thus in violation of Mr. Kovalev's rights under this provision.

11.4 The Committee further notes the authors' allegations that the principle of presumption of innocence was not respected, because several State officials made public statements about Mr. Kovalev's guilt before his conviction by the court and mass media made available to the public at large materials of the preliminary investigation before the consideration of his case by the court. Moreover, he was kept in a metal cage throughout the court proceedings and the photographs of him behind metal bars in the court room were published in local print media. In this respect, the Committee recalls its jurisprudence²⁶ as reflected in its general comment No. 32, 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, 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 this principle".²⁷ The same general comment refers to the duty of all public authorities to refrain from prejudging the outcome of a trial, including by abstaining from making public statements affirming the guilt of the accused;²⁸ it further 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 the media should avoid news coverage undermining the presumption of innocence. On the basis of the information before it and in the absence of any other pertinent information from the State party, the Committee considers that the presumption of innocence of Mr. Kovalev guaranteed under article 14, paragraph 2, of the Covenant has been violated.

11.5 With regard to the authors' claims that Mr. Kovalev was visited by his lawyer only once during the pretrial investigation, that the confidentiality of their meetings was not respected, that they did not have adequate time to prepare the defence and that the lawyer was denied access to him on several occasions, the Committee recalls that article 14, paragraph 3 (b) provides that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing, this provision being an important element of the guarantee of a fair trial and an application of the principle of equality of arms.²⁹ The right to communicate with counsel requires that the accused is granted prompt access to counsel, and counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.³⁰ The Committee is of the view that the conditions, as described by the authors, in which Mr. Kovalev was assisted by his lawyer during the pretrial investigation and in the course of court proceedings adversely affected his possibilities to prepare his defence.³¹ In the absence of any information by the State party to refute the authors' specific allegations and in the absence of any other pertinent information

²⁶ See, for example, communications No. 770/1997, *Gridin v. Russian Federation*, Views adopted on 20 July 2000, para. 8.3; No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010, para. 6.5.

²⁷ See Committee's general comment No. 32, para. 30.

²⁸ *Ibid.*, para. 30.

²⁹ *Ibid.*, para. 32.

³⁰ *Ibid.*, para. 34. See also communications No. 1117/2002, *Khomidov v. Tajikistan*, Views adopted on 29 July 2004, para. 6.4; No. 907/2000, *Siragev v. Uzbekistan*, Views adopted on 1 November 2005, para. 6.3; No. 770/1997, *Gridin v. Russian Federation*, Views adopted on 20 July 2000, para. 8.5.

³¹ See communications No. 1117/2002, *Khomidov v. Tajikistan*, Views adopted on 29 July 2004, para. 6.4; No. 283/1988, *Little v. Jamaica*, Views adopted on 1 November 1991, para. 8.4; No. 1167/2003, *Rayos v. Philippines*, Views adopted on 27 July 2004, para 7.3.

on file, the Committee considers that the information before it reveals a violation of Mr. Kovalev's rights under article 14, paragraph 3 (b), of the Covenant.

11.6 The authors further claim that Mr. Kovalev's right to have his sentence and conviction reviewed by a higher tribunal was violated in view of the fact that the sentence rendered by the Supreme Court is not subject to appeal. The Committee observes that, as it transpires from materials before it, Mr. Kovalev was sentenced to death at first instance by the Supreme Court on 30 November 2011 and the judgment mentions that it is final and not subject to any further appeal. Although Mr. Kovalev availed himself of the supervisory review mechanism, the Committee notes that such review only applies to already executory decisions and thus constitutes an extraordinary means of appeal which is dependent on the discretionary power of judge or prosecutor. When such review takes place, it is limited to issues of law only and does not permit any review of facts and evidence and therefore cannot be characterized as an "appeal", for the purposes of article 14, paragraph 5.³² The Committee recalls in this respect that even if a system of appeal may not be automatic, the right to appeal under article 14, paragraph 5 imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.³³ In the absence of any explanation from the State party, the Committee considers that the absence of a possibility to appeal the judgment of the Supreme Court passed at first instance to a higher judicial instance is inconsistent with the requirements of article 14, paragraph 5.³⁴

11.7 The Committee notes the authors' allegations, not refuted by the State party, that the Supreme Court was biased, and violated the principle of independence, impartiality, equality of arms and the principle of publicity of court proceedings, contrary to article 14, paragraph 1, of the Covenant. In the light of the Committee's findings that the State party failed to comply with the guarantees of a fair trial under article 14, paragraphs 2, 3 (b) and (g), and 5, of the Covenant, the Committee is of the view that Mr. Kovalev's trial suffered from irregularities which, taken as a whole, amount to a violation of article 14, paragraph 1, of the Covenant.

11.8 The authors further claim a violation of Mr. Kovalev's right to life under article 6 of the Covenant, since he was sentenced to death after an unfair trial. The Committee notes that the State party has argued, with reference to article 6, paragraph 2, of the Covenant, that Mr. Kovalev was sentenced to death following the judgment handed down by the Supreme Court, in accordance with the Constitution, the Criminal Code and the Criminal Procedure Code of Belarus, and that the imposed death penalty was not contrary to the international instruments to which Belarus is a State party. In this respect, the Committee recalls its general comment No. 6 (1982) on the right to life, where it noted that the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant, which implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the

³² See footnote 19 above.

³³ See Committee's general comment No. 32, para. 48; communications No. 1100/2002, *Bandajevsky v. Belarus*, Views adopted on 28 March 2006, para. 10.13; No. 985/2001, *Aliboeva v. Tajikistan*, Views adopted on 18 October 2005, para. 6.5; No. 973/2001, *Khalilova v. Tajikistan*, Views adopted on 30 March 2005, para. 7.5; No. 964/2001, *Saidova v. Tajikistan*, Views adopted on 8 July 2004, para. 6.5; No. 701/1996, *Gómez Vázquez v. Spain*, Views adopted on 20 July 2000, para. 11.1.

³⁴ See, for example, communications No. 985/2001, *Aliboeva v. Tajikistan*, Views adopted on 18 October 2005, para. 6.5; No. 973/2001, *Khalilova v. Tajikistan*, Views adopted on 30 March 2005, para. 7.5.

right to review by a higher tribunal”.³⁵ In the same context, the Committee reiterates its jurisprudence that the imposition of a sentence of death upon 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.³⁶ In the light of the Committee’s findings of a violation of article 14, paragraphs 1, 2, 3 (b) and (g), and 5, of the Covenant, it concludes that the final sentence of death in respect of Mr. Kovalev was passed without having met the requirements of article 14, and that as a result article 6 of the Covenant has been violated.

11.9 In the light of the above finding of a violation of article 6 of the Covenant, the Committee will not examine separately the authors’ allegation under article 7 with regard to Mr. Kovalev’s mental distress caused by the situation of uncertainty about his fate (see para. 3.10 above).

11.10 The Committee notes the authors’ claim that they themselves are victims of a violation of article 7 of the Covenant in view of the severe mental suffering and stress caused to them as a result of the authorities’ refusal to reveal any detail about Mr. Kovalev’s situation or whereabouts from 13 March 2012 (rejection of his application for pardon) until 17 March 2012 (when they were informed that the death sentence had been carried out), as well as their failure to inform them beforehand of the date, time and place of the execution, to release the body for burial and to disclose the location of Mr. Kovalev’s burial site. These allegations remain unchallenged by the State party. The Committee notes that the law in force prescribes that the family of an individual under sentence of death is not informed in advance of the date of the execution, the body is not handed over to them and the location of the burial site of the executed prisoner is not disclosed. The Committee understands the continued anguish and mental stress caused to the authors, as the mother and sister of the condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his grave. The complete secrecy surrounding the date of the execution and the place of burial, as well as the refusal to hand over the body for burial in accordance with the religious beliefs and practices of the executed prisoner’s family have the effect of intimidating or punishing the family by intentionally leaving it in a state of uncertainty and mental distress. The Committee therefore concludes that these elements, cumulatively, and the State party’s subsequent persistent failure to notify the authors of the location of Mr. Kovalev’s grave, amount to inhuman treatment of the authors, in violation of article 7 of the Covenant.³⁷

11.11 Having come to this conclusion, the Committee will not examine the authors’ separate allegations under article 18 of the Covenant.

³⁵ *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, para. 7; see also communication No. 253/1987, *Kelly v. Jamaica*, Views adopted on 8 April 1991, para. 5.14.

³⁶ See the Committee’s general comment No. 32, para. 59; communications No. 719/1996, *Levy v. Jamaica*, Views adopted on 3 November 1998, para. 7.3; No. 1096/2002, *Kurbanov v. Tajikistan*, Views adopted on 6 November 2003, para. 7.7; No. 1044/2002, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 8.6; No. 1276/2004, *Idieva v. Tajikistan*, Views adopted on 31 March 2009, para. 9.7; No. 1304/2004, *Khoroshenko v. Russian Federation*, Views adopted on 29 March 2011, para. 9.11; No. 1545/2007, *Gunan v. Kyrgyzstan*, Views adopted on 25 July 2011, para. 6.5.

³⁷ See also communications No. 886/1999, *Schedko v. Belarus*, Views adopted on 3 April 2003, para. 10.2; No. 887/1999, *Staselovich v. Belarus*, Views adopted on 3 April 2003, para. 9.2; No. 973/2001, *Khalilov v. Tajikistan*, Views adopted on 30 March 2005, para. 7.7; No. 985/2001, *Aliboeva v. Tajikistan*, Views adopted on 18 October 2005, para. 6.7; No. 1044/2002, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 8.7.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of Mr. Kovalev's rights under articles 6; 7; 9, paragraph 3; and 14, paragraphs 1, 2, 3 (b) and (g), and 5, of the Covenant, as well as under article 7 in relation to the authors themselves. The State party also breached its obligations under article 1 of the Optional Protocol to the Covenant.

13. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including appropriate compensation for the anguish suffered, and disclosure of the burial site of Mr. Kovalev. The State party is also under an obligation to prevent similar violations in the future, including by amending article 175, paragraph 5 of the Criminal Execution Code so as to bring it in line with the State party's obligations under article 7 of the Covenant.

14. 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 or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case that 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. In addition, it requests the State party to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly]
